THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

*****

सत्यमेव जयते

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HIGH COURT OF JUDICATURE AT ALLAHABAD

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(2024) 1 ILRA 7
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, A.C.J.
THE HON'BLE DONADI RAMESH, J.

Special Appeal No. 335 of 2023

State of U.P. & Ors. ...Petitioners
Versus
Girijesh Narayan Pathak & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rama Nand Pandey, Sri Manish Goyal (Addl. A.G.)

Counsel for the Respondents:
Sri Gulrez Khan, Sri Javed Husain Khan

Disciplinary Proceedings – Violation of Natural Justice – The petitioners challenged the Single Judge's order setting aside disciplinary actions for procedural lapses – Held, the Enquiry Officer's failure to conduct an oral enquiry, examine witnesses, or allow the respondent to cross-examine witnesses violated Rule 7 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999, and principles of natural justice, rendering the enquiry invali (Paras 8, 12, 13, 19, 25)

Procedure under Rule 7 of 1999 Rules – Mandatory Requirements – The respondent, a retired Marketing Inspector, faced charges of stock shortages and financial losses – Held, Rule 7 mandates recording witness St.ments and allowing cross-examination when charges are denied, even in ex parte proceedings; non-compliance vitiated the enquiry. (Paras 11, 14, 15, 19)

Plea of Non-Prejudice and Waiver – Inapplicability – The petitioners argued the respondent waived objections by not raising prejudice during the enquiry – Held, fundamental procedural defects, such as non-examination of witnesses, were not curable by waiver or lack of prejudice plea, as they undermined the enquiry's validity. (Paras 9, 20, 22, 23, 25)

Article 351-A of Civil Service Regulations – Procedural Compliance – Disciplinary action continued post-retirement under Article 351-A, forfeiting gratuity and withholding pension – Held, Article 351-A requires adherence to Rule 7 procedures; non-compliance invalidated the punishment orders. (Paras 1, 11, 19)

Remittance for Fresh Enquiry – Futility – The Single Judge declined to remit the matter for fresh enquiry due to the respondent's death in 2014 – Held, remitting the case after the respondent's demise would be futile, justifying quashing of punishment orders and granting consequential benefits to the respondent's widow. (Paras 8, 25, 26)

Appeal Dismissed – Single Judge's Order Upheld

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1. St. of U.P. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

2. Sur Enamel and Stamping Works Lt Vs The Workmen, (1964) 3 SCR 616

3. St. of Uttaranchal Vs Kharak Singh, (2008) 8 SCC 236

4. Brij Bhushan Maurya Vs St. of U.P., 2021 SCC OnLine All 652

5. Smt. Mazda Begum Vs St. of U.P., 2014 SCC OnLine All 16503

6. Ghanshyam Das Varshney Vs St. of U.P., 2018 SCC OnLine All 4964

7. P. Agrawal Vs St. Bank of India, (2006) 8 SCC 776

8. Union of India Vs Alok Kumar, (2010) 5 SCC 349

9. St. of U.P. Vs C.S. Sharma, AIR 1968 SC 158

10. S.L. Kapoor Vs Jagmohan, (1980) 4 SCC 379

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

1. The instant intra-court appeal is directed against the judgement of learned Single Judge dated 20.09.2022 by which the writ petition1 filed by the non-appellant (hereinafter referred to as 'the petitioner') was allowed and the orders dated 15.01.2009, 4.11.2011 and 16.12.2011 were set aside. By order dated 15.01.2009, permission was granted by the Governor under Article 351-A of Civil Service Regulations to continue the disciplinary proceedings against the petitioner after he had attained the age of superannuation. By order dated 4.11.2011, the State Public Service Commission granted its approval to the proposed action against the petitioner and by order dated 16.12.2011, the Special Secretary, Government of U.P. has forfeited the entire gratuity of the petitioner and had directed for withholding of pension until the pecuniary loss allegedly suffered by the Government is recovered.

FACTS

2. The petitioner was appointed as Marketing Inspector in the Civil Supplies Department of Government of U.P. in 1972-73. In 1998, he was promoted to the post of Senior Marketing Inspector. In the year 2004, he was suspended and was served with a charge sheet dated 22.09.2004 levelling four charges. The first charge related to shortage in stock of sugar, wheat and rice; the second charge related to 6-8 months' delay in submitting bank draft of PDS Khadyan Nirgaman resulting in loss of interest to the Government; the third charge related to transferring stock of sugar and rice from Sikandarpur Centre to Pandah Centre; and the fourth charge related to dispatch of sugar from Pandah Centre to Account Office during the year 2001-02, the receipt of which was not being confirmed by the Account Office.

3. The suspension of the petitioner was revoked by order dated 1.08.2005, but the departmental proceedings were continued. The petitioner submitted his reply on 10.10.2005 denying all the charges. In reply to charge no.1, he took the defence that Deputy Senior Marketing Officer took the charge in his absence. He specifically pleaded that in fact, the stocks when compared with daily stock register would reveal that there was no shortage but only storage losses. In respect of charge no.2, he took specific defence that he alongwith guard went to Azamgarh to deliver the cheque to concerned clerk, but he demanded bribe and did not accept the cheque. The petitioner also stated that he made a complaint in this respect to the Assistant Marketing Inspector, but no heed was paid to the same. He consequently sent the cheque by registered post and as such, charge no.2 relating to delay in handing over the cheque and consequent loss of interest was wholly baseless. In respect of third charge, he explained that Sikandarpur and Pandah godowns were in same building at the time of his transfer. Physical verification of the stock would have taken several hours and would have delayed handing over of charge. Therefore, under due intimation to Regional Food Controller and Deputy Regional Food Officer, the stock was transferred to the stock of Pandah and this facilitated immediate handing over of charge of Sikandarpur godown. It had not resulted in any loss to the Government. In respect of charge no.4, the explanation was that entire sugar sent to Account Office was duly received and DTS

between 1.11.2001 to 31.03.2001 were sent to Regional Accounts Officer (Foods), Azamgarh. Entry of the said transaction duly finds place in the records of Pandah Centre which can be easily obtained to verify the stand of the petitioner.

4. According to the petitioner, he was not being supplied with the documents on which reliance was placed in the charge sheet. The petitioner was compelled to file Writ Petition No.14105 of 2007 before this Court for supplying him the documents mentioned in the charge sheet. The said writ petition was disposed of by order dated 15.03.2007 directing the respondents to supply the documents to the petitioner within six weeks, but according to the petitioner, even thereafter, the documents were not supplied to him.

5. The enquiry was conducted by one Arvind Kumar Dwivedi, Sambhagiya Khadya Niyantrak, Varanasi. He did not hold any oral enquiry nor examined any witness. He also did not give any opportunity to the petitioner to place his defence and in great hurry, submitted enquiry report dated 19.05.2007, as the petitioner was due to retire on 31.05.2007. The specific case of the petitioner before the Writ Court was that the Enquiry Officer fixed 11.12.2006 for cross-examination of the then District Food Marketing Officer, Mau. On that day, the petitioner remained present, but the District Food Marketing Officer did not appear for cross-examination. As the petitioner was due to retire on 31.05.2007, another date was not fixed for cross-examination and straight away enquiry report was submitted on 19.05.2007.

6. After almost two years of submission of enquiry report, the petitioner was issued a show cause notice dated 15.01.2009 seeking his explanation in respect of the enquiry report. He gave a detailed reply mentioning therein how the findings returned by the Enquiry Officer were not correct. It seems that thereafter approval from Public Service Commission was obtained on 13.07.2009 followed by passing of the punishment order dated 16.12.2011.

7. The respondents filed counter affidavit before the Writ Court and in paragraph 23 thereof, it was admitted that the Enquiry Officer fixed 11.12.2006 for cross-examination of the then District Food Marketing Inspector, Mau. However, his cross-examination could not take place, as he remained absent, while the petitioner was present. Thereafter, without fixing any further date in the enquiry, it was concluded, as the petitioner was due to retire on 31.05.2007.

8. The Writ Court held that although charges were serious but they were specifically denied by the petitioner and, therefore, it was incumbent for the employer to have examined the witnesses to prove the charges and also afford opportunity to the petitioner to cross-examine the witnesses. However, that was not done and in tearing hurry, as the petitioner was due to retire shortly, the Enquiry Officer concluded the enquiry proceedings and submitted his report dated 19.12.2006. It has been held that although in disciplinary enquiry, strict rules of evidence do not not apply but principles of natural justice demanded that the petitioner should have been given opportunity to cross-examine the witnesses. Moreover, it was the burden of the employer to have examined witnesses to prove the charges. No such course was adopted and, therefore,

it resulted in the enquiry getting vitiated and the said inherent defect was not a curable one. The fact that the petitioner was given opportunity to submit reply in response to the enquiry report, was not sufficient to cure the defect which had occurred at the initial stages of the enquiry proceedings. Accordingly, the enquiry was held to be invalid and non-est in the eyes of law and the punishment order was quashed. The Writ Court also held that since the petitioner had died on 27.02.2014 and, therefore, no purpose would be served in remitting the matter back to the stage of enquiry. The widow of the petitioner, who came to be substituted in place of the petitioner, was held entitled to all consequential benefits accruing in favour of the deceased petitioner as a result of setting aside of the order dated 16.12.2011.

CONTENTIONS

9. Sri Manish Goyal, learned Additional Advocate General assisted by Sri Ramanand Pandey, learned Additional Chief Standing Counsel made the following submissions:-

(a) The petitioner in his reply to the enquiry report did not raise any plea of prejudice having been caused to him because of non-examination of witnesses or denial of opportunity of cross-examination. It proves that the same had not resulted in any prejudice to him. In any case, he had waived the said rights and, therefore, learned Single Judge erred in going into the said aspect and in setting aside the disciplinary proceedings. In support of his submission, he has placed reliance on **P.D. Agrawal Vs. State Bank of India2, Union of India and others Vs. Alok Kumar3, Smith Vs. Mcknight4 and the Covington Virginian Vs. Woods5.**

(b) The learned Single Judge erred in not remitting the matter back for holding enquiry from the stage it stood vitiated.

10. Per contra, learned counsel for the petitioner submitted that the petitioner, while replying to show cause notice issued to him alongwith the enquiry report, stated in great detail how the findings recorded by the Enquiry Officer are not sustainable in law. He specifically pointed out to various documents which, if considered, would have proved that the charges were incorrect. It was implicit in his reply that had the petitioner been given opportunity during course of enquiry to produce evidence and cross-examine witnesses, he would have successfully countered the charges. Moreover, it was incumbent upon the employer to have followed the procedure prescribed under Rule 7 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as '1999 Rules') which mandates that even if enquiry is being held exparte, the Enquiry Officer shall record the statement of witnesses to bring home the charges. Therefore, the plea of waiver is not sustainable in law.

ANALYSIS

11. The petitioner was a government servant. The Government had passed the order for withholding his gratuity and recovery of losses from him, in exercise of power under Article 351-A of the Civil Service Regulations. Thereunder, it is specifically provided that the "procedure applicable to proceedings on which an order of dismissal from service may be made" is to be followed for taking action under Article 351-A. Consequently, the procedure stipulated under the U.P.

Government Servants (Discipline and Appeal), Rules, 1999 was applicable. Rule 7 of the 1999 Rules stipulates that:

"7. Procedure for imposing major penalties–Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner:

(i) The disciplinary authority may himself inquire into the charges or appoint an authority subordinate to him as Inquiry Officer to inquire into the charges.

(i) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the disciplinary authority:

Provided that where the appointing authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary; as the case may be, of the concerned department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same alongwith oral evidence, if any, shall be mentioned in the charge-sheet.

(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer shall proceed to complete the inquiry ex parte.

(v) The charge-sheet, alongwith the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any, shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records. In case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the disciplinary authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges, the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence:

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh

Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The disciplinary authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner of the disciplinary authority having regard to the circumstances of the case so permits:

Provided that this rule shall not apply in following cases:

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the disciplinary authority is satisfied that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

12. In **State of Uttar Pradesh and others vs. Saroj Kumar Sinha6**, the Supreme Court while considering the 1999 Rules held that failure on part of the Enquiry Officer to fix date for appearance of the delinquent to answer the charges would vitiate the proceedings. It has also been observed that even when the enquiry is proceeding ex parte, the Enquiry Officer is under mandate to record the statement of witnesses. In such a situation, the delinquent being absent would loose the benefit of cross-examination but nonetheless in order to establish the charges, the department is required to produce necessary evidence before the Enquiry Officer. The relevant observations are as follows:

"A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the Government servant despite notice of the date fixed failed to appear that the enquiry officer can proceed with the inquiry *ex parte*. Even in such circumstances, it is incumbent on the enquiry officer to record the statement of witnesses mentioned in the charge sheet. Since the Government servant is absent, he would clearly lose the benefit of cross examination of the witnesses. But nonetheless in order to establish the charges the department is required to produce the necessary evidence before the enquiry officer. This is so as to avoid the charge

that the enquiry officer has acted as a prosecutor as well as a judge."

13. Again, in **Sur Enamel and Stamping Works Ltd. v. The Workmen7**, the Supreme Court emphasised on the importance of giving opportunity to the delinquent to cross-examine witnesses. It has been held as follows:

"An enquiry cannot be said to have been properly held unless (i) the employee proceeded against has been informed clearly of the charges levelled against him, (ii) the witnesses are examined - ordinarily in the presence of the employee - in respect of the charges, (iii) the employee is given a fair opportunity to cross-examine witnesses, (iv) he is given a fair opportunity to examine witnesses including himself in his defence if he so wishes on any relevant matter, and (v) the enquiry officer records his findings with reasons for the same in his report."…..

In State Of Uttar Pradesh & Anr v. Sri C.S. Sharma, AIR 1968 SC 158, the apex court took the view that an opportunity has to be given to the charge-sheeted employee to produce his witnesses or to lead evidence in defence in absence whereof, the entire disciplinary proceeding gets vitiated….."

14. The Supreme Court has summarized the legal principles in respect of the procedure to be followed in departmental enquiries in **State of Uttaranchal & others vs. Kharak Singh8**. Relevant part of the judgment is extracted below:

"From the above decisions, the following principles would emerge:

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

15. A Division Bench of this Court in **Brij Bhushan Maurya vs. State of U.P. and another9**, again emphasised the importance of fixing date for an oral enquiry and also held that failure to fix a date in this behalf would vitiate the enquiry. Paragraph-18 of the Law Report wherein the said aspect has been dealt with is extracted below:

"A conspectus of the decisions noticed above would show that where, in a major penalty enquiry, after service of the charge-sheet, the charge-sheeted employee

in his reply to the charge-sheet does not admit the charge or refutes the charge, it is mandatory to fix a date for an oral enquiry. Failure to fix a date for the oral enquiry in such circumstances would vitiate the enquiry and the consequential order of punishment. It is not necessary for the charge-sheeted officer to pray for an oral enquiry inasmuch as the moment the charge-sheeted officer does not admit the charge or refutes the charge, an oral enquiry is required not only to comply with the provisions of the 1999 Rules but also the principles of natural justice. In a disciplinary enquiry, even if evidence is in the form of documents, the documents would have to be produced and their authenticity certified either by production of a witness or on the basis of an admission of the charge-sheeted employee made by him after receipt of those documents or production of those documents before him in the inquiry. After the department has led its evidence, the charge-sheeted employee is to be given opportunity to lead evidence in defence. Defence evidence may be oral or documentary depending upon the nature of the evidence which the defence wishes to rely on."

16. In the same judgment, the Division Bench also considered the plea of non-prejudice taken by the employer and repelled the same holding as follows:

"In the instant case, the appellant had not admitted the charges. He had pleaded not guilty. In these circumstances, he had a right to lead evidence in defence in the inquiry. Not holding an inquiry in these circumstances most certainly was prejudicial to his defence more so when the reversion order dated 01.10.2020 recites that the appellant had not led any evidence to substantiate his defence. The view taken by the learned Single Judge that the writ petitioner (the appellant herein) had failed to demonstrate as to what prejudice was caused to him by not holding an oral enquiry, in our considered view, is not correct."

17. Another Division Bench in **Smt. Mazda Begum and others vs. State of U.P. and others10,** after considering a number of precedents both of Supreme Court and this Court, observed as follows:

"It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

18. Another judgment on which the petitioner has placed reliance is in **Ghanshyam Das Varshney v. State of U.P. and others11**, wherein also a Division Bench of this Court held that where the procedure under Rule 7 of the 1999 Rules is not followed, it would vitiate the entire enquiry. The relevant paragraph is extracted below:

"A perusal of the enquiry report ipso facto reveals that in his reply to the charge sheet the petitioner had not only

denied the charges but had also denied the verification reports to be correct and in accordance with the spot position. The reply to show cause notice given by the petitioner to the disciplinary authority, copy of which is annexure 6 to the petition also reveals that in it also he had reiterated his denial. We are thus unable to accept the contention of learned Additional Chief Standing Counsel that since the imputing facts had not been denied by the petitioner there was no necessity for the Enquiry Officer to record any oral evidence. In our opinion it was clearly not a case covered by the provisions of Rule 7 (vi) of the Rules. Instead it was a case covered by the provisions of Rule 7(vii) of the Rules wherein the Enquiry Officer in view of the denial of charges was under a statutory obligation to record oral evidence of the witnesses to whom the department proposed to summon in order to prove the documentary evidence relied upon by it.

Even if a delinquent employee does not request for personal hearing, the burden of proving charges is upon the department. Under the rules, it is obligatory for the Enquiry Officer to fix a date for such an enquiry and also to inform about the same to the delinquent employee. The Enquiry Officer is also under statutory obligation to examine the documentary as well as oral evidence, if any, adduced in support of the charges. In case, the delinquent employee does not participate in the enquiry, even then, the Enquiry Officer is under statutory duty to discharge his obligation as an Enquiry Officer to ascertain the truth in respect of the charges levelled against the delinquent employee on the basis of the evidence and to come to the conclusion as to whether the said charges are proved against the delinquent employee or not. Even if the delinquent employee has not demanded the opportunity of personal hearing or does not give the list of names of the witnesses with a brief note indicating the points on which he desires to examine or cross-examine the witnesses, the Enquiry Officer is still statutory bound to fix a date of enquiry and to intimate the said date to the delinquent employee and in case, the delinquent employee does not appear on the date fixed or moves an application for adjournment, the Enquiry Officer may, in his discretion, either adjourn the enquiry to some other date or to proceed ex-parte against the delinquent employee."

19. In the instant case, concededly the petitioner had filed a detailed reply to the charge-sheet traversing each and every charge levelled against him. In the charge sheet, the appellants had relied on various documents and records to prove the charges. The charges were required to be proved as the petitioner had specifically refuted all the charges. He also requested for summoning the Deputy Regional Marketing Officer during course of enquiry to controvert the charges levelled against him. He also annexed various documents along with his reply in support of his case. The Enquiry Officer, having regard to the defence set up by the petitioner, directed the then District Food Marketing Officer, Mau to appear on 19.12.2006 for cross-examination by the petitioner. The petitioner was also informed about the same. Admittedly, the petitioner appeared before the Enquiry Officer on 19.12.2006 for cross-examining the District Food Marketing Officer, Mau. It is admitted in paragraph-23 of the counter affidavit that the District Food Marketing Officer, Mau did not appear and therefore on that date, the petitioner was deprived of his right to cross-examine him. Thereafter, for almost five months no effort was made to get him

cross-examined. Since the petitioner was due to superannuate on 31.05.2007, the Enquiry Officer without holding any further enquiry submitted his report dated 19.05.2007. It is, thus, evident that the procedure prescribed under Rule 7 of the 1999 Rules was not followed. The department did not prove the documents nor led any oral evidence to bring home the charges. The petitioner was deprived of valuable right to cross-examine the witnesses and to lead evidence in support of his defence.

20. The disciplinary enquiry in the facts and circumstances noted above, was only an eyewash. No legal sanctity could be accorded to such an enquiry. The question which now arises is whether the petitioner could be non-suited on basis of the doctrine of "non prejudice" and by setting up "plea of waiver".

21. Before we dwell on the above submissions, we would first advert to the judgments cited on behalf of the appellants. In **P.D. Agrawal (supra)**, the issue was regarding delay in initiation of disciplinary proceedings. It was held in the aforesaid context that where the employee did not raise any objection in respect of delay in initiation of proceedings during course of enquiry, in appeal and before High Court nor could show any prejudice, the sanctity of the enquiry cannot be doubted. Paragraph-17, on which reliance has been placed, is extracted below:

"The validity of the disciplinary proceeding and/or justifiability thereof on the ground of delay or otherwise had never been raised by the appellant before any forum. It was not his case either before the Appellate Authority or before the High Court that by reason of any delay in initiating the disciplinary proceeding he had been prejudiced in any manner whatsoever. It may be true that delay itself may be a ground for arriving at a finding that enquiry proceeding was vitiated in the event it is shown that by reason thereof the delinquent officer has been prejudiced, but no such case was made out."

22. The facts of the instant case as noted above are completely different. In case of delay in initiation of disciplinary proceedings undoubtedly the delinquent should raise the plea at the first opportunity. However, the same principle would not apply to the facts of the instant case where the enquiry itself was found to be faulty and held in complete violation of the procedure prescribed under the Statute. The lacuna in the enquiry, in the facts of the instant case, goes to the root of the matter whereas the plea of delay was only relevant for determining the issue of prejudice which if not pleaded was definitely not fatal.

23. Again, in **Union of India and others vs. Alok Kumar** (supra), it was held that a very hyper technical approach should not be adopted to frustrate departmental enquiries if upon admitted or indisputable facts only one conclusion was possible. The infraction of principles of natural justice is in itself not sufficient unless prejudice is proved. It was held that every case should be examined on its own merits. Paragraph-85 on which reliance has been placed is extracted below:

"Doctrine of de facto prejudice has been applied both in English as well as in Indian Law. To frustrate departmental inquiries on a hyper technical approach has not found favour with the Courts in the

recent times. In S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379, a three-Judge Bench of this Court while following the principle in Ridge v. Baldwin, 1964 AC 40:(1963) 2 WLR 935:(1963) 2 All ER 66 (HL) stated that if upon admitted or indisputable facts only one conclusion was possible, then in such a case that principle of natural justice was in itself prejudice would not apply. Thus, every case would have to be examined on its own merits and keeping in view the statutory rules applying to such departmental proceedings. The Court in S.L. Kapoor held as under:

"18. In Ridge v. Baldwin [1964 AC 40 at p. 68 : All ER at p. 73] one of the arguments was that even if the appellant had been heard by the Watch Committee nothing that he could have said could have made any difference. The House of Lords observed at (p. 68):

"It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in his own defence before dismissing him, this case was so clear that nothing that the appellant could have said could have made any difference. It is at least very doubtful whether that could be accepted as an excuse. But, even if it could, the watch committee would, in my view, fail on the facts. It may well be that no reasonable body of men could have reinstated the appellant. But at between the other two courses open to the watch committee the case is not so clear. Certainly on the facts, as we know them, the watch committee could reasonably have decided to forfeit the appellant's pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they had in the exercise of their discretion decided to take a more lenient course."

24. In **Covington Virginian** (supra), the theory of waiver has been explained and the established principle that for waiver to apply there must be intentional relinquishment of a known right, was reiterated. Again, the first principles governing the theory of waiver, have been noted. It has been observed as follows:

"A waiver such as is claimed here may be generally defined as a voluntary abandonment of some known legal right, advantage, or privilege, or such conduct as warrants an inference of the abandonment of such right, or the intentional doing of an act inconsistent with claiming it, all of which is usually dependent upon the peculiar circumstances of the case."

25. In the instant case, as already noted, the disciplinary enquiry held by the appellants was for namesake only. They had not examined any witness nor proved any document in support of their case. The petitioner was not given any opportunity to cross-examine the witnesses. Merely on basis of the charge-sheet and reply, enquiry report was submitted. Thereafter, once again on basis of reply submitted by the petitioner challenging the correctness of the finding recorded in the enquiry report, the appellants have proceeded to pass the order for withholding gratuity and deduction from pension. The instant case is clearly distinguishable from the cases where procedure prescribed was substantially followed but the delinquent employee comes up with some technical plea to assail the enquiry proceedings and in such a case, undoubtedly he has to prove prejudice. Moreover, the plea has to be raised at the first available opportunity, otherwise he would be deemed to have waived the plea. The same would not apply to the facts of the instant case. Mere fact that the

petitioner did not raise the plea of not being given opportunity to cross-examine the witnesses or to lead evidence in his reply to the enquiry report, would not infuse life into the proceedings which as noted above were *non est* in the eyes of law. The appellants in fact failed to bring home the charges, in absence of oral enquiry. The illegality was not a curable one so as to sustain the plea of 'non-prejudice' and 'waiver'. We are in complete agreement with the learned Single Judge that the inherent defects in the enquiry had rendered the same vulnerable in law. We also find no good ground to interfere with the order of learned Single Judge insofar it declines to remit the matter for fresh enquiry as the petitioner had died long back and holding enquiry in his absence at this distance in time would not only be a futile but a sham exercise.

26. In view of foregoing discussion, we find no merit in the instant appeal. It is, accordingly, dismissed.

(2024) 1 ILRA 18
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Special Appeal No. 681 of 2023

Lal Mani ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Rahul Agarwal, Sri Abhishek Kumar Saroj

Counsel for the Respondents:
C.S.C., Sri Ramesh Chandra Dwivedi, Sri Shivendu Ojha, Sri R.K. Ojha (Sr. Advocate)

Civil Law - Statutory Scheme under U.P. Secondary Education Service Selection Board Act, 1982 – The appellant, an L.T. Grade teacher, claimed seniority as a Lecturer based on Government Orders granting higher pay-scale and designation after 10 years of service – Held, seniority on the post of Lecturer is governed by Regulation 3 of the U.P. Intermediate Education Act, 1921, and requires substantive appointment or promotion under Section 16 of the Act of 1982; mere grant of pay-scale or designation under Government Orders does not confer substantive appointment or seniority, as per *Dr. Rashmi Srivastava Vs Vikram University*. (Paras 7, 9, 15, 17, 19)

Government Orders – Scope and Limitation – The appellant relied on Government Orders dated 28.02.1990 and 25.10.2000 to claim Lecturer status – Held, these orders grant personal benefits of higher pay-scale and designation to teachers meeting specific criteria (10 years of teaching higher classes with requisite qualifications) but do not constitute substantive promotion under the Act of 1982; such benefits are ex-cadre and personal, not affecting cadre seniority, as clarified in *Bharti Roy Vs Deputy Director of Education-II*. (Paras 6, 11, 16, 18, 19)

Substantive Appointment and Promotion – Mandatory Procedure – The appellant's claim to Lecturer seniority was based on an order dated 14.05.2023 granting Lecturer designation – Held, substantive appointment or promotion to Lecturer requires adherence to Section 12 of the Act of 1982 and Rule 14 of the Rules of 1998; non-compliance renders such promotion void under Section 16(2), and the appellant remained an L.T. Grade teacher, as supported by *Madan Gopal Agrawal Vs District Inspector of Schools*. (Paras 9, 10, 14, 15, 19)

Inter-se Seniority – Effect of Transfer – The appellant, transferred in 2016, was placed at the bottom of seniority in the new institution, while the respondent/writ petitioner, a substantively appointed Lecturer since 2011, was senior – Held, transfer rules under the Act

of 1921 place transferred teachers at the bottom of seniority, and the appellant's personal promotion did not override the respondent's substantive appointment, justifying the Single Judge's decision. (Paras 3, 4, 7, 19)
Protection of Personal Benefits – The Single Judge set aside the order granting the appellant Lecturer status but allowed personal benefits to continue – Held, the court's modification ensures that pay-scale and designation benefits under the Government Orders remain personal to the appellant without affecting cadre seniority or substantive appointment, aligning with *Vipin Kumar Vs District Inspector of Schools*. (Paras 19, 20, 21)

Special Appeal Disposed of.

List of Cases cited:

1. Dr. Rashmi Srivastava Vs Vikram University, (1995) 3 SCC 653

2. Bharti Roy Vs Deputy Director of Education-II, 2008 (2) ADJ 134

3. Madan Gopal Agrawal Vs District Inspector of Schools, 1996 (3) ESC 202

4. Vipin Kumar Vs District Inspector of Schools, (1993) 3 UPLBEC 1900

5. Bal Krishna Agarwal Vs St. of U.P., (1995) 1 SCC 614

6. Narendra Singh Vs Jai Bhagwan, AIR 2005 SC 582

7. Ram Pal Singh Vs Khandey, 1976 RD 162

8. Raj Bahadur Vs Board of Revenue, 1979 RD 50

9. Rati Ram Vs Rajvir, 1991 ALJ 58

10. Ansan Lal Jha Vs District Inspector of Schools, Writ No. 39731 of 2000 (All HC, 13.02.2006)

(Delivered by Hon'ble Ashwani Kumar Misra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. This intra-court appeal is filed by the appellant, Lal Mani, against the judgment and order dated 25.08.2023, passed by the Single Judge in Writ-A No.10696 of 2023 (Jeet Lal Saroj Vs. The State of U.P. And 3 Others).

2. The appellant was the respondent in the writ petition filed before the learned Single Judge. He was appointed as 'Assistant Teacher' in 'Physical Education' on 05.10.2006 in L.T. Grade. He sought transfer to Saraswati Shiksha Sadan Intermediate College, Marron, Handia, District Prayagraj (herinafter referred to as 'Institution') and the same was allowed vide order dated 07.01.2016. The appellant consequently joined on 01.02.2016.

3. As against the case of appellant, the respondent/writ petitioner was appointed as Lecturer on substantive basis on 08.12.2010. His appointment was pursuant to the recruitment exercise undertaken by the U.P. Secondary Education Service Selection Board vide Advertisement No.1 of 2009. The respondent/writ petitioner actually joined on 04.01.2011 in a different institution. He too sought transfer, which was allowed on 28.06.2019 and he acutally joined on 04.07.2019.

4. The substantive post of Principal in the institution fell vacant. It transpires that the appellant claimed benefit of two Government Orders dated 28.02.1990 and 25.10.2000 and asserted that he is entitled to the post of Lecturer w.e.f. 05.10.2016, upon completion of ten years' service in the L.T. Grade. The claim of appellant in that regard was intially rejected on 26.11.2018. Certain proceedings were then initiated by the State Scheduled Castes Commission

and the Authorities had a change of heart and a fresh order came to be passed on 14.05.2023, granting the benefit of the post of Lecturer to the appellant w.e.f. 05.10.2016. Once that was so, the appellant was treated senior as a Lecturer to the respondent/writ petitioner and was consequently allowed to officiate as Principal. We may note that under the applicable provisions upon transfer of a teacher from one institition to another, he is to be placed at the bottom of the seniority.

5. Aggrieved by the order of the District Inspector of Schools, Prayagraj, the respondent/writ petitioner approached this Court by filing Writ-A No.10696 of 2023 (Jeet Lal Saroj Vs. The State of U.P. And 3 Others), which has been allowed by the learned Single Judge vide judgement and order dated 25.08.2023. Thus aggrieved, the respondent in the writ petition has challenged the judgment and order of learned Single Judge by filing the present special appeal.

6. Shri Rahul Agarwal, learned counsel for the appellant contends that the object of the two Government Orders is to grant benefit of higher pay-scale to a teacher placed in a Lower Grade, consequent upon satisfactory working of specificed length i.e. ten years, wherein he has taught students of a higher class. In order to appreciate the contentions so advanced by learned counsel for the appellant, it would be relevant to take note of the two Government Orders, which are relied upon by the appellant in support of its case. The first Government Order in that regard dated 28.02.1990 is reproduced hereinafter:-

"विषयः- वेतन पुनरीक्षण समिति, उत्तर प्रदेश, 1989 की संस्तुतियों पर लिये गये निर्णयानुसार अशासकीय सहायताप्राप्त उच्चतर माध्यमिक विद्यालयों/इण्टर कालेजों मे शैक्षिक पदों पर पुनरीक्षित वेतनमानो की स्वीकृति।

महोदय,

उपर्युक्त विषयक शासनादेश संख्या-4749/15-8-89/3087/89 दिनांक 4 अक्टूबर, 1989 के पैरा-3 के अनुक्रम में मुझे यह कहने का निदेश हुआ है कि कला, व्यायाम, भाषा, गृह विज्ञान, शिल्प, संगीत, त्रिभाषा, पेंटिग, टंकण, आशुलिपिक तथा क्राफ्ट विषयों को कक्षा 9-10 में पढ़ाने वाले सी.टी. ग्रेड में निर्धारित अर्हता के अधीन नियुक्त अध्यापकों को जब कक्षा 9-10 में पढ़ाते हुए 10 पर्ष पूरे हो जाये तो उन्हें एल. टी. ग्रेड के साधारण वेतनमान 1400-40-1800-द.रो.-50-2300 दिया जाये।

2- उक्त विषयों के कक्षा 11-12 में पढ़ाने वाले एल. टी. ग्रेड के ऐसे अध्यापकों को, जिनकी नियुक्ति निर्धारित अर्हता के अधीन हुई है, जब कक्षा 11-12 में पढ़ाते हुए 10 वर्ष पूरे हो जायें तो उन्हें प्रवक्ता वेतनमान रू० 1600-50-2300-द.रो.-60-2600 दिया जाये।

3- भविष्य में उपर्युक्त विषयों को पढ़ाने वाले अध्यापकों की एल. टी. एवं प्रवक्ता वेतनमान में नियुक्ति के लिए सम्बन्धित व्यवसाय की अर्हता के साथ क्रमशः स्नातक/ स्नातकोत्तर अर्हता निर्धारित की जाती है।

4- ये आदश वित्त (वेतन आयोग) अनुभाग-2 के अशासकीय संख्या-वे.आ. (2) 55/10-90 दिनांक 28 फरवरी, 1990 में प्राप्त उनकी सहमति से जारी किये जा रहे हैं।"

The Second Government Order, relied upon dated 25th October, 2000 is also reproduced hereinafter-

"विषयः अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों के कला, व्यायाम, शिल्प आदि विषयों के अध्यापकों

को प्रवक्ता पद की निर्धारित अर्हता रखने पर प्रवक्ता पद नाम दिये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक निदेशालय के प्रत्रांक साख (1)/शि./ 8744/2000-2001 दिनांक 4 सितम्बर, 2000 के सन्दर्भ में मुझे यह कहने का निर्देश हुआ है कि अशासकीय सहायता प्राप्त ऐसे माध्यमिक विद्यालयों (इन्टर कालेजों),जो कला, व्यायाम, भाषा, शिल्प आदि विषयों से इण्टर स्तर तक मान्यता प्राप्त है, मै कार्यरत उक्त विषयों के ऐसे अध्यापकों जो निरन्तर 10 वर्ष से इण्टर में पढ़ा रहे हैं तथा प्रवक्ता वेतनमान प्राप्त कर रहे हैं, को निम्न शर्तों एवं प्रतिबन्धों के अधीन 'प्रवक्ता' पद नाम दिये जाने की श्री राज्यपाल सहर्ष स्वीकृति प्रदान करते हैं।

(1) जिन अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों (इण्टर कालेजों) मे कला, व्यायाम, भाषा, शिल्प, संगीत आदि विषयों में प्रवक्ता के पद सृजित नहीं है, उनमें प्रवक्ता वेतनमान में कार्य करने वाले अध्यापकों को स्नातक श्रेणी के मूलपद को समाप्त करते हुए प्रवक्ता पद में उच्चीकृत किया जायेगा तथा प्रवक्ता वेतनमान प्राप्त अध्यापकों को यदि वे प्रवक्ता पद हेतु निर्धारित अर्हता रखते हों, उपर्युक्तानुसार उच्चीकृत पदों के सापेक्ष नियुक्त कर दिया जायेगा।

(2) प्रवक्ता वेतनमान प्राप्त ऐसे अध्यापक जो प्रवक्ता पद हेतु निर्धारित अर्हता नहीं रखते है, वे पूर्ववत स्नातक वेतनक्रम की भांति शिक्षा प्रदान करते रहेगें तथा उनकी सेवानिवृत्ति के उपरान्त स्नातक श्रेणी का पद उसी तिथि से समाप्त होकर प्रवक्ता पद में परिवर्तिति हो जायेगा।

(3) उपर्युक्त प्रस्तर-1 एवं 3 में वर्णित सुविधा केवल उन्हीं अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों के अध्यापकों की प्राप्त होगी, जिन्हें संबंधित विषय में इण्टर स्तर की मान्यता प्राप्त हो।

(4) सम्बन्धित अध्यापक को शासनादेश संख्या 1121/15-8-90/3087/89, दिनांक 28 फरवरी 1990 के प्रस्तर-3 के अधीन सम्बन्धित व्यवसाय की अर्हता के साथ स्नातकोत्तर उपाधि की अर्हता रखना आवश्यक है।

(5) यह सुविधा केवल उन्हीं अध्यापकों को अनुमन्य होगी जो संबंधित विषयों में कक्षा-11 एवं 12 को पढ़ाते हुए 10 वर्ष की निरन्तर संतोषजनक सेवा पूरी करते हुए प्रवक्ता का वेतनमान 1600-2660 (पुराना) वैयक्तिक रूप से प्राप्त कर चुके हो।

(6) उक्त विषयों के केवल उन्हीं अध्यापकों को प्रवक्ता पद नाम अनुमन्य होगा जो,इस आदेश के जारी होने की तिथि तक निर्धारित अर्हता पूरी कर चुके हो।

(7) प्रवक्ता पद पर कार्यभार ग्रहण करने वाले अध्यापकों की ज्येष्ठता उक्त पद पर कार्यभार ग्रहण करने की तिथि से ही निर्धारित की जायेगी। उनकी पूर्व सेवायें स्नातक श्रेणी के रूप में मानी जायेगी तथा प्रवक्ता पद का कार्यभार ग्रहण करने के बाद स्नातक श्रेणी की सेवाओं का कोई लाभ प्रवक्ता के चयन/ प्रोन्नत वेतनमान दिये जाने हेतु अनुमन्य नहीं होगा।

(8) पदनाम परिवर्तित होने के फलस्वरूप यदि किसी प्रकार का व्यय भार उत्पन्न होगा तो उसका बटन राज्य सरकार अथवा शिक्षा विभाग के मुख्यालय द्वारा नहीं किया जायेगा और न ही इस विषय में किसी

प्रकार का अनुदान किसी भी श्रोत से उपब्ध कराया जायेगा।

(9) उपर्युक्तानुसार प्रवक्ता पद की अर्हता/रखने वाले अध्यापकों को पदनाम दिये जाने से पूर्व उनके लिखित अण्डर टेकिंग ले ली जायेगी ताकि ज्येष्ठता निर्धारित आदि के संबंध में बाद में कोई विवाद उत्पन्न न हो।

2. यह आदेश वित्त (वेतन आयोग) अनुभाग-2 के अशासकीय संख्या वे.आ. (2) 1507/दस/2000 दिनांक 25 अक्टूबर 2000 में प्राप्त उनकी सहमति से निर्गत किये जा रहे है।"

7. The core issue involved in the case is with regard to the determination of inter-se seniority between the appellant and the respondent/writ petitioner. The seniority on the post of Lecturer is to be governed by Regulation 3 framed under Chapter-II of the U.P. Intermediate Education Act, 1921 (hereinafter referred to as 'Act of 1921'). Regulation 3 (1) being relevant is reproduced hereinafter:-

"3(1). The Committee of Management of every institution shall cause a seniority list of teachers to be prepared in accordance with the following provisions:-

(a) The seniority list shall be prepared separately for each grade of teachers whether permanent or temporary, on any substantive post;

(b) Seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade. If two or more teachers were so appointed on the same date, seniority shall be determined on the basis of age; ....."

8. The provisions of the Act of 1921 as well as regulations framed thereunder would continue to govern appointment and promotion in various recognized educational institutions, in so far as they are not inconsistent with the provisions of the U.P. Secondary Education Services Selection Board Act, 1982. Section 32 of the Act of 1982 has cleary pointed out this position and is reproduced hereinafter:-

"32. Applicability of U.P. Act No. II of 1921. - The provisions of the Intermediate Education Act, 1921 and the Regulations made thereunder in so far as they are not inconsistent with the provisions of this Act [or the rules or regulations made thereunder] shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher."

9. It is to be borne in mind that appointment and promotion on the post of Assistant Teacher and Lecturer in an institution recognized under the Intermediate Education Act, 1921 is regulated by the U.P. Secondary Education Service Selection Board Act, 1982. Section 16 of the Act of 1982 is reproduced hereinafter:-

"16. Appointment to be made only on the recommendation of the Board. - *(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made thereunder but subject to the provisions of ["Sections 12, 18, 21-B, 21-C, 21-D, 21-E, 21-F, 21-G, 33, 33-A, 33-B, 33-C, 33-D, 33-F and 33-G"], every appointment of a teacher, shall on or after the date of the commencement of the Uttar Pradesh Secondary Education Services*

Selection Board (Amendment) Act, 2001 be made by the Management only on the recommendation of the Board.

Provided that in respect of retrenched employees, the provisions of Section 16-EE of the Intermediate Education Act, 1921, shall mutatis mutandis apply.

Provided further that the appointment of a teacher by transfer from one Institution to another, may be made in accordance with the regulations made under clause (c) of sub-section (2) of Section 16-G of the Intermediate Education Act, 1921.

[Provided also that the dependent, of a teacher or other employee of an Institution dying-in-harness who possesses the qualifications prescribed under the Intermediate Education Act, 1921 may be appointed as teacher in Trained Graduate's Grade in accordance with the regulations made under sub-section (4) of Section 9 of the said Act.]

(2) Any appointment made in contravention of the provisions of sub-section (1) shall be void."

10. For any appointment to be lawfully made in an educational insitituon recognized under the Act of 1921 it would have to be consistent with the provisions of the Act of 1982. Appointment under the Act of 1982 would include promotion for which separate procedure is prescribed under Section 12 of the Act of 1982 read with Rule 14 of the Rules of 1998. The procedure for promotion specified under the Act of 1982 read with Rules of 1998 unless are followed, no substantive promotion to the post of Lecturer can be said to have been made. It is to be noticed that any promotion made in an institution without following the procedure prescribed under the Act of 1982 would be void by virtue of Section 16(2) of the Act of 1982.

11. The above statutory scheme is specific and has to be borne in mind when this Court is called upon to interpret the provisions of the government order issued by the State Government. Government Order dated 28.02.1990 provides that the teacher appointed on the specified post in C.T. Grade and if has been teaching students of Classes 9th and 10th , then upon completion of ten years of such service, he would become entitled to salary in the pay-scale of an L.T. Grade Teacher. Similarly, L.T. Grade teachers possessing requisite qualification when is teaching students of Classes 11th and 12th for ten years would become entitled to salary in the pay-scale of a Lecturer. The Government Order of 28.02.1990 therefore merely extends the benefit of a higher pay-scale to a teacher otherwise having qualification, if he has been teaching on such higher posts for more than ten years. Similarly, the Government Order dated 25.10.2000 states that such teachers, who have been teaching for the last ten years in intermediate section and are receing salary in the Lectureres' Grade, would be entitled to the benefit of designation of the post of Lecturer. Clause 6 of the Government Order dated 28.02.1990 indicates that its benefit was to be extended to such teachers, who had requisite qualification on the date of issuance of the Government Order dated 25.10.2000. It would be worth noticing at this stage that a subsequent Government Order has also been issued on 06.10.2015, which interprets the aforesaid Government Orders. Paragraph Nos.2 and 4 of this Government Order is relied upon by leanred counsel for the appellant, which are reprouduced hereinafter:-

"2. प्रश्नगत शासनादेश दिनांक 30 अक्टूबर, 2000 में प्रावधान किया गया कि जिन अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों (इण्टर कालेजों में) कला, व्यायाम, भाषा, गृहविज्ञान, शिल्प, संगीत, त्रिभाषा, पेंटिग, टंकण, आशुलिपिक, क्रांफ्ट आदि विषयों में प्रवक्ता के पद सृजित नहीं है, उनके प्रवक्ता वेतनमान मे कार्य करने वाले अध्यापकों को स्नातक श्रेणी के मूल पद को समाप्त करते हुए प्रवक्ता पद में उच्चीकृत किया जाय तथा प्रवक्ता वेतनमान प्राप्त अध्यापकों को यदि वे प्रवक्ता पद हेतु निर्धारित अर्हता रखते हो, उपर्युक्तानुसार उच्चीकृत पदों के सापेक्ष नियुक्त किया जायेगा। प्रश्नगत शासनादेश में उल्लेख है कि यह सुविधा केवल उन्हीं सहायक अध्यापकों को अनुमन्य होगी जो सम्बन्धित विषय में कक्षा-11 एवं 12 को पढ़ाते हुए 10 वर्ष की निरन्तर संतोषजनक सेवा पूरी करते हुए प्रवक्ता का वेतनमान 1600-2660 (पुराना) वैयक्तिक रूप से प्राप्त कर रहे हो।

4. उल्लेखनीय है कि कतिपय जनपदों के जिला विद्यालय निरीक्षकों द्वारा वर्ष 1996 के बाद नियुक्त एल० टी० ग्रेड के व्यायाम शिक्षकों को, उनकी 10 वर्ष की सेवा के आधार पर वित्त एवं लेखाधिकारी का परामर्श प्राप्त कर, प्रवक्ता पदनाम अनुमन्य किया गया है। उपरोक्त के फलस्वरूप प्रवक्ता पद पर मौलिक रूप से चयनित/पदोन्नति प्राप्त प्रवक्ता, एल० टी० ग्रेड के उन शिक्षकों से कनिष्ठ हो रहे हैं, जिन्हें प्रवक्ता पदनाम अनियमित रूप से अनुमन्य किया गया है।"

12. The thrust of appellant's submission is that once benefit of pay-scale and designation of the post of Lecturer is accorded to the teacher by virtue of his having taught in intermidiate section for ten years, the concerned teacher would be entitled to become a Lecturer and consequently would be entitled to seniority on the post of Lecturer.

13. The argument advanced on behalf of the appellant is strongly opposed by Shri R. K. Ojha, learned Senior Counsel assisted by Shri Shivendu Ojha, learned counsel for the respondent/writ petitioner and Shri Ramesh Chandra Dwivedi, learned counsel for the Committee of Management. The respondent/writ petitioner contendes that merely on acccount of grant of higher pay-scale or designation, the appointment of appellant would not be converted into a substantive appointment on the post of Lecturer, which alone would confer benefit of seniority on such teacher.

14. We have already indicated that the aforesaid Government Orders would have to be read in the context of the statutory scheme, which specifies the manner and mode of appointment of a teacher as well as the promotion to a higher post. The Act of 1982 as well as Rules framed thereunder specifies the procedure for such substantive appointment and promotion. It is admitted that the appellant has not been substantively promoted to the post of Lecturer for which specific provision has been laid down in Rule 14 of the Rules of 1998, which is reprouduced hereinafter:-

"14. Procedure for recruitment by promotion. - (1) Where any vacancy is to be filled by promotion, all teachers working in Trained graduates grade or Certificate of Teaching grade, if any, who possess the qualifications prescribed for the post and have completed five years

continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the Lecturers grade or the Trained graduates grade, as the case may be, without their having applied for the same.

Note.- For the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the pro forma given in Appendix 'A'.

(4) Within three weeks of the receipt of the list from the Management under sub-rule (3), the Inspector shall verify the facts from die record of his office and forward the list to the Joint Director.

(5) The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call for such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee referred to in sub-section (1) of Section 12 and after the Committee's recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management.

(6) Within ten days of the receipt of the panel from the Joint Director under sub-rule (5), the Inspector shall send the name of the selected candidates to the Management of the institution which has notified the vacancy and the Management shall accordingly on authorisation under its resolution issue the appointment order in the *proforma* given in Appendix 'F' to such candidate."

15. In view of Section 16 of the Act of 1982, any substantive appointment or promotion unless is made in accordance with the provisions of the Act of 1982 or the Rules framed thereunder, such appointment or promotion would be void by virtue of Section 16 of the Act of 1982. The Government Orders therefore will have to be treated as granting benefit, which is personal to the teacher concerned.

16. The Government Order of 25th October, 2000 upgrades the post of L.T. Grade teacher in specified circumstances and also grants benefit of designation on the post of Lecturer as also seniority from the date a person joins on the post of Lecturer. The benefit in that regard is personal to the teacher concerned inasmuch as the post of L.T. Grade teacher would be treated to have been abolished. Such promotion cannot be treated to be a substantive promotion in the grade and cadre of Lecturer since the procedure for appointment to the post of Lecturer as per the Act of 1982 is not followed. Such promotion at best can be treated personal in nature to the teacher concerned against an ex-cadre post or else the Government Order itself would become inconsistent with the Act of 1982. The seniority of teacher who is granted the benefit of personal promotion under the Government Order dated 25th October, 2000 therefore would have to be separately maintained. The benefit of seniority in the cadre of Lecturer therefore cannot be granted under

Regulation 3 framed under Chapter-II to the Act of 1921.

17. In Dr. Rashmi Srivastava Vs. Vikram University and others, 1995(3) SCC 653 a similar issue came up for consideration before the Apex Court. Claim of seniority between direct recruits and those promoted under the merit promotion scheme was examined. In paras 37 and 38 of the judgment, the Apex Court observed as under:-

"37. A resume of relevant provisions of the merit promotion scheme and the relevant provisions of the Vikram University Act (sic M.P. Vishwavidyalaya Adhiniyam, 1973) to which we have made reference earlier clearly shows that when the Act was enacted in 1973 the State Legislature had not contemplated any promotion of a Lecturer as Reader or Reader as Professor as the case may be. All the relevant ordinances and statutes will therefore have to be read in that light. It is not possible to agree with the contention of the learned counsel for appellants that Section 49 as enacted can take in its sweep even departmental promotees. A mere look at Section 49 shows that the Members of the Committee of Selection as contemplated by sub-section (4) of Section 49 have to investigate the merits of the various candidates and to recommend to the Executive Council the names if any, of persons whom they consider suitable for the posts, arranged in order of merit. Sub-section (5) mentions that out of the names so recommended under sub-section (4) the Executive Council shall appoint persons in order of merit. This clearly contemplates an open market recruitment procedure by way of direct recruitment and candidates selected will have to be appointed in order of merit. It is obvious that there would be no occasion to consider the question of inter se merit of a departmental promotee and a direct recruit. It is also pertinent to note that in the year 1973 the subsequent merit promotion scheme of 1982 would never have been under contemplation of the Legislature. It must therefore be held on a conjoint reading of the relevant provisions of the Act that only one source of recruitment of University teachers namely, Professors and Readers and even of Lecturers is contemplated and that source is by way of direct recruitment. If that is so and if under merit promotion scheme as recommended by the Commission which was adopted by Respondent 1 University, any departmental candidate is to be promoted, he would be so promoted dehors Section 49 and would obviously be an ex cadre Reader or Professor as the case may be. Once that happens it would be obvious that there would be no occasion to fix the inter se seniority of directly recruited Readers and Professors who are holding cadre posts and ex cadre merit promoted Readers and Professors who would stand outside the cadre. The first respondent by its impugned decision which was quashed by the High Court in the judgment under appeal tried to fuse the inter se seniority of both these classes of employees. And that itself amounted to treating unequals as equals. It clearly offended the provisions of Articles 14 and 16(1) of the Constitution of India. Unless Section 49 is suitably amended and a separate source of recruitment by way of internal promotion is contemplated by the Act there would remain no occasion of undertaking any exercise of fixing inter se seniority between ex cadre employees and cadre employees. It is not in dispute between the parties that neither the Act nor any ordinances or statutes of Respondent 1 University even remotely whisper about creation of a

separate recognised source of recruitment of Professors and Readers by way of departmental promotions. It is of course true as indicated by Dr Dhavan appearing for the intervenors that in some of the Universities even ordinances have been issued accepting such new source of promotion of University teachers under the merit promotion scheme. But even if it is so that would make no difference as it is the parent Act, namely, University Act concerned which should contemplate creation of new source of recruitment by way of departmental promotions of University teachers. Unless that is done mere issuance of ordinances or statutes to that effect which to that extent would conflict with the parent Act would be of no avail and would be an exercise in futility. They would also be ultra vires the Act. It must therefore be held that unless the University Acts concerned under which the Universities are functioning, by suitable amendments provided for an additional source of recruitment of Readers and Professors by way of departmental promotions, mere adoption of merit promotion scheme recommended by the Commission or mere decision of the Coordination Committee or Executive Committee not to discriminate between merit promotees and direct recruit University teachers and even issuance of ordinances or statutes to that effect would be of no avail and will not have any legal effect nor would they permit the Universities concerned to fuse the cadre employees with ex cadre employees and to prepare a combined seniority list on that basis.

38. It is true as submitted by learned counsel for appellants that for avoiding stagnation and heart burning promotional avenues should be made available in any service as laid down by this Court in number of decisions to which our attention was invited by them. However the short question for our consideration is whether the University Act concerned has made such a provision. If a provision is made then there would be no difficulty in the way of the appellants but in the absence of such a provision mere availability of merit promotion scheme cannot elevate the merit promoted Reader or Professor to the cadre of such Readers or Professors as the case may be. They would remain ex cadre employees who cannot claim any inter se seniority with direct recruits forming the cadre concerned. It is not possible to agree with the contention of Shri Bobde and Dr Dhavan that under the merit promotion scheme though the promotions were personal, to that extent there was a temporary extension of the cadre of Reader or Professor as the case may be or that they were special promotees as Dr Dhavan would like to have it. The very guidelines of the scheme suggest that a merit promoted Reader or Professor will be treated to have a personal promotion. It will not create any addition to the cadre nor will it create any vacancy in the lower cadre from which he or she was promoted. The workload has to be so distributed as not to require any additional staff. Dr Dhavan said that this was only because of the financial crunch. That may be so. But ultimately the effect thereof would be that once a merit promoted Reader or Professor goes out of service there will be no post which will fall vacant in the promotional avenue. Consequently, it cannot be said that there was any temporary addition to the cadre strength of Reader or Professor as the case may be. We entirely concur with the reasoning adopted by the High Court while considering the relevant clauses of the merit promotion scheme when it took the view that Readers and Professors promoted

under the scheme were not entitled to be included in the seniority list of directly recruited Readers and Professors. Reliance placed by learned counsel for appellants on Statute 16 is also of no avail to the appellants for the simple reason that Statute 16 deals with seniority of teachers of the University. This statute is promulgated under Section 35(o) of the Act. Section 35(o) of the Vikram University Act (sic M.P. Vishwavidyalaya Adhiniyam, 1973) deals with the mode of determining seniority for the purpose of the Act. Consequently it will have to be read with Section 49 meaning thereby when a Professor, Reader or Lecturer is recruited under Section 49 how his seniority is to be determined can be decided in the light of the relevant statute framed under Section 35(o). When we turn to Statute 16 we find that as per clause (2) thereof the seniority of Professors, College Professors, Readers, Associate Professors or Lecturers shall be determined in accordance with the length of continuous service of such person in the cadre concerned taken together with length of continuous service which is equivalent to or superior to the cadre concerned. It was submitted by learned counsel for the appellants that the word cadre as employed by Statute 16(2) is used in a loose sense. It is difficult to agree. Statute 16(2) read with Section 35(o) and Section 49 leaves no room for doubt, that all those Readers and Professors who were recruited under Section 49 as direct recruits and who enter the cadres of Professors and Readers as the case may be shall have their seniority determined in accordance with length of service in their cadres concerned. As merit promotee Reader or Professor is outside the cadre there is no question of Statute 16(2) operating in his case. It is also pertinent to note that merit promotee Professors or Readers form a separate distinct class as compared to directly recruited Professors or Readers. It is true that as decided by Respondent 1 University, the same Selection Committee which directly recruits Professors and Readers under Section 49(2) deals with the question of granting merit promotions to the Lecturers concerned as Readers and Readers as Professors. But to that extent the machinery or infrastructure available under Section 49(2) for directly recruiting teachers was made available for deciding the eligibility of departmental candidates for merit promotion but that would not by itself create a new source of recruitment for promotee Readers and Professors unless Section 49 was suitably amended. That has not been done till now. In this connection, we can profitably refer to the decision of this Court in the case of Bal Krishna Agarwal (Dr) v. State of U.P. [(1995) 1 SCC 614 : 1995 SCC (L&S) 356 : JT (1995) 1 SC 471] In that case a Division Bench of this Court was concerned with the question whether Professors promoted by Allahabad University governed under Uttar Pradesh State University Act, 1973 could claim seniority vis-à-vis directly recruited Professors. Under Section 31 a merit promotion scheme adopted by Allahabad University was promulgated by State of Uttar Pradesh. By inserting Section 31-A in the University Act with effect from 10-10-1984 a distinct source of recruitment by way of merit promotion for Lecturers and Readers in the University was created by State Legislature. But that section which created a distinct source of recruitment by promotion was effectively brought into force from 10-10-1994. The appellant before this Court was directly appointed as Professor on 9-11-1984 while the contesting Respondents 4 and 5 were promoted as Professors under the scheme by Government Orders dated 12-12-1983

and 25-2-1984. These respondents were treated as senior to the appellant before this Court. He unsuccessfully challenged the said fixation of inter se seniority before the High Court, as the High Court took the view that the appellant had to be relegated to the alternative remedy available under Section 68 of the Act. In appeal pursuant to leave granted by this Court, S.C. Agrawal, J. speaking for the Division Bench took the view that the appellant was entitled to be treated as senior to the promotee Professor as Section 31-A was not on the statute book when Respondents 4 and 5 were promoted and therefore their promotions could be treated as valid only from 21-2-1985 when Section 31-A was enforced. Before that date the appellant had already entered the cadre of Professors on 11-11-1984 and therefore he had to be treated as senior to Respondents 4 and 5. In para 13 of the report the following observations were made in this connection: (SCC pp. 621-22)

"We are of the opinion that in view of the provisions contained in Section 31-A and Section 2(14) of the Act there is no escape from the conclusion that Respondents 4 and 5 could not be given promotion under the Personal Promotion Scheme till the necessary provisions prescribing the length of service and the qualifications for such promotion were made in the Statutes and since this was done by Notification dated 21-2-1985, promotion under the Personal Promotion Scheme could not be made prior to 21-2-1985. The Executive Council in its Resolution No. 198 dated 8-11-1984 had accepted the recommendations of the Selection Committee for promotion of Respondents 4 and 5 on the basis of Government Orders dated 12-12-1983 and 25-2-1984. At that time Section 31 of the Act provided for appointment of teachers by direct recruitment and did not envisage promotion from a lower teaching post to a higher teaching post. The orders of the Government aforementioned could not be given effect till necessary amendment was made in the Act making provision for personal promotion. This was done by introducing Section 31-A by U.P. Act No. 9 of 1985 with effect from 10-10-1984. But Section 31-A could be given effect only after the necessary provision was made in the Statutes prescribing the length of service and the qualifications for personal promotion. This was done by the notification dated 21-2-1985. The promotion of Respondents 4 and 5 to the grade of Professor under the Personal Promotion Scheme could, therefore, not be made prior to 21-2-1985 and it has to be treated to have been made with effect from 21-2-1985. The inter se seniority of the appellant and Respondents 4 and 5 has to be determined on that basis."

In our view the aforesaid decision of this Court is squarely applicable to the facts of the present case. As seen above in the Uttar Pradesh Act there is already an amendment by insertion of Section 31-A which provided for a distinct source of promotion. In the Vikram University Act with which we are concerned, there is no such provision. ***It is therefore to be held that till appropriate amendments are effected in the Universities Act concerned on the same lines as Section 31-A of the Uttar Pradesh Act there would be no occasion for considering the merit promotees to have entered the cadre of Reader or Professor as the case may be and consequently there would arise no occasion for consideration of the further question of fixation of inter se seniority of such ex cadre promotees and the directly recruited Readers or Professors who form the cadre concerned."***

(emphasis supplied by us)

18. This Court in Bharti Roy Vs. Deputy Director of Education-II, Kanpur and others, 2008 (2) ADJ 134, has also taken the view that benefit of seniority cannot be granted unless the appointment or promotion is in accordance with the Regulations and the Act of 1982. After referring to Division Bench judgment of this Court in Madan Gopal Agrawal and others Vs. The District Inspector of Schools, Bijnor and others, 1996 (3) ESC 202, this Court observed as under in paras 26 to 29:-

"26. Same view was taken by another Hon'ble Single Judge (Dr. B.S. Chauhan, J.) in Madan Gopal Agrawal and Ors. v. The District Inspector of Schools, Bijnor and Ors. 1996 (3) ESC 202 (All). However, this Court also held that grant of LT grade under the aforesaid Government Orders is personal and it does not mean posting in LT grade, inasmuch as, when such a person would retire, it would result in a vacancy in CT grade and not in LT grade since the incumbent cannot be said to hold the post of Assistant Teacher in LT grade. The observations of this Court are as under:

"7. ... under the different Government Orders issued from time to time the teachers working in C.T. Grade become eligible to be considered for L.T. Grade as a personal pay scale. This does not mean the posting in L.T. Grade and the post which becomes vacant after the retirement of such a teacher would not be deemed to be a vacant post in L.T. Cadre nor such a person can take benefit on the post of the L.T. Grade for promotion and seniority as he is not holding the post in Grade in L.T. Grade vide Rashmi Srivastava v. University , Virendra Pandey v. State of U.P. 1994 (24) ALR (H) 19, Writ Petition No. 30754 of 1991 Madljuri Devi v. Regional Inspectress of Girls Schools, decided on 20.3.1995 and Vipin Kumar v. District Inspectress of Schools 1993(2) Educational and Service Cases 456.

8. It is not to be treated as their promotion in L. T. Grade till they are promoted to the post in L.T. Grade strictly in accordance with law."

27. Same view has been expressed by another Hon'ble Single Judge (Hon. Ashok Bhushan, J.) in Civil Misc. Writ Petition No. 39731 of 2000, Ansan Lal Jha v. District Inspector of Schools and Ors. decided on 13.2.2006.

28. A pari material Government Order was issued on 28.2.1990 for grant of Lecturer Grade to those teachers who were working in L.T. Grade and had completed ten years of service and were imparting education to the students of XI and XII class continuously for ten years. The incumbent was granted Lecturer's Grade pursuant to the Government Order dated 28.2.1990 and he raised a similar contention which came up for adjudication before a Division Bench of this Court in Vipin Kumar v. District Inspector of Schools (1993) 3 UPLBEC 1900 and in paragraphs No. 6, 9 and 13 the Court held:

"6. ...A teacher may be given lecturer's pay scale even though there is no vacancy to the post of lecturer. The grant of lecturer's pay scale is not correlated with the filling of vacancy in a particular post. In a college where teachers are appointed in L. T. grade and they are given lecturer's pay scale, then in that situation there would not occur any vacancy to the post of lecturer and on the other hand the post may not exist but the teachers are given lecturer's pay scale. The word "grade" has different connotations in the context of a particular statute."

"9. The word "grade" used in Para 4(2) of the Removal of Difficulties

Order, 1981, Rule 9 of U.P. Secondary Education Service Commission Rules, 1983 and Regulation 6 of Chapter II of Intermediate Education Act, 1921 must be taken as "post" of lecturer. A teacher, who is working in L T. Grade is to be promoted to the post of lecturer's grade in the sense that he is to be promoted to the post of lecturer in an institution. A teacher may be given lecturer's pay scale but he may not be given the post. Unless he is given a post the mere fact that he has been given lecturer's pay scale will not be taken as to have given him the post of lecturer unless he is duly promoted to the said post in accordance with the provisions of a Statute."

"13. The seniority of a teacher of a lecturer's grade is also to be considered from the date of appointment to the post in lecturer's grade and not from the date of payment of lecturer's pay scale. Regulation 3 of Chapter II of Regulations of the Intermediate Education Act contemplates seniority from the date of appointment and the same principle has to be made applicable in case of persons appointed on ad hoc basis. The seniority cannot be fixed on the basis of grant of pay scale given by the Government under its own orders."

29. In view of the aforesaid authorities which are binding on this Court as well and even otherwise, I am also in respectful agreement with the law laid down therein, it is evident that the first petitioner even if treated to have been granted L.T. grade w.e.f. 1.7.1992 after completion of ten years of service in C.T. Grade, that would not entitle her to claim seniority on the post of Assistant Teacher (L.T. Grade) unless she is appointed or promoted in accordance with the Regulations and 1982 Act on the said post. Neither there is any averment in any of the petitions filed by the first petitioner nor any order is available on record to show that the first petitioner was ever promoted on the post of Assistant Teacher (L.T. Grade) in accordance with 1982 Act read with Regulations framed under 1921 Act. In these circumstances, I am clearly of the view that she could not have been granted benefit of seniority on the post of Assistant Teacher (L.T. Grade) and could not have been placed above the second petitioner who admittedly was appointed directly as Assistant Teacher (L.T. Grade) and was regularised on the said post on 27.1.1994. Thus, the entire claim and dispute raised by the first petitioner loses its ground resulting in vitiating the order dated 12.7.2006 passed by Joint Director of Education, Kanpur Region whereby she has been declared first petitioner senior to the second petitioner ignoring the exposition of law on the subject in its entirety."

19. Since the promotion of the appellant has not been substantively made on the post of Lecturer as such he is not entitled to the benefit of seniority on the post of lecturer. The substantive appointment of the appellant would continue to be that of L.T. Grade teacher notwithstanding the grant of higher pay-scale as well as the designation, which remains personal to the appellant concerned. The order passed by the D.I.O.S., Prayagraj granting benefit of post of Lecturer to the appellant has thus rightly been set aside by the learned Single Judge. Any benefits, which are granted to the appellant by virtue of the aforesaid Government Orders would remain personal to the appellant concerned and would not amount to his having been appointed substantively on the post of Lecturer.

20. It is however made clear that any benefit of pay-scale or designation granted

to the appellant relying upon the aforesaid Government Orders would not be withdrawn and would remain personal to the appellant concerned.

21. The order of D.I.O.S., Prayagraj dated 14.05.2023 as well as the order passed by learned Single Judge stands modified in terms of the above directions.

22. Subject to the above observations and submissions, the special appeal stands **disposed of.**

(2024) 1 ILRA 32
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.01.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 5813 of 2022

Indu Bhushan Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Chandra Bhushan Pandey, Asim Kumar Singh

Counsel for the Respondents:
C.S.C., Sanjay Singh

U.P. Electricity Regulatory Commission (Appointment and Condition of Service of the Chairperson and Members) Rules, 2008, via First Amendment Rules, 2021, - Challenge to amendment of Rule 15 of U.P. Electricity Regulatory Commission (Appointment and Condition of Service of the Chairperson and Members) Rules, 2008, via First Amendment Rules, 2021 - applying National Pension Scheme (NPS) retrospectively to Chairperson and Members appointed on or after 01.04.2005 - Amendment ultra vires Section 89(2) of Electricity Act, 2003, as it varies terms and conditions to petitioners' disadvantage post-appointment - Cancellation of pension and recovery of Rs.22,65,528/- arbitrary, violating Articles 14 and 16 - Impugned orders dated 31.07.2020, 02.06.2020, 11.11.2021, and 04.04.2022 quashed - Petitioners entitled to pension as per unamended Rule 15, with recovered amounts to be refunded within two months.

List of Cases cited:

1. Bank of Baroda & anr. Vs G. Palani & ors., (2002) 5 SCC 612

2. St. of Pun. Vs Kailash Nath, (1989) 1 SCC 321

3. Laghu Udyog Bharti Vs U.O.I., (1999) 6 SCC 418

4. Punjab State Cooperative Agriculture Development Bank Vs Registrar Co-operative Societies, (2022) 4 SCC 363

5. Arjan Singh & anr. Vs The St. of Punjab & ors., 1970 AIR 703

6. St. of Punjab & ors. Vs Rafiq Masih (White Washer) & ors., (2015) 4 SCC 334

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

(1) Herad Sri Chandra Bhushan Pandey, Sri Paavan Awasthi and Sri Apoorva Tewari, learned Counsel appearing for the petitioners in the respective petitions, learned Sri V. P. Nag, learned Additional Chief Standing Counsel for the State-respondents and Sri Sanjay Singh, learned Counsel appearing for the Commission.

(2) In the aforesaid three writ petitions, mainly challenge to Rule 15 of The Uttar Pradesh Electricity Regulatory Commission (Appointment and Condition of Service of the Chairperson and

Members) ***Rules, 2008*** [in brief, it has been referred to as 'Rules, 2008'] has been made. Thus, they have been clubbed together and decided by a common order.

(3) Apart from above, in Writ-A No. 5813 of 2022, Indu Bhushan Pandey v. State of U.P. and two others, following ancillary prayers have also been made:-

"(i) to issue a writ, order or direction of or in the nature of certiorari to quashing the order, dated 31.07.2020, whereby respondent no.3 illegally and arbitrarily cancelled the petitioner's pension, provided under Rule 15 of The Uttar Pradesh Electricity Regulatory Commission (Appointment and Condition of Service of the Chairperson and Members) Rules, 2008, as contained in Annexure No.2 to this writ petition;

(ii) to issue a writ, order or direction of or in the nature of certiorari to quashing the order, dated 02.06.2020, thereby, State Government/ Respondent No.1 illegally and arbitrarily did not sanction further pension to the petitioner, as contained in Annexure No.3 to this writ petition;

(iii) to issue a writ, order or direction of or in the nature of mandamus commanding the respondents to provide pension including all the perks, allowances and benefits as admissible with un-amended Rule 15 of The Uttar Pradesh Electricity Regulatory Commission (Appointment and Condition of Service of the Chairperson and Members) Rules, 2008 revisable from time to time in favour of the petitioner, commensurate with that admissible to a retired Hon'ble Judge of the High Court with all the consequential benefits;

(iv) to issue a writ, order or direction of or in the nature of mandamus commanding the respondents to release the withholding amount of pension including 12% interest, since, August 2021 to till date.

(v) to issue a writ, order or direction of or in the nature of mandamus commanding the respondent to not to recover Rs.22,65,528/- (Rupees Twenty Two Lakhs Sixty Five Thousand Five Hundred Twenty Eight only) from the petitioner;

(vi) to issue any other order or direction which this Hon'ble Court deems fit and proper in the facts and circumstances of the present case;

(vii) to allow this writ petition with exemplary costs."

(4) The events leading to the filing of this petition are recapitulated in brief as under:

In the year 2003, the Parliament enacted the Electricity Act, 2003 [here-in-after referred to as **'Act']** to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and for establishment of Regulatory Commission and Appellate Tribunal. After receipt of assent from the President on 26.05.2003, it was published in the Gazette of India on 02.06.2002.

(5) Section 82 of the Act provides for the constitution of a Commission for the State Electricity Regulatory Commission whereas Section 82 (2) of the Act provides that the State Commission shall be a body corporate having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable and to contract and shall, by the said name, sue or be sued.

(6) Section 82 (4) of the Act postulates that the State Commission shall consist of not more than three Members, including the Chairperson. Section 82 (5) of the Act, 2003 provides that the Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in Section 85.

(7) Section 89 of the Act provides for the term of office and conditions of service of Members which reads as under:-

"89. Term of office and conditions of service of Members. – (1) The Chairperson or other Member shall hold office for a term of five years from the date he enters upon his office:

Provided that the Chairperson or other Member in the Central Commission or the State Commission shall not be eligible for re-appointment in the same capacity as the Chairperson or a Member in that Commission in which he had earlier held office as such:

Provided further that no Chairperson or Member shall hold office as such after he has attained the age of sixty-five years.

(2) The salary, allowances and other terms and conditions of service of the Chairperson and Members shall be such as may be prescribed by the Appropriate Government:

Provided that the salary, allowances and other terms and conditions of service of the Members, **shall not be varied to their disadvantage after appointment.**

(3) Every Member shall, before entering upon his office, make and subscribe to an oath of office and secrecy in such form and in such manner and before such authority as may be prescribed.

(4) Notwithstanding anything contained in sub-section (1), a Member may –

(a) Relinquish his office by giving in writing to the Appropriate Government a notice of not less than three months; or

(b) be removed from his office in accordance with the provisions of Section 90.

(5) Any member ceasing to hold office as such shall –

(a) not accept any commercial employment for a period of two years from the date he ceases to hold such office; and

(b) not represent any person before the Central Commission or any State Commission in any manner.

Explanation – For the purpose of this sub-section "commercial employment" means employment in any capacity in any organization which has been a party to the proceedings before the Appropriate Commission or employment in any capacity under, or agency of, a person engaged in trading, commercial, industrial or financial business in electricity industry and includes a director of a company or partner of a firm or setting up practice either independently or as partner of a firm or as an advisor or a consultant."

(8) In pursuance of the Act, the State Government vide Notification dated 06.02.2004 had promulgated Uttar Pradesh Electricity Regulatory Commission, Lucknow, Regulations 2004 [in short, it is referred to as 'Regulations'] whereby the Uttar Pradesh Electricity Regulatory Commission was established in the State of U.P.

(9) Section 180 (2)(d) of the Act specifies the power of the State Government to frame Rules regarding the

salary, allowances and other terms and conditions of service of the Chairperson and Members of the State Commission under 89 (2) of the Act. For ready reference, relevant provisions of the Rule are being reproduced as under:-

"Section 180. (Powers of State Governments to make rules):--

(1) The State Government may, by notification, make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of foregoing power, such rules may provide for all or any of the following matters, namely:-

….

(d) the salary, allowances and other terms and conditions of service of the Chairperson and Members of the State Commission under sub-section (2) of Section 89;"

(10) In exercise of powers conferred under Section 180 (2)(d) of the Act, 2003 and Regulations, the State Government notified the Rules, 2008 which came into force on 01.01.2009. Rule 15 of Rules, 2008 which provides for payment of pension to the Chairperson and the Members of the Commission is reproduced hereunder:-

"Rule 15. The Chairperson and the members shall be entitled to pension provided that no such pension shall be payable

(i) if he has put in less than two years of service; or

(ii) if he has been removed from an office in the Commission as per the provisions of the Act.

Provided further that the aggregate amount of the pension payable to any person under this rule together with amount of any pension (including commuted portion of pension), if any, admissible to him in respect of the service rendered by him prior to his appointment in the Commission as a Judge of the High Court or a Government Servant shall not exceed the maximum amount of pension admissible to a Judge of the High Court or a Secretary to the Government of India, whichever is more."

(11) By virtue of the aforesaid Rule, the persons appointed on the post of Chairman or Member of the Commission is entitled for payment of pension under the Rules, 2008.

(12) Pursuant to the notification dated 24.09.2013, the petitioner/Indu Bhushan Pandey had assumed the post of Member to the Commission on 28.09.2013. It is pertinent to mention here that the petitioner's service under the National Thermal Power Corporation Limited was non-pensionable service.

(13) In view of above, the petitioner/Indu Bhushan Pandey became entitled to all perks, facilities and allowances admissible to a High Court Judge in light of various statutory provisions and notifications issued from time to time.

(14) It is pertinent to mention here that at the time of his retirement from the Commission, the petitioner/Indu Bhushan Pandey was granted pension vide order dated 19.08.2016 issued by the Commission.

(15) In the meantime, the State Government vide letter dated 02.06.2020 directed the Commission to take necessary action on three points pertaining to the pension of the Chairman/Members of the

Commission which are being reproduced as under:-

"(1) केन्द्रीय विद्युत नियामक आयोग एवं अन्य राज्यों के विद्युत नियामत आयोगों में से किसी में भी अध्यक्ष को चुनाव आयुक्त के समकक्ष पेंशन की अनुमान्यता नहीं है अपितु कई आयोगों–केन्द्रीय विद्युत नियामक आयोग, दिल्ली विद्युत नियामक आयोग, मध्य प्रदेश, तमिललनाडु,गुजरात, राजस्थान तथा महाराष्ट्र राज्यों के विद्यत नियामक आयोगों के अध्यक्षों को उनके द्वारा आयोग में की गयी सेवा हेतु पेंशन अनुमन्य ही नही है ।

(2) दिनांक 01.04.2005 से पुरानी पेंशन योजना राज्य सरकार द्वारा समाप्त कर उसके स्थान पर नयी परिभाषित अंशदान पेंशन योजना ;राष्ट्रीय पेंशन प्रणालीद्ध लागू की गयी है । दिनांक 01.04.2005 के उपरान्त नियामक आयोग में नियुक्त होने वाले अध्यक्ष एव सदसगिण की आयोग की सेवायें राष्ट्रीय पेंशन प्रणाली ;एन0पी0एस0द्ध से आच्छादित होगी ।

(3) उ0प्र0 राज्य विद्युत नियामक आयोग नियमावली, 2008 के सुसंगत अनुच्छेद में दिनांक 01,04,2005 को अथवा उसके उपरान्त नियुक्त अध्यक्ष/सदस्य एवं अन्य कार्मिकों को राष्ट्रीय पेंशन प्रणाली से आच्छादित किये जाने हेतु संगत सेवा नियमों में संशोथन का प्रस्ताव उपलब्ध कराने का कष्ट करें ।

(16) In pursuance of the letter dated 02.06.2020, the Secretary to the Commission has clarified vide letter dated 29.06.2020 as under:-

(1) In respect of point No.1, it is stated that every State Government is independent to regulate its own system pertaining to provide pension to the Chairperson and Members of the Commission, therefore, it is not appropriate to take any decision in context of other States.

(2) In respect of point No.2, the respondent No.2 has clarified that as per the proviso of Section 89 (2) of the Act, 2003, **the salary and allowances and other terms and conditions of service of the Members shall not be varied to their disadvantage after appointment. Significantly, Rules, 2008 were enacted w.e.f. 01.01.2009 after enforcement of the NPS on 01.04.2005 and moreover, any amendment in Section 15 of the Rules 2008 cannot be given retrospective effect in view of the proviso of Section 89 (2) of the Act, 2003.**

(3) However, the respondent No.2 in response to the point No.3 sent a proposed amendment with respect of Rule 15 of the Rules, 2008 which is being reproduced as under:-

Column – I	Column - II
Pension 15 The Chairperson and the members shall be entitled to pension provided that no such pension shall payable. (i) if he has put in less than two years of service; or (ii) if he has been removed from an office in the Commission as per the provisions of the Act: Provided further that the aggregate amount of the pension payable to any person under this rule together with amount of any pension (including commuted portion of pension), if any, admissible to him in respect of the service rendered by him prior admissible to him in respect of the service rendered by him prior to his appointment in the Commission as a Judge of the High Court or a Government Servant shall not exceed the maximum amount of pension admissible to a Judge of the High Court or a Secretary to the Government of India, whichever is more.	**Pension 15. The Chairman and Members appointed on or after 1st April, 2005 shall be covered under the National Pension Scheme (N.P.S.)**

(17) Thereafter, vide order dated 31.07.2020, the respondent No.3/Secretary of the Commission has cancelled the pension of the petitioner/Indu Bhushan Pandey on the ground that vide order dated 02.06.2020, the State Government did not approve further pension to the petitioner, in view of the applicability of the National Pension Scheme, 2005.

(18) Learned Counsel for the petitioner has submitted that the pension of the petitioner was revised according to the amendment made in the High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Act, 2016 and consequently, arrears on the pension was released on 16.01.2019. However, without informing the petitioner, respondent No.2/the Commission has not only stopped the pension with effect from July, 2020 but also started recovery of Rs.22,65,528/- from the servant allowance of the petitioner.

(19) The next submission of the learned Counsel for the petitioner is that the amendment to Rule 15 of Rules, 2008 was made, known as Uttar Pradesh Electricity Regulatory Commission (Appointment and Conditions of Service of the Chairperson and Members) (First Amendment) Rules, 2021 vide notification dated 25.10.2021 whereby the Chairperson and Members appointed on or after 1st April, 2005 shall be covered under the National Pension Scheme, 2005.

(20) Further submission of the learned Counsel for the petitioner is that due to pandemic of COVID – 19, everything was kept in abeyance. Thereafter, in response to the letter dated 03.06.2022 sent by the respondent No.3, the State Government vide letter dated 21.06.2022 informed that after amendment and incorporation in Rule 15 of Rules, 2008, no review to the aforesaid amendment could be considered.

(21) Further submission of the learned Counsel for the petitioner is that the aforesaid amendment was in violation to the provisions of Section 182 of the Act which prescribes that every Rule made by the State Government and every Regulation made by the State Commission shall be laid before the State Legislature. In the present case, no such procedure has been followed by the respondents.

(22) In support of the aforesaid submissions, learned counsel for the petitioner has relied on a dictum of Hon'ble Supreme Court rendered in the case of ***Bank of Baroda and another v. G. Palani and others [(2002) 5 SCC 612],*** wherein the aforesaid aspect has been taken care of. In the said case, it was categorically held that the pension is not a bounty but a right and cannot be arbitrarily dealt with and accrued rights of pension cannot be taken away with retrospective effect. In fact, no government order, notification or circular can substitute or amend statutory rules or regulations framed under any authority of law with retrospective effect to take away accrued rights of pension.

(23) Next he has submitted that since the amendment in the Rules cannot be made with retrospective effect, it is beyond comprehension as to how this amendment was enacted despite the provision of the Act being absolutely contrary to it. According to him, the impugned amendment is without jurisdiction and is wholly unsustainable.

(24) It is next submitted that after providing the pension to the petitioner for such a long time, the vested right that had accrued to him cannot be taken away retrospectively, particularly in view of the mandate of Section 89 (2) of the Act.

(25) Relying upon the citation of ***State of Punjab v. Kailash Nath [(1989) 1 SCC 321],*** learned counsel for the petitioner has submitted that pension falls

within the purview of the terms and conditions of service.

(26) A rule which is in conflict with a provision of the Statute is ultra vires as has been held by the Apex Court in the case of ***Laghu Udyog Bharti v. Union of India [(1999) 6 SCC 418].***

(27) In support of the submission that an amendment of the rules which have the effect of taking away the benefits already availed by the employee under the existing rules would divest an employee of an accrued right and would violate Articles 14 and 21 of the Constitution of India, learned Counsel for the petitioner has relied upon the judgment of Apex Court in ***'Punjab State Cooperative Agriculture Development Bank v. Registrar Co-operative Societies [(2022) 4 SCC 363].***

(28) Thus, there is no justification for fixing a retrospective date for providing pension. Therefore, the impugned amendment in Rule 15 of Rules, 2008 is illegal, invalid and arbitrary, therefore, it deserves to be declared as such.

(29) On the other hand, precise submission made by the learned counsel for the opposite parties is that in view of the abolition of pension scheme to the personnel working in the government offices on or after 01.04.2005 after obtaining approval from the Council of Ministers, Rule – 15 of Rules, 2008 was amended on 25.10.2021. Accordingly, vide order dated 11.11.2021, the Commission paid the contributory amount to the petitioner under National Pension Scheme.

(30) They have further submitted that after due consideration at the Government level, the Secretary of the Commission was informed vide letter dated 21.06.2022 that the system of National Pension Scheme has been implemented in the State by notification No. 3-379/10-2005-301(9)-2003 dated 28.03.2003 read with notification No.0-16/ 2019/ Sa-3-322/ 10-2019-301(8)/ 2015 dated 16.04.2019. Lastly, their further submission is that all the employees entering into the service in the State on or after 01.04.2005 will compulsorily be covered by the National Pension Scheme and the amendment made in the Rules, 2008 is not in violation of any Rule.

(31) We have considered the submissions made by the learned Counsel for the respective parties and perused the material available on the aforesaid writ petitions.

(32) **The question involved in the aforesaid three writ petition is, as to whether the amendment made to Rule 15 of Rules, 2008 in the year 2021 is applicable to the petitioners or not?**

(33) Before giving answer to the aforesaid question, it is necessary to look into the necessary provisions of the Act and Rules.

(34) Legislation cannot be implemented retrospectively to affect pre-existing rights unless expressly stated otherwise or by necessary implication. Whether a law is applied in the future or in the past depends entirely on the legislative intent. If the terms of the statute are unambiguous and it is obvious that the legislature intended for it to apply retrospectively, then it must without a doubt be interpreted as written. However, if the terms of a statute do not by themselves make the intention clear or certain, the

statute will be presumed to operate prospectively, where it is in derogation of a common law right or where it would interfere with an existing contract, destroy a vested right, create a new liability in connection with a past transaction, or invalidate a defense that was valid at the time the statute was passed.

(35) While considering the question of the statute's retrospective application, the nature of the affected right must be considered first. In cases where a vested right exists, an amendment will be viewed as prospective in order to protect the vested right. Normally, there is no vested right if the right is only procedural.

(36) In ***Arjan Singh and another v. The State of Punjab and others*** **[1970 AIR 703],** it has been observed that it is a well-established rule of construction that no provision in a statute should be given retrospective effect unless the Legislature has made it retrospective by express terms or by necessary implication, and that where a provision has been made retrospective, care should be taken not to extend its retrospective effect beyond what was intended.

(37) All the petitioners were appointed in light of Rules, 2008 and as per Section 89 of the Act, the Chairman or Members shall hold office for a term of five years from the date he/she enters upon his/her office or till he/she attains the age of sixty years whichever is earlier. Further, as per Rule 15 of Rules, 2008, the Chairman and the Members of the Commission shall be entitled for pension on putting two years of service. Method of drawing pension has also been provided in the proviso to Rule 15 (ii) of the Rules, 2008.

(38) Admittedly, Indu Bhushan Pandey/petitioner of Writ-A No. 5813 of 2022 had assumed the post of Member on 28.09.2013, whereas Suresh Kumar Agarwal/petitioner of Writ-A No.6487 of 2022 had taken charge on the post of Member of the Commission on 09.12.2015 and both these petitioners retired on attaining the age of 65 years and were drawing pension before amendment of Rule 15 of the Rules, 2008. In Writ-A No. 6486 of 2022, the petitioner/Kaushal Kishore Sharma took oath as Member of the Commission on 02.04.2018 and superannuated on 05.10.2022.

(39) In view of above, all the petitioners on attaining the age of six five years retired from the post of Member of the Commission and as per Rules, they were granted pension and the same has been paid to them till amendment in Rule 15 of the Rules, 2008 has been carried out in the year 2021. In the meantime, pension of the petitioner of Writ-A No. 5813 of 2022 has also been revised in consonance with the provisions of High Court and Supreme Court Judges (Salaries and Conditions of Service) Amendment Act, 2016 and consequently, arrears on the pension was also released on 16.01.2019.

(40) Drawing attention of the Court to the proviso appended to sub-section (2) of Section 89 of the Act, learned counsel for the petitioner has argued that salary/allowances and other terms and conditions of service of Members of the Commission shall not be varied to their disadvantage after appointment.

(41) It has been stated by the learned Counsel for the petitioners that the petitioners were appointed prior to 2020 and at that time unamended Rule 15 of

Rules, 2008 were in vogue. However, by means of bringing the First Amendment by a Notification dated 25.10.2021, Rule 15 has been amended to the detriment and disadvantage of the petitioners, which is impermissible in view of the provisions contained in the proviso appended to sub-section (2) of Section 89. Since First Amendment Rules, 2021 have been applied retrospectively, hence the same is *ultra vires* to the provisions contained in the proviso appended to Section 89 (2) of the Act.

(42) Even when the State Government directed the Commission to take action on three points, the Commission clarified that as per proviso to Section 89 (2) of the Act, the salary, allowances and other terms and conditions of service of the Chairman and Members, shall not be varied to their disadvantage after appointment. Further, it has been clarified that significantly, Rules, 2008 were enacted on 01.01.2009, i.e., after enforcement of the National Pension Scheme (NPS) on 01.04.2005 and moreover, amendment made in Rule 15 of Rules 2008 cannot be given retrospective effect in view of the proviso to Section 89 (2) of the Act.

(43) Rule 2 of Rules, 2021, existing Rule of 15 of the Rules, 2008 has been substituted which postulates that the Chairman and Members of the Commission appointed on and after 01.04.2005 shall be covered under the National Pension Scheme (NPS). Therefore, the aforesaid amendment to Rule 15 made vide Rules, 2021 has retrospectively taken away the entitlement of the former/retired Members and Chairman of the Commission to draw pension in most arbitrary and illegal manner. Further, the retrospective application of the amended Rule 15 clearly varies the terms and conditions of service of the Members to their disadvantage after their appointment which is in clear violation and contradiction to the specific mandate of Section 89 (2) of the Act. Thus, the amendment to Rule 15 made vide Rules, 2021 is ultra vires to Section 89 (2) of the Act as it evidently varies the terms and conditions of service of the Members to their disadvantage after appointment.

(44) The denial of payment of pension to the petitioner as per the un-amended Rules, 2008 and application of National Pension Scheme to the petitioners on account of the retrospective application of Rule 15 of the Rules, 2008 as amended vide Rules, 2021 is absolutely arbitrary and also in violation of Articles 14 and 16 of the Constitution of India as well as in violation of Section 89 (2) of the Act.

(45) As per Rules, 2008, on the date of appointment of petitioners as Chairman/Member of the Commission, they were entitled for payment of pension.

(46) In the case of ***State of Punjab and others v. Rafiq Masih (White Washer) and others [(2015) 4 SCC 334],*** the Apex Court has held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:

"(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) **Recovery from retired employees,** or employees who are due to

retire within one year, **of the order of recovery.**

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

(47) In the case of ***Punjab State Co-operative Agriculture Development Bank (supra)***, the Apex Court has held that the exposition of the legal principles culled out is that **an amendment having retrospective operation which has the effect of taking away the benefit already available to the employee under the existing rule indeed would divest the employee from his vested rights** and that being so it would be held to be violative of the rights guaranteed under Article s 14 and 16 of the constitution.

(48) In view of what has been stated above, all the three writ petitions are **allowed** with the following directions:-

• Ignoring the First Amendment made in 2021, only the petitioners of aforesaid three petitions are entitled for pension from the date of their retirement of 65 years.

• For the above purpose, the impugned order dated 11.11.2021 passed in Writ-A No. 6486 of 2022 and the impugned order dated 04.04.2022 passed in Writ-A No. 6487 of 2022 are quashed.

• Since the pension has been stopped to the petitioners, the respondents are directed to pay pension as also other allowances, as was drawing before the amendment in Rule 15 of Rules, 2021. In this regard, the order of cancellation of pension issued by the respondents is quashed.

• Recovery, if any, issued in the case of the petitioners has also been quashed and the respondents are directed to pay the recovered amount within a period of two months from the date of receipt of a certified copy of this order.

• It is made clear that in the peculiar facts and circumstances of the case, this order is applicable to the petitioners of the aforesaid three petitions and shall not be treated as a precedent.

(49) No order as to costs.

(2024) 1 ILRA 41
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ A No. 9035 of 2023

Vikram Singh Tomar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Himanshu Singh, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C.

A. Service Law – Promotion – U.P.Subordinate Education Clerical Cadre

Service Rules, 1985 – Government Order dated 28.5.1997 – Sealed Cover Procedure – Petitioner, eligible for promotion from Head Assistant to Administrative Officer, was not considered by the selection committee due to pending disciplinary proceedings – Juniors promoted vide order dated 24.11.2021 – Disciplinary proceedings concluded on 10.6.2022 with petitioner exonerated – Held, Government Order dated 28.5.1997 mandates that the selection committee must consider eligible candidates for promotion despite pending disciplinary proceedings, with recommendations kept in sealed cover – Upon exoneration, the employee is entitled to notional promotion from the date of promotion of their immediate junior – Failure to consider petitioner's case and adopt sealed cover procedure violates the Government Order – Impugned order dated 13.4.2023 rejecting petitioner's representation unsustainable. (Paras 12, 20, 22, 23)

B. Service Law – Promotion – Relevance of Adverse Remarks – Impugned order cited adverse remarks by District Basic Education Officer, Firozabad, dated 11.11.2022, as a ground for denying promotion – Held, remarks made after the promotion date (24.11.2021) are irrelevant for the purpose of petitioner's promotion claim – District Basic Education Officer, not being the appointing authority, lacks jurisdiction to make binding remarks unless approved by the competent authority – Adverse remarks not sustainable as a basis for denying promotion. (Para 24)

Writ Petition Allowed – Impugned Order Quashed – Respondent Directed to Consider Notional Promotion from 24.11.2021.

List of Cases cited:

U.O.I. & ors. Vs K.VS Jankiraman & ors., AIR 1991 SC 2010

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Himanshu Singh, learned counsel appearing for the petitioner and learned Standing Counsel appearing for the respondents.

2. Petitioner through this writ petition has assailed the order dated 13.4.2023 passed by the Additional Director of Education (Basic), U.P. Prayagraj, whereby his representation for grant of promotion on the post of Administrative Officer with effect from the date of promotion of his juniors, has been rejected on the ground that on the date when his juniors were given promotion on the posts of Administrative Officer, disciplinary proceedings were pending against him and further District Basic Education Officer, Firozabad vide his letter dated 11.11.2022 has informed that petitioner is full of spontaneity and does not care to follow the rules and regulations.

3. Facts of the case, in brief, are that petitioner was initially appointed on the post of Junior Clerk and was posted at Government Normal School Goverdhan, District Mathura vide appointment order dated 24.3.1988. Petitioner was granted promotion on the post of Senior Clerk vide order dated 19.2.1994 and was posted in the office of District Inspector of Schools, Etah. Later on, vide order dated 26.4.2013 passed by the Additional Director of Education (Basic), U.P. Prayagraj, post of Senior Clerk was re-designated as Head Assistant.

4. Petitioner in the capacity of Head Assistant was transferred at different places and lastly, he was posted as Head Assistant in the office of District Inspector of Schools, Agra.

5. The terms and conditions of the service on the post of Head Assistant are

governed by the Uttar Pradesh Subordinate Education Clerical Cadre Service Rules, 1985 (hereinafter referred to as 'the Rules of 1985'). Under the Rules of 1985, next promotional post of the Head Assistant is Administrative Officer and 100% posts of Administrative Officer are filled in by way of promotion of Head Assistants on the criteria of seniority subject to rejection of unfit. Seniority list of the incumbents working on the posts of Senior Clerk (re-designated as Head Assistant) was published under the signatures of the Additional Director of Education (Basic), U.P. Prayagraj on 24.7.2007. The name of petitioner finds place at serial no. 361 in the aforesaid seniority list of Head Assistants.

6. Services of the petitioner while he was working on the post of Head Assistant in the office of District Basic Education Officer, Agra, were placed under suspension vide order dated 12.2.2021 passed by the Additional Director of Education (Basic), U.P., Prayagraj. A charge sheet was issued to the petitioner and thereafter, vide order dated 6.8.2021 passed by the Additional Director of Education (Basic), U.P., Prayagraj, petitioner was reinstated in service with full salary with a rider that disciplinary proceedings initiated against him will continue. The Additional Director of Education (Basic) U.P. Prayagraj passed another order on 9.8.2021 whereby place of posting of the petitioner was changed and he was posted in the office of District Basic Education Officer, Firozabad.

7. The aforesaid disciplinary proceedings initiated against the petitioner were concluded and the Additional Director of Education (Basic), U.P., Prayagraj passed an order on 10.6.2022, whereby disciplinary proceedings against the petitioner were dropped on the ground that the charges levelled against the petitioner were not found proved.

8. The disciplinary proceedings against the petitioner remained pending from 12.2.2021 till 10.6.2022 and during the aforesaid period exercise of promotion from the post of Head Assistant to the post of Administrative Officer was carried out and vide order dated 24.11.2021, on the basis of recommendations of the selection committee, twenty four Head Assistants were granted promotion on the posts of Administrative Officer. Petitioner in his writ petition has categorically stated that the selection committee constituted for the aforesaid promotions did not consider his case for the reason that disciplinary proceedings were pending against him.

9. The Government of U.P. has issued a Government Order on 28.5.1997, wherein it has been provided that if disciplinary proceedings against a government servant are pending, then his case for promotion to higher post shall be considered by the selection committee along with other government servants and recommendations of the selection committee shall be kept in sealed cover. In the Government Order dated 28.5.1997, it has further been provided that on exoneration of the government servant in the disciplinary proceedings, sealed cover of the concerned government servant shall be opened and if the selection committee has recommended for his promotion on the higher post, then he will be granted promotion with effect from the date of promotion of his immediate junior. Petitioner in his writ petition has categorically stated that the procedure of putting recommendations in the sealed cover was not adopted in his case and his case was not at all considered

by the selection committee for the reason that disciplinary proceedings were pending against him though as per the provisions of the aforesaid Government Order, the selection committee was under obligation to consider the case of the petitioner for promotion on the post of Head Assistant and to adopt sealed cover procedure. It has been further stated in the writ petition that case of the petitioner was not considered by the selection committee and various Head Assistants, who are juniors to the petitioner, were promoted to the posts of Administrative Officer vide promotion order dated 24.11.2021 issued by the Additional Director of Education (Basic), U.P., Prayagraj.

10. Since case of the petitioner for promotion on the post of Administrative Officer was not considered by the selection committee and his juniors were given promotion, he filed Writ-A No.14480 of 2022, which was finally disposed of by this court vide order dated 20.9.2022, whereby direction was given to Additional Director of Education (Basic), U.P., Prayagraj to consider and decide the petitioner's representation dated 16.6.2022 and to pass appropriate order strictly in accordance with law.

11. Pursuant to the aforesaid order dated 20.9.2022 passed by this court in Writ- A No.14480 of 2022, the Additional Director of Education (Basic), U.P., Prayagraj has passed an order on 13.4.2023, whereby representation of the petitioner for his promotion on the post of Administrative Officer with effect from the date of promotion of his immediate junior has been rejected on the ground that on the date of promotion of juniors, disciplinary proceedings were pending against him and further District Basic Education Officer, Firozabad vide his letter dated 11.11.2022 has informed that petitioner is full of spontaneity and does not care to follow the rules and regulations.

12. Learned Senior Advocate appearing for the petitioner has submitted that even if disciplinary proceedings were pending against the petitioner, in view of provisions of the Government Order dated 28.5.1997, it was obligatory on the selection committee to consider his case for promotion on the post of Administrative Officer along with other Head Assistants but in absolutely illegal manner the selection committee did not consider his case for promotion. It has further been submitted that the Government Order dated 28.5.1997, in unequivocal terms, provides that if on the date of meeting of selection committee, disciplinary proceedings are pending against any government servant and he is in the list of eligible candidates, his case will be considered by the selection committee and recommendations regarding the said government servant shall be kept in sealed cover and after conclusion of the disciplinary proceedings, the said sealed cover shall be opened and if the selection committee has recommended for his promotion, then the said government servant shall be given promotion from the date of promotion of his immediate junior, whereas in the case of petitioner the said procedure has not been adopted and therefore, the entire exercise carried out by the respondents is in violation of the provisions of the Government Order dated 28.5.1997.

13. Learned Senior Advocate appearing for the petitioner has vehemently argued that it is well settled proposition of law that if a government servant could not be given promotion due to pending disciplinary proceedings and later on he is

exonerated from the charges and disciplinary proceedings are dropped, he will be given promotion with effect from the date his immediate junior was promoted on the higher post, whereas in the present case it is admitted case of the respondents that juniors to the petitioner have been promoted and he was not given promotion only for the reason that disciplinary proceedings were pending against him but now once he has been exonerated from the charges and disciplinary proceedings pending against him have been concluded, he is entitled for his promotion on the post of Administrative Officer with effect from the date of promotion of his immediate junior.

14. Learned Senior Advocate appearing for the petitioner has empathetically argued that the order dated 13.4.2023 has been passed by the Additional Director of Education (Basic), U.P., Prayagraj in gross violation of the provisions of the Government Order dated 28.5.1997 and therefore, the said order is unsustainable in the eyes of law.

15. Learned Senior Advocate appearing for the petitioner has contended that representation of the petitioner for his promotion on the post of Administrative Officer with effect from the date of promotion of his immediate junior has been rejected by the Additional Director of Education (Basic), U.P., Prayagraj on two grounds, firstly, that on the date of promotion of juniors, disciplinary proceedings were pending against him and secondly, the District Basic Education Officer, Firozabad has submitted some adverse report vide letter dated 11.11.2022 regarding working of the petitioner. The first ground taken by the Additional Director of Education (Basic), U.P. Prayagraj in the impugned order dated 13.4.2023 cannot sustain in view of the provisions of the Government Order dated 28.5.1997 and the second ground is also not sustainable as District Basic Education Officer, Firozabad has given his opinion vide letter dated 11.11.2022 whereas promotions were made on 24.11.2021. Learned Senior Advocate appearing for the petitioner has argued that the observations made by the District Basic Education Officer, Firozabad in his letter dated 11.11.2022 are totally uncalled for and the District Basic Education Officer, Firozabad does not have any jurisdiction to make such comments as he is not the appointing authority of the post of the petitioner. Learned Senior Advocate has also argued that even otherwise observations made by the District Basic Education Officer, Firozabad in his letter dated 11.11.2022 are irrelevant for the purpose of promotion of the petitioner on the post of Administrative Officer as his juniors were promoted on the posts of Administrative Officer on 24.11.2021 i.e. much prior to the letter dated 11.11.2022.

16. Learned Senior Advocate appearing for the petitioner has concluded his arguments and has submitted that the order dated 13.4.2023 passed by the Additional Director of Education (Basic), U.P. Prayagraj is unsustainable in the eyes of law and is liable to be quashed by this court with a further direction to the respondents to promote the petitioner on the post of Administrative Officer with effect from the date his immediate junior was given promotion.

17. Per contra, learned Standing Counsel appearing the respondents has argued that petitioner is not entitled for promotion on the post of Administrative

Officer with effect from 24.11.2021 i.e. the date his juniors were promoted on the post of Administrative Officer as on the said date disciplinary proceedings were pending against him. Learned Standing Counsel appearing for the respondents has further argued that District Basic Education Officer, Firozabad vide his letter dated 11.11.2022 has submitted a report wherein it has been mentioned that petitioner is full of spontaneity and he does not care to follow the rules and regulations and therefore, petitioner cannot be granted promotion on the post of Administrative Officer with effect from 24.11.2021.

18. Learned Standing Counsel appearing for the respondents has concluded his arguments by submitting that there is neither any illegality nor infirmity in the order dated 13.4.2023 which is impugned in the present writ petition and therefore, this writ petition is liable to be dismissed by this court.

19. I have considered the submissions advanced by the learned counsels appearing for the parties and have perused the record.

20. I find that petitioner while working on the post of Head Assistant in the office of District Inspector of Schools, Agra was put to disciplinary proceedings vide order dated 12.2.2021 and the said disciplinary proceedings were concluded vide order dated 10.6.2022 passed by the Additional Director of Education (Basic), U.P., Prayagraj, whereby disciplinary proceedings against the petitioner were dropped for the reason that charges levelled against him were not found proved. I further find that during pendency of the aforesaid disciplinary proceedings, selection committee considered the cases of promotion of Head Assistants to the posts of Administrative Officer but case of the petitioner was not considered and on the basis of recommendations made by the selection committee, his juniors were promoted on the posts of Administrative Officer vide order dated 24.11.2021.

21. The Government of U.P. in compliance of the judgment dated 27.8.1991 rendered by the Hon'ble Supreme Court in ***Union of India and others vs. K.V. Jankiraman and others,*** reported in ***AIR 1991 SC 2010*** has issued a Government Order dated 28.5.1997, wherein it has been provided that selection committee shall consider the cases of promotion of all the government servants who are eligible for promotion under the relevant service rules and their names find place in the list of eligible candidates. It has further been provided in the said Government Order that if disciplinary proceedings are pending against any government servant, then the recommendations of the selection committee made in respect of his promotion shall be kept in sealed cover and the said sealed cover shall be opened after conclusion of the disciplinary proceedings and if the concerned government servant is exonerated from the charges, he will be given notional promotion with effect from the date of promotion to his immediate junior. The relevant provisions of the Government Order dated 28.5.1997 are extracted as under:-

"उत्तर प्रदेश शासन

कर्मिक अनुभाग-1

संख्या-13/21/89-का-1-1997

लखनऊ, दिनांक 28 मई, 1997

कार्यालय-ज्ञाप

विषयः- राज्याधीन सरकारी सेवा में सेवारत कर्मिको की प्रोन्नतियों के लिये होने वाले चुनावों

में बन्द लिफाफे की कार्यवाही आदि की प्रक्रिया का निर्धारण।

उपरोक्त विषय पर शासन की वर्तमान नीति कार्यालय-ज्ञाप संख्या-15/85/1983-कर्मिक-1 दिनांक 30 नवम्बर, 1983 में निहित है। "भारत संघ इत्यादि बनाम जानकी रमन इत्यादि, (ए०आई०आर० 1991 एस०सी०2010)"नामक वाद में मा० उच्चतम न्यायालय के निर्णय दिनांक 27 अगस्त, 1991 तथा स्थायीकरण के सम्बन्ध में वर्तमान में लागू नीति आदि के प्रकाश में सम्यक् रूप से विचारोपरान्त उपरोक्त कार्यलय-ज्ञाप दिनांक 30 नवम्बर, 1983 को निरस्त करते हुए शासन द्वारा उक्त विषय पर अब निम्नलिखित प्रक्रिया निर्धारित की गयी हैः-

(1) पात्रता सूची के प्रत्येक कार्मिक के सम्बन्ध में चयन समिति द्वारा विचार किया जायः प्रोन्नति हेतु गठित चयन समिति द्वारा उन सभी कार्मिको की प्रोन्नति के सम्बन्ध में विचार किया जायेगा, जो संगत सेवा नियमों व पात्रता विषयक नियमों के तहत नियमानुसार पात्रता सूची में आते है। भले ही उनमें से किसी कार्मिक के विरूद्ध किसी प्रकार की जांच (प्रकीर्ण-जांच, विभागीय प्रारम्भिक जांच, सतर्कता जांच, विभागीय औपचारिक-जांच, प्रशासनाधिकरण की जांच) या अभियोजन की कार्यवाही विचाराधीन अथवा लम्बित हो अथवा वह निलम्बित चल रहा हो, और चयन समिति द्वारा ऐसे समस्त लम्बित/विचाराधीन मामलों को छोडते हुए अन्य समस्त सेवाभिलेखों के आधार पर प्रोन्नति हेतु कार्मिक की उपयुक्तता पर विचार किया जायेगा।

……..

(4) मुहरबन्द लिफाफे से सम्बन्धित मामले हेतु स्थान सुरक्षित रखना - यदि किसी कार्मिक के विषय में चयन समिति की संस्तुति को मुहरबन्द लिफाफे में रखा गया हो तो उसके लिए एक पद सुरक्षित रखा जायेगा ताकि उसके निर्दोष पाये जाने पर लिफाफे में रखी संस्तुति के अनुसार अथवा यथा-स्थिति अग्रलिखित नीति के अनुसार मुहरबन्द लिफाफे में रखी संस्तुति पर पुनर्विचार के आधार पर चयन समिति द्वारा की गयी पुनर्सस्तुति के अनुसार (यदि प्रोन्नति किये जाने की संस्तुति या पुनर्सस्तुति की गई हो) उक्त सुरक्षित पद के विरूद्ध उसे प्रोन्नत किया जा सके।

……

(7) मुहरबन्द लिफाफे के निस्तारण की प्रक्रिया- जब सम्बन्धित कार्मिक निलम्बित न हो और उसके विरूद्ध चल रही अनुशासमिक विभागीय कार्यवाही, प्रशासनाधिकरण या यथास्थिति अभियोजन की समस्त कार्यवाहियों के अन्तिम परिणाम सामने आ जायें अर्थात उसके विरूद्ध कोई ऐसा मामला न हो जो ऊपर खण्ड (2) के उपखण्ड (क) (ख) (ग) की श्रेणी में आता है तो निम्नलिखित प्रक्रिया अपनाते हुए मुहरबन्द लिफाफे का निस्तारण किया जायेगा

(क) पूर्णतः निर्दोष पाये जाने की दशा में- आरोपित कार्मिक, जिसके विषय में चयन समिति की संस्तुति मुहरबन्द लिफाफे में रखी गयी है, को यदि पूर्ण रूप से दोष मुक्त पाया जाता है को नियुक्ति प्राधिकारी (या यथास्थिति चयन कराने वाले विभाग के सचिव या प्रमुख सचिव जिनकी अभिरक्षा में चयन समिति का कार्यवृत रखा जाता है) द्वारा लिफाफे को खोला जायेगा और तदोपरान्त इसमें रखी संस्तुति के क्रियान्वयन की कार्यवाही की जायेगी। ऐसे मामले में यदि लिफाफे में रखी संस्तुति के अनुसार उसे प्रोन्नति हेतु संस्तुत किया गया हो तो उसे संदर्भित चयन के आधार पर प्रोन्नत किये गये उसके कनिष्ठ की प्रोन्नति की तिथि से नोशनल प्रोन्नत माना जायेगा और तदनुसार आदेश निर्गत किये जायेंगे।

(ख) यदि न्यायालय द्वारा अभियोजन के मामले में किसी आरोपित कार्मिक को गुणावगुण के आधार पर दोषमुक्त किया गया हो और सक्षम प्राधिकारी द्वारा उस निर्णय के विरूद्ध न तो अपील की जाती है और न

विभागीय कार्यवाही प्रस्तावित है तो ऊपर उपखण्ड (क) के अनुसार उसी प्रकार कार्यवाही की जायेगी जो न्यायालय द्वारा गुणावगुण के आधार पर दोष मुक्त करार दिये जाने की दशा में की जाती ।

(ग) अंशतः या पूर्णतः दोषी पाये जाने की दशा में- यदि आरोपित कार्मिक के विरूद्ध मामलो की समाप्ति पर यह पाया जाता है कि उसके विरूद्ध लगाये गये आरोप आंशिक या पूर्णरूप से सिद्ध हुये है तो उसी स्तर की चयन समिति की बैठक आहूत की जायेगी जिस स्तर को चयन समिति द्वारा संदर्भगत चयन सम्पन्न किया गया था। यह चयन समिति उसके विरूद्ध चल रहे मामलों में प्राप्त अन्तिम परिणामों सहित समस्त अभिलेखों के प्रकाश में मुहरबन्द लिफाफे में रखी संस्तुति पर पुनर्विचार करेगी। यदि किसी कार्मिक के सम्बन्ध में एक से अधिक लिफाफे उपलब्ध हों तो उपलब्ध लिफाफों को तब तक क्रमवार एक-एक करके खोलते हुए उन पर उपरोक्तानुसार चयन समिति द्वारा पुनर्विचार किया जायेगा जब तक कि यथास्थिति उसे चयन समिति द्वारा किसी चयन के संदर्भ में प्रोन्नति के लिये संस्तुत न किया जाय अथवा समस्त उपलब्ध लिफाफे खोल कर उन पर पुनर्विचार न कर लिया जाये। यदि पुनर्विचार के परिणामस्वरूप उसे किसी पूर्व चयन के संदर्भ में प्रोन्नति के लिए संस्तुत किया जाता है तो उसे चयन के आधार पर उसके कनिष्ठ की प्रोन्नति की तिथि से प्रोन्नत समझा जायेगा जिस तिथि की चयन समिति की संस्तुति पर पुनर्विचारोपरान्त उसकी प्रोन्नति का निर्णय लिया गया है व इस विषय में स्पष्ट आदेश जारी किये जायेंगे।"

22. The aforesaid Government Order dated 28.5.1997 makes it mandatory for the selection committee to consider the cases of all the government servants for their promotion, whose names find place in the list of eligible candidates and if against any government servant disciplinary proceedings are pending, then the recommendations of the selection committee in respect of his promotion shall be kept in sealed cover. The aforesaid Government Order dated 28.5.1997 further provides that on conclusion of the disciplinary proceedings if the concerned government servant is exonerated from the charges, he will be given notional promotion on the higher post with effect from the date his immediate junior has been given promotion. In the present matter, there is no dispute that promotions on the posts of Administrative Officer are to be made from amongst Head Assistants on the criteria of seniority subject to rejection of unfit, as contemplated under the Rules of 1985. It is also not disputed that petitioner as per provisions of the Rules of 1985 was eligible for promotion on the post of Administrative Officer. Once there is no dispute in respect of petitioner being eligible for promotion on the post of Administrative Officer, his case for promotion ought to have been considered by the selection committee along with the cases of his juniors, whereas selection committee did not consider his case for promotion on the post of Administrative Officer and made recommendations in respect of promotions of his juniors and thereby juniors to the petitioner were promoted on the posts of Administrative Officer vide order dated 24.11.2021. The case of petitioner was not considered by the selection committee only for the sole reason that on the date of meeting of selection committee disciplinary proceedings were pending against him, whereas the Government Order dated 28.5.1997 mandates that even if disciplinary proceedings are pending against a government servant, his case for promotion shall be considered and

recommendations of the selection committee shall be kept in the sealed cover.

23. This court finds that selection committee while not considering case of the petitioner for his promotion on the post of Administrative Officer and making recommendations for promotion of his juniors, has acted in gross violation of the provisions made in the Government Order dated 28.5.1997. The Government Order dated 28.5.1997 categorically provides that if a government servant was otherwise eligible for promotion but he could not be promoted on the ground of pending disciplinary proceedings and subsequently on conclusion of disciplinary proceedings he is exonerated from the charges, he will be given notional promotion with effect from the date of promotion of his immediate junior, therefore, once disciplinary proceedings pending against the petitioner have been concluded and he has been exonerated from all the charges, there is no reason for the respondents not to grant him promotion on the post of Administrative Officer with effect from the date of promotion of his immediate junior. This court further finds that finding recorded by the Additional Director of Education (Basic), U.P., Prayagraj in the impugned order dated 13.4.2023 that since on the date of promotion of juniors disciplinary proceedings were pending against the petitioner, therefore even if he has been subsequently exonerated from the charges, he is not entitled for promotion with effect from the date of promotion of his juniors, is contrary to the provisions of the Government Order dated 28.5.1997, as such, the impugned order dated 13.4.2023 cannot sustain in the eyes of law.

24. So far as the second ground of rejection of representation mentioned in the impugned order dated 13.4.2023 that the District Basic Education Officer, Firozabad vide his letter dated 11.11.2022 has submitted a report in which it has been stated that petitioner is full of spontaneity and does not care to follow the rules and regulations, is concerned, this court finds that the aforesaid observations have been made subsequent to the date of promotion of the juniors i.e. subsequent to 24.11.2021, as such they are not relevant for the purposes of the claim of the petitioner for his promotion on the post of Administrative Officer with effect from the date of promotion of his immediate junior and further District Basic Education Officer, Firozabad under the relevant service rules is not the appointing authority of the post of the petitioner, therefore the observations made by him in his report dated 11.11.2022 cannot be taken as final unless they are accepted and approved by the appointing authority by passing some final order.

25. In view of the aforesaid reasons, this court finds that the order dated 13.4.2023 passed by the Additional Director of Education (Basic), U.P., Prayagraj is liable to be quashed.

26. Accordingly, this writ petition is allowed, order dated 13.4.2023 passed by the Additional Director of Education (Basic), U.P., Prayagraj is quashed. Respondent No.3 is directed to consider the case of petitioner for grant of notional promotion on the post of Administrative Officer with effect from the date of promotion of his juniors i.e. with effect from 24.11.2021 and to pass order as per the provisions of the Government Order dated 28.5.1997 within one month from the date of service of certified copy of this order.

(2024) 1 ILRA 50
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.01.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 13538 of 2018

Dharmendra Mishra ...Petitioner
Versus
U.P. State Public Services Tribunal & Ors. ...Respondents

Counsel for the Petitioner:
Rajendra Prasad Shukla, Rakesh Kumar Agarwal, Saksham Agarwal

Counsel for the Respondents:
C.S.C.

A. Service Law – Disciplinary Proceedings – U.P. Police Officers Subordinate Rank (Punishment & Appeal) Rules, 1991 – Time Limit for Inquiry – Petitioner, a constable, dismissed from service for unauthorized absence – Earlier dismissal order quashed by Tribunal for violating natural justice, with directions to conduct fresh inquiry within six months, excluding time consumed by petitioner – Fresh inquiry delayed due to petitioner's requests for additional time to respond to charge-sheet and show-cause notice – Tribunal dismissed petitioner's claim challenging second dismissal order – Held, delay in concluding inquiry beyond the Tribunal's stipulated period does not ipso facto nullify proceedings – Tribunal's direction to exclude petitioner's consumed time and petitioner's non-cooperation justified the delay – Disciplinary authority's explanation for delay satisfactory – Dismissal order upheld. (Paras 11, 13, 15, 16)

B. Service Law – Disciplinary Proceedings – Judicial Discretion to Extend Time – Tribunal fixed six-month period for concluding inquiry but retained inherent jurisdiction to extend time – Held, courts and tribunals have power to extend time limits for disciplinary proceedings, even after expiry, if delay is satisfactorily explained – No statutory mandate renders proceedings void upon expiry of stipulated time – Tribunal's dismissal of claim petition justified as delay was attributable to petitioner. (Paras 12, 14)

Writ Petition Dismissed.

List of Cases cited:

1. Abhishek Prabhakar Awasthi Vs The New India Assurance Company Ltd. & ors., 2013 SCC OnLine All 14267

2. U.O.I. & ors. Vs Sharvan Kumar, 2022 LiveLaw (SC) 595

3. Mahanth Ram Das Vs Ganga Das, (1961) 3 SCR 763

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

(1) The instant writ petition under Article 226 of the Constitution of India has been filed by the petitioner, **Dharmendra Mishra**, assailing the judgment/order dated 20.03.2018 passed by the State Public Services Tribunal, Lucknow (hereinafter referred to as **"the Tribunal")**, whereby the claim petition No. 137 of 2016 filed by the petitioner against the order of punishment/ dismissal dated 12.05.2015 and appellate order dated 30.11.2015, has been dismissed.

(2) The brief facts of the case are that in the year 2005, the petitioner was posted as Constable in 32nd Battalion, P.A.C., Lucknow. On 15.05.2015, he had gone to his home after getting the Earned Leave of fifteen days sanctioned i.e. till 01.06.2005, however, he came back on his duty on 04.06.2005 instead of 01.06.2005. Thereafter, on 25.06.2005 again, he had gone to his home after getting the Earned Leave of twenty days sanctioned i.e. till

25.06.2005, however, he did not report for duty on 25.06.2005. On account of the absence from duty, he was placed under suspension vide order dated 14.02.2006 and an inquiry was instituted against him. A charge-sheet was issued against him, however, it was alleged by the petitioner that the said charge-sheet was not served upon him. In the absence of reply to the charge-sheet, the Inquiry Officer had conducted the inquiry *ex parte* and submitted its *ex parte* inquiry report dated 20.11.2007 to the disciplinary authority. On receipt of the said inquiry report dated 20.11.2007, the disciplinary authority dismissed the petitioner from service vide order dated 24.03.2008.

(3) Aggrieved by the aforesaid order of dismissal dated 24.03.2008, the petitioner had preferred an appeal under Rule 20 of the U.P. Police Officers Subordinate Rank (Punishment & Appeal) Rules, 1991 (hereinafter referred to as **'Rules, 1991'**), which was rejected vide order dated 08.08.2008. Against the order of dismissal dated 24.03.2008 and appellate order dated 08.08.2008, the petitioner had preferred revision, which too was rejected vide order dated 20.12.2012.

(4) The petitioner, thereafter, has challenged the order of dismissal dated 24.03.2008, appellate order dated 08.08.2008 and revisional order dated 20.12.2012, before the Tribunal by instituting Claim Petition No. 129 of 2013. It is the case of the petitioner before the Tribunal that since all of a sudden, he became mentally ill and was admitted in Mental Hospital, Rajendra Institute of Medical Science, Ranchi, w.e.f. 20.06.2005 to 23.07.2008, he could not join his services on the said date and also did not participate in the inquiry and the punishment of dismissal was passed in utter violation of natural justice as no charge-sheet had ever been served upon him nor any opportunity of hearing was provided to him. The learned Tribunal, after hearing the parties and examining the record, allowed the claim petition vide judgment/order dated 23.04.2014. The operative portion of the judgment/order dated 23.04.2014 reads as under :-

"The claim petition succeeds. The impugned order dated 24.03.2008 (Annexure no.1), appellate order dated 08.08.2008 (Annexure no.2), revisional order dated 20.12.2012 (Annnexure no.3) and the order dated 28.01.2013 (Annexure no.4) are quahsed. The opposite parties are given liberty to process afresh if they so desire and if the decision to proceed fresh is taken within two month then the inquiry shall be started from the stage of issuing of fresh charge-sheet and the Inquiry Officer shall conduct the inquiry in accordance with procedure prescribed in Appendix-I of Rule 14 (1) of U.P. Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991. ***The whole inquiry shall be concluded expeditiously preferably within six months. The petitioner shall be under obligation to co-operate in the inquiry. Any time consumed by the petitioner shall be excluded from the period prescribed by this Tribunal. The petitioner shall be reinstated for the purpose of inquiry only and will be kept under suspension and shall be paid subsistence allowance.*** *The consequential service benefits shall be subject to final outcome of the inquiry. If no decision is taken within two month to proceed afresh then the consequential service benefits shall be released in favour of petitioner which was withheld on account of the punishment order."*

(5) The aforesaid judgment/order dated 23.04.2014 was served upon the department by the petitioner on 08.05.2014. Pursuant to the aforesaid judgment/order dated 23.04.2014, the petitioner was reinstated in service, however, he was kept under suspension and an inquiry was instituted against petitioner vide order dated 21.08.2014. A charge-sheet dated 15.09.2014 was issued upon the petitioner requiring him to submit his reply by 22.09.2014. On receipt of the charge-sheet dated 15.09.2014, the petitioner, vide letter dated 22.09.2014, had sought ten days additional period for submitting reply and also for supplying copy of the certain documents. In response to the letter dated 23.09.2014, the Inquiry Officer had accorded ten days further time to file reply to the aforesaid charge-sheet and also supplied the required documents to the petitioner. Subsequently, the petitioner had again sought 10 days further time for filing reply to the charge-sheet, which was accorded by the Inquiry Officer on 03.10.2014. Thereafter, the petitioner had submitted his reply to the charge-sheet on 09.10.2014. The Inquiry Officer, after examining the reply of the petitioner and adducing the evidence of the witnesses, had submitted its report dated 13.01.2015 to the disciplinary authority, holding guilty of unauthorized absence of the petitioner from duty w.e.f. 01.06.2005 to 04.06.2005 and 25.06.2005 to 24.03.2008.

(6) The disciplinary authority, on receipt of the aforesaid inquiry report dated 13.01.2015, had issued show cause notice to the petitioner along with the inquiry report dated 13.01.2015, requiring him to submit his reply. The petitioner, thereafter, vide letter dated 03.02.2015, had sought 15 days further time for submitting his reply, which was accorded him. Thereafter, the petitioner had submitted his reply dated 12.02.2015 to the show cause notice. The disciplinary authority, after examining the inquiry report dated 13.01.2015 and the reply of the petitioner dated 12.02.2015 as well as record available before him, had passed the punishment order dated 12.05.2015, dismissing the petitioner from service. Aggrieved by this order of dismissal dated 12.05.2015, the petitioner had filed an appeal, which was dismissed vide order dated 30.11.2015.

(7) Feeling aggrieved, the petitioner had preferred Claim Petition No. 137 of 2016 before the Tribunal. The learned Tribunal, after hearing the parties and examining the record, dismissed the claim petition vide judgment/order dated 20.03.2018. It is this judgment/order dated 20.03.2018 as well as dismissal order dated 12.05.2015 and appellate order dated 30.11.2015, which have been assailed in the instant writ petition.

(8) Heard learned Counsel for the petitioner and learned Standing Counsel and gone through the record available before this Court.

(9) Learned counsel for the petitioner has strenuously argued that in view of the mandate of the previous order of the Tribunal dated 23.04.2014 (supra), the Disciplinary Authority was duty bound to decide the matter within six months, but the Disciplinary Authority had failed to do so. According to the learned counsel, the order passed by the Disciplinary Authority on 12.05.2015 dismissing the petitioner from service is a nullity in the eyes of law, for the stipulated period of time, as provided for by the Tribunal, having expired and no extension having been sought nor granted by the Tribunal.

(10) The learned Counsel for the petitioner has submitted that the Courts and Tribunals have inherent powers to prescribe time limits to conduct proceedings and any such prescription remains binding on the authority conducting the proceedings. According to the learned counsel, if such directions are not properly and punctually complied with, the proceedings would come to an end with the expiry of the time fixed by the Court or the Tribunal. Thus, learned counsel has contended that the view taken by the learned Tribunal remains unjustified and calls for interference. In this regard, he has placed reliance upon the decision of Full Bench in **Abhishek Prabhakar Awasthi Vs. The New India Assurance Company Limited and others:** 2013 SCC OnLine All 14267.

(11) Per contra, learned Standing Counsel has submitted that though in the earlier proceedings when order of dismissal dated 24.03.2008 was set-aside on the ground of violation of principles of natural justice, time period was given within which the disciplinary authority was supposed to complete the enquiry, which they could not for the reason of non-cooperation of the petitioner. According to the learned Standing Counsel, inquiry has not been concluded within the prescribed time because the petitioner had consumed twice time for filing reply to the charge-sheet and further has sought once time by the petitioner for filing reply to the show cause notice and the petitioner had not co-operated with the inquiry. According to learned Counsel, not concluding the inquiry within the prescribed time would not be a ground for setting aside impugned order of dismissal. Moreso, learned Tribunal, in earlier proceeding while setting-aside the order of dismissal, specifically provided that any time consumed by the petitioner shall be excluded from the period prescribed by this Tribunal. In this backdrop, he has submitted that if the time consumed by the petitioner for filing reply to the charge-sheet and for filing reply to the show-cause notice be counted, then, the enquiry proceedings can safely be said to be concluded within the prescribed time. Thus, the learned Tribunal has rightly dismissed the claim petition vide impugned judgment and the instant writ petition is liable to be dismissed.

(12) Having given thoughtful consideration to the rival submissions and having examined the record available before this Court, it is required to be noted herein that in the case of **Abhishek Prabhakar Awasthi Vs. New India Insurance Company Ltd. and Ors.** (supra), the Full Bench of this Court has held as under :-

"18. These judgments of the Supreme Court consequently recognize that the delay in concluding a departmental enquiry would not ipso facto vitiate the proceedings or render it invalid or non est. The Court has to take into consideration and balance all the relevant factors. The Court must consider in that balance the need for preserving the sanctity of the administration. On the other hand, fairness towards the delinquent employee requires that disciplinary proceedings should be concluded expeditiously. Hence, the nature of the charge, its complexity and the reasons for that delay are all relevant considerations which have to be borne in mind. Where the court has stipulated a period of time within which an enquiry has to be concluded, the direction of the Court, particularly in the form of a mandamus, has to be duly observed. It would not be open to the employer to willfully disregard

the fixation of a time limit as a matter of no consequence. However, the fixation of a period within which a disciplinary enquiry has to be concluded, in an order of the Court, does not deprive the court of its jurisdiction to extend time in an appropriate case having due regard to all the facts and circumstances which have been noted above. Whether the time should be extended on a consideration of the relevant circumstances is for the court to determine.

19. In view of the above discussion, we now proceed to answer the questions which have been referred to the Full Bench.

(A) Question No. (a): We hold that if an enquiry is not concluded within the time which has been fixed by the Court, it is open to the employer to seek an extension of time by making an appropriate application to the court setting out the reasons for the delay in the conclusion of the enquiry. In such an event, it is for the court to consider whether time should be extended, based on the facts and circumstances of the case. However, where there is a stipulation of time by the Court, it will not be open to the employer to disregard that stipulation and an extension of time must be sought;

(B) Question No. (b): The judgment of the Supreme Court in the case of Suresh Chandra (supra) as well as the judgment of the Division Bench of this Court in the case of Satyendra Kumar Sahai (supra) clearly indicate that a mere delay on the part of the employer in concluding a disciplinary enquiry will not ipso facto nullify the entire proceedings in every case. The court which has fixed a stipulation of time has jurisdiction to extend the time and it is open to the court, while exercising that jurisdiction, to consider whether the delay has been satisfactorily explained. The court can suitably extend time for conclusion of the enquiry either in a proceeding instituted by the employee challenging the enquiry on the ground that it was not completed within the stipulated period or even upon an independent application moved by the employer. The court has the inherent jurisdiction to grant an extension of time, the original stipulation of time having been fixed by the court itself. Such an extension of time has to be considered in the interests of justice balancing both the need for expeditious conclusion of the enquiry in the interests of fairness and an honest administration. In an appropriate case, it would be open to the Court to extend time suo motu in order to ensure that a serious charge of misconduct does not go unpunished leading to a serious detriment to the public interest. The court has sufficient powers to grant an extension of time both before and after the period stipulated by the court has come to an end."

(13) When considered the issue involved in the instant writ petition on the touchstone of the aforesaid Full Bench decision, we find that no doubt, the disciplinary proceedings against the petitioner could not be completed within the period of six months prescribed by the learned Tribunal vide judgment/order dated 23.04.2014 in earlier proceeding. However, from perusal of the order of dismissal dated 12.05.2015 reveals that the disciplinary authority, after examining the record available before it, had narrated the reasons for not concluding the inquiry within the prescribed period. It is stated in the impugned order of dismissal itself that though the learned Tribunal in earlier proceeding, in addition to other direction, also directed the petitioner to co-operate in

the inquiry and excluded any time consumed by the petitioner from the period prescribed by the Tribunal, however, even then the petitioner had not co-operated in the inquiry inasmuch as the petitioner had sought twice time to file reply to the counter affidavit and sought once time to file reply to the show cause notice and as such, the inquiry proceedings could not be completed within the prescribed period. In this backdrop, learned Tribunal has returned to a finding that the delay in concluding the inquiry proceedings had occurred due to the petitioner as well as due to the witnesses of the defence, which were produced before the inquiry officer belatedly.

(14) At this juncture, it would be apt to mention that in **Union of India and others Vs. Sharvan Kumar :** 2022 LiveLaw (SC) 595, the Apex Court has held as under :-

"9.1. It needs hardly any elaboration to say that fixing of the period of two months by the Tribunal in this case had only been to ensure expeditious proceedings because the matter was being restored for reconsideration in the year 2010 , though the disciplinary proceedings related with the incident dated 09.01.2005. However, the said period of two months did not acquire any status akin to that of a statutory mandate that the disciplinary proceedings would have automatically come to an end with its expiry. It remains trite that if an Adjudicating Authority in exercise of its jurisdiction could grant or fix a time period to do a particular thing, in the absence of a specific statutory provision to the contrary, the jurisdiction to fix such a time period inhers the jurisdiction to extend the time initially fixed. Such conditional orders have regularly been construed by this Court to be in terrorem so as to put a check on the dilatory tactics by any litigant or to guard against any laxity on the part of the Adjucating Authority but, the Court is not powerless to enlarge the time even though it had peremptorily fixed the period at any earlier stage. In the case of Mahanth Ram Das v. Ganga Das: (1961) 3 SCR 763, this Court examined the peremptory order of the Court fixing the period of payment of deficit court fees in the backdrop of the fact that the application for extension of time came up for hearing only after the time fixed by the Court had expired and the application was rejected. This Court put the things in perspective while observing, inter alia, as under: -

"5…Such orders are not like the law of the Medes and the Persians. Cases are known in which Courts have moulded their practice to meet a situation such as this and to have restored a suit or proceeding, even though a final order had been passed…"

9.2. We may elaborate a little. ***When a conditional order is passed by the Court/ Tribunal to do a particular act or thing within a particular period but the order does not provide anything as to the consequence of default, the Court/Tribunal fixing the time for doing a particular thing obviously retains the power to enlarge such time. As a corollary, even the Appellate Court/Tribunal or any higher forum would also be having the power to enlarge such time, if so required. In any case, it cannot be said that the proceedings would come to an end immediately after the expiry of the time fixed."***

(emphasis supplied)

(15) Keeping in mind the aforesaid legal proposition and having regard to the facts and circumstances of the case, what

we find is that delay in concluding the inquiry proceedings in pursuance of the earlier order passed by the learned Tribunal was on account of the petitioner and the delay in conclusion of the inquiry proceedings have satisfactorily been explained by the respondent.

(16) For the aforesaid reasons, we are of the view that the learned Tribunal has rightly dismissed the claim petition filed by the petitioner and there is no error in the impugned judgment/order.

(17) The writ petition lacks merit and is, accordingly, **dismissed**. However, there shall be no order as to costs.

(2024) 1 ILRA 56
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

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

Writ A No. 17548 of 2023

Deepak Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Surya Pratap Singh, Sri Jai Bahadur Singh

A. Service Law – Compassionate Appointment – U.P. Recruitment of Dependants of Government Servants (Dying-in-Harness) Rules, 1974 – Petitioner sought compassionate appointment following the death of his father, a Safai Karmchari with Nagar Nigam, Saharanpur, who died in harness on 05.04.2023 – Father was appointed in 1990 after his own father resigned due to ill-health – Respondents rejected petitioner's application, claiming the deceased's appointment was invalid as it was not in accordance with the 1974 Rules – Held, the validity of the deceased employee's appointment cannot be adjudged posthumously to deny compassionate appointment – No proceedings were initiated against the deceased during his lifetime to challenge his appointment – Posthumous invalidation of his status violates principles of natural justice and is impermissible – Petitioner entitled to consideration for compassionate appointment. (Paras 8, 11, 13)

B. Service Law – Disciplinary Proceedings Against Deceased Employee – No disciplinary or other proceedings can be initiated against a deceased employee to challenge the validity of their appointment after death – Supreme Court's ruling in *A.K.S. Rathore (Dead) through LRs* clarifies that such proceedings abate upon the employee's demise – Respondents' attempt to deem the deceased's appointment void ab initio after his death is unsustainable – Petitioner's claim for compassionate appointment must be considered based on the deceased's status as a permanent employee at the time of death. (Paras 11, 12, 13)

Writ Petition Allowed – Impugned Order Quashed – Respondents Directed to Consider Petitioner's Claim for Compassionate Appointment.

List of Cases cited:

1. Karan Addiwal Vs St. of U.P. & ors., Writ-A No. 15004 of 2022

2. Nagar Ayukt, Nagar Nigam through its Chief Executive Officer & ors. Vs Karan Addiwal & ors., Special Appeal Defective No. 103 of 2023

3. A.K.S. Rathore (Dead) through LRs Vs U.O.I. & anr., Civil Appeal No. 7028 of 2022, decided on 28.09.2022

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

This writ petition is directed against the order dated 14.09.2023 passed by the Nagar Swasthya Adhikari, Nagar Nigam, Saharanpur, rejecting the petitioner's application for compassionate appointment.

2. Heard Mr. Siddharth Khare, learned Counsel for the petitioner, Mr. Surya Pratap Singh, Advocate holding brief of Mr. Jai Bahadur Singh, learned Counsel for respondent Nos. 4, 5 and 6, and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of respondent Nos. 1, 2 and 3.

3. The petitioner's father, Balbir Singh, was a permanent employee, a *Safai Karmchari* with the Nagar Nigam, Saharanpur. He died in harness on 05.04.2023. The deceased-employee's father, Chandu Ram, was a government employee with the then Nagar Palika Parishad, Saharanpur. He suffered from indifferent health, and therefore, submitted his resignation. Consequent upon Chandu Ram's resignation, the petitioner's father and Chandu Ram's son, Balbir Singh, was appointed in the year 1990 as a *Safai Karmchari*, a position he held until his death in harness on 05.04.2023. The petitioner was solely dependant upon his deceased father for his livelihood and sustenance. The petitioner has earned his degree of Master of Arts (M.A.), besides Bachelor of Arts (B.A.) in English. He also holds a Diploma in Elementary Education. The petitioner applied for compassionate appointment commensurate to his educational qualifications. His application has been rejected by the Nagar Swasthya Adhikari by the order impugned dated 14.09.2023.

4. Aggrieved, the petitioner has instituted the present writ petition.

5. A perusal of the impugned order shows that the reason assigned to decline the petitioner's claim for compassionate appointment is that according to the Government Order dated 15.09.2002, in force at the relevant time, there was no provision to grant the petitioner's father an appointment for reason that his father had resigned his job. It has been further observed that going by the order of the Nagar Ayukt, Nagar Nigam, Saharanpur dated 12.09.2023, the petitioner cannot be granted appointment in place of his deceased father, because the deceased was not lawfully appointed.

6. The moot question involved in this petition is :

Whether compassionate appointment can be denied to a candidate on ground that the deceased-employee, whose demise gives him a right under the Uttar Pradesh Recruitment of Dependants of Government Servants (Dying-in-Harness) Rules, 1974/Dying-in-Harness Scheme, was not lawfully appointed?

7. A return has been filed on behalf of respondent Nos. 1, 2 and 3 by the Principal Secretary, Urban Development Department, Government of U.P. and a separate counter affidavit, on behalf of respondent Nos. 4, 5 and 6, by the *Apar* Nagar Ayukt, Nagar Nigam, Saharanpur. The unanimous stand taken is that the petitioner's father was appointed de hors the Rules, because his father had resigned his post as a *Safai Karmchari*, which did not give the petitioner a right to be appointed. Nevertheless, the petitioner's father was

appointed on the sole premise that his father had resigned on account of ill-health.

8. Learned Counsel for the petitioner has contended that the validity of the petitioner's father's appointment is irrelevant to judge the petitioner's claim, because the petitioner's father, while in harness, was never declared to be unlawfully appointed. Learned Counsel for the petitioner has placed reliance upon the decision of a learned Single Judge of this Court in **Karan Addiwal v. State of U.P. and others1**. He submits that on identical facts, it has been held that validity of appointment of the deceased-employee, whose dependant claims compassionate appointment, cannot be gone into for the purpose of determining the entitlement under the Uttar Pradesh Recruitment of Dependants of Government Servants (Dying-in-Harness) Rules, 19742. It is also pointed out that the decision of learned Single Judge in **Karan Addiwal** *(supra)* has been upheld by the Division Bench in **Nagar Ayukt, Nagar Nigam through its Chief Executive Officer and others v. Karan Addiwal and others3.**

9. Mr. Surya Pratap Singh, learned Counsel appearing Nagar Nigam, Saharanpur and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of the State have strenuously argued that apparently, the petitioner's father could have never been appointed, except in accordance with the Rules of 1974, to a post governed by Statute. The petitioner's father held the position of a *Safai Karmchari* in the employ of the Nagar Nigam, and that appointment has been made in his favour simply on ground that his father had resigned due to ill-health. Mr. Singh and Ms. Arya emphatically submit that no such appointment could ever have been made, which is *de hors* the Rules.

10. Learned Counsel for the respondents have invited this Court's attention to the appointment letter dated 08.11.1989 issued by the Senior Medical Officer of the Health Municipal Board, Saharanpur, appointing the petitioner's father. It says that the petitioner's father was being appointed in compliance with an order of the Chairman of the Nagar Palika in the vacancy caused due to the resignation of Chandu Ram. Learned Counsel for the respondents have emphasized that there is apparently nothing under the Rules of 1974, where, on account the resignation of an employee of a Nagar Palika in harness, for whatsoever reason, his son can be offered an appointment, without following the due procedure of selection. Therefore, in the submission of learned Counsel for the respondents, the appointment of the petitioner's father on the post of a *Safai Karmchari* must be held *non est* and *void ab initio*, which does not confer any right upon the petitioner to ask for a consideration for compassionate appointment.

11. An identical issue arose in **Karan Addiwal** and in answering it, my esteemed Brother Neeraj Tiwari observed :

Learned Senior Counsel appearing for petitioner further submitted that once, it is undisputed that father of petitioner was given appointment on compassionate ground after resignation of his grand-father and he was permitted to continue in service till his death i.e. 18.02.2019. No departmental proceeding has ever been initiated against father of petitioner, therefore, after his death, application of petitioner for compassionate

appointment cannot be rejected on the ground that appointment of his father was bad and de hors the rules. He next submitted that as on date, father of petitioner is not alive, therefore, no departmental proceeding can be initiated against him. In support of his contention, he has placed reliance upon the judgement of Apex Court in the matter ***A.K.S. Rathore (Dead) through Lrs. vs. Union of India & Anr. (Civil Appeal No. 7028 of 2022)*** decided on 28.09.2022.

Learned counsel for respondents though opposed, but could not dispute the factual as well as legal submissions made by counsel for petitioner.

I have considered the submissions made by counsel for parties and perused the records as well as judgments cited above.

Facts of the case are undisputed. Appointment of father of petitioner cannot be treated invalid or contrary to the rules after his death coupled with this fact that against his appointment, he was never charge sheeted. Therefore, appointment of father of petitioner shall be treated valid and application of petitioner for appointment on compassionate ground cannot be rejected on the ground that appointment of his father was bad and contrary to the rules.

Law is very well settled that against a dead person, no inquiry proceeding can be initiated as held by the Apex Court in the matter of ***R.K.S. Rathore (Supra)*** and the said judgment is also followed by this Court in Writ-A No. 15004 of 2022.

12. On appeal from the aforesaid judgment, it was held by the Division Bench in **Nagar Ayukt, Nagar Nigam v. Karan Addiwal** (supra) :

It appears that the writ petitioner namely respondent no.1 herein has moved an application for grant of compassionate appointment on account of death of his father in harness on 18.2.2019. The said application has been rejected on the ground that the appointment of father of the petitioner itself was bad, inasmuch as, the father of the petitioner got appointment after resignation of the grandfather of the writ petitioner though there was no provision for the same.

We may note that the father of the petitioner namely the deceased employee had been appointed by an order of the Executive Officer, Nagar Nigam, Saharanpur on 1.6.1991 and had continued in service till his untimely death. During the entire service period of the deceased employee, neither any dispute had been raised with regard to the validity of his appointment nor any adjudication had been made any competent authority or a court of law. It is, therefore, not permitted for the respondents to make any inquiry into the validity of the appointment of the deceased employee made on 1.6.1991 by then Executive Officer, Nagar Nigam, Saharanpur, after his death, at the time of consideration of claim of the petitioner for grant of compassionate appointment on account of untimely death of his father.

13. In the opinion of this Court, the crux of the matter is whether the appointment of the petitioner's father can be adjudged void posthumously and retrospectively. In our considered opinion, that cannot be done. It is well settled that that an employee, after being appointed to a post, eligible or ineligible, cannot be removed, except by the procedure established by law. Generally, for a permanent employee, even if there is a case about ineligibility, some kind of proceedings, normally disciplinary proceedings, have to be taken to determine his employment. Once an employee, who has occupied a post governed by Statute is

dead, no proceedings of any kind can be taken, terminating his status after his demise. Even if it be considered that the petitioner's father's appointment was made contrary to the Statute, holding it so after his demise, would be passing an order against a dead man adverse to his interest, particularly one relating to his status. If disciplinary proceedings were initiated against the petitioner's father on the charge that he secured an appointment, that was invalid, deliberately, these would abate upon his demise, as held by the Supreme Court in **A.K.S. Rathore (Dead) through LRs v. Union of India and another4.** Since no disciplinary proceedings or other proceedings were initiated during the petitioner's father's lifetime, no different consequence can attach after his death *vis-à-vis* his status and the rights of his dependents. The petitioner's father held a permanent post in the establishment of the Nagar Nigam, Saharanpur until his demise. Therefore, the respondents are obliged to consider the petitioner's candidature for compassionate appointment as an eligible member of the deceased-employee's family, in accordance with the Rules of 1974.

14. In the result, this writ petition **succeeds** and stands **allowed**. The impugned order dated 14.09.2023 passed by the Nagar Swasthya Adhikari, Nagar Nigam, Saharanpur is hereby **quashed**. A *mandamus* is issued to the Nagar Ayukt, Nagar Nigam, Saharanpur and the Nagar Swasthya Adhikari, Nagar Nigam, Saharanpur to consider and decide, between themselves, the petitioner's claim for appointment on compassionate basis in accordance with law, within a month of the date of receipt of a copy of this judgment.

15. The Registrar (Compliance) is directed to communicate this order to the Nagar Ayukt, Nagar Nigam, Saharanpur and the Nagar Swasthya Adhikari, Nagar Nigam, Saharanpur.

(2024) 1 ILRA 60
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.01.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 31192 of 2017
Along With
Writ A No. 21232 of 2021
Special Appeal No. 513 of 2023
And
Special Appeal No. 507 of 2023

Alka Tiwari & Ors. ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
Sameer Kalia, Birendra Pratap Singh, Meenakshi Singh Parihar

Counsel for the Respondent:
C.S.C., Ajay Pratap Singh, Onkar Singh, Raj Kr. Singh Suryavanshi

Civil Law - The U.P. Educational (General Education Cadre) Service Rules, 1992 - Rule 5(18) -The petitioners challenged Sub-Rule 18 of Rule 5, which allocates 61% of promotion quotas to Headmasters (Men's Branch), 22% to Headmistresses (Women's Branch), and 17% to Deputy Inspectors of Schools and equivalent non-teaching posts for the position of Principal, Government Intermediate Colleges. The petitioners argued that this quota is arbitrary, unreasonable, and discriminatory, as it disadvantages Headmistresses despite their larger cadre strength (824 posts) compared to Headmasters (768 posts). (Paras 2, 5, 14, 16-17, 24-26)

Constitutional Validity and Gender Discrimination The court found the 61:22

quota ratio between Headmasters and Headmistresses to be prima facie discriminatory, violating Articles 14 (equality before law), 15(1) (prohibition of discrimination based on sex), and 16 (equality of opportunity in public employment). The disproportionate quota favoring the Men's Branch, despite the increased number of Headmistresses, was deemed irrational, especially since the eligibility criteria for promotion under Rule 16 are non-discriminatory and seniority-base (Paras 31, 44-45)

Changed Circumstances and Obsolescence of Rules The court noted that at the time of promulgation of the 1992 Rules, the cadre strength of Headmasters (470) significantly exceeded that of Headmistresses (154). However, by 2023, the cadre strength had shifted to 768 Headmasters and 824 Headmistresses, rendering the original 61:22 quota obsolete and misaligned with the current cadre realities. The court emphasized that rules must serve their legislative intent and adapt to changed circumstances to avoid perpetuating inequity. (Paras 26, 31-32)

St.'s Inaction on Proposed Amendments The Director of Secondary Education's proposal (dated 20.02.2019) to revise the promotion quota to 33:33:34 for Men's Branch, Women's Branch, and Inspection Branch, respectively, was not acted upon by the St. Government despite multiple court orders and a Committee's recommendations (dated 26.10.2021). The court criticized this inaction, noting that it failed to address the gender imbalance and perpetuated discrimination. (Paras 15, 27, 36-37, 41-43)

Interim Relief and Combined Eligibility List Pending amendment of the 1992 Rules, the court directed that promotions to Group B posts, including Principals, be made based on a combined eligibility list of Headmasters and Headmistresses, utilizing the total 83% quota (61% + 22%) for teaching staff, in accordance with Rule 16's seniority-based criteriThe 17% quota for the non-teaching wing was preserve The court overruled its prior interim order (dated 14.07.2021) prohibiting promotions under existing rules to facilitate this process. (Para 47)

Special Appeals of Direct Recruits In Special Appeal Nos. 507 and 513 of 2023, direct recruits challenged interlocutory orders affecting their postings as Principals. The court allowed these appeals, setting aside the impugned orders, as the appellants were appointed under the 50% direct recruitment quota, which was unaffected by the promotion quota disputThe St. was granted flexibility to adjust postings based on administrative needs. (Para 48)

G. Directive to St. Government The court disposed of Writ-A Nos. 31192 of 2017 and 21232 of 2021, directing the St. Government to expeditiously decide on the Director's proposal (dated 20.02.2019) and the Committee's recommendations (dated 26.10.2021) to amend the 1992 Rules. The court emphasized the need for the St. to address gender discrimination and align the promotion quota with current cadre strengths to ensure constitutional complianc(Para 46)

H. Judicial Role and Gender Justice The court underscored its duty to uphold gender justice under the Constitution, particularly through Articles 14, 15, and 16. While acknowledging that courts cannot legislate, it held that statutory provisions must be interpreted to serve their purpose and eliminate discrimination, especially when rules become obsolete due to changed circumstances. (Paras 33, 44-45)

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

(1) Heard Sri S. K. Kalia, learned Senior Advocate assisted by Mr. Birendra Singh, learned counsel for the petitioners in Writ-A No. 31192 of 2017, Sri Onkar Singh, learned counsel for the petitioners appearing in Writ-A No. 21232 of 2021, Sri Sharad Pathak, learned counsel for the appellant in Special Appeal Nos. 513 of 2023 and 507 of 2023, Sri Kuldeep Pati Tripathi, learned Additional Advocate General appearing for the State-respondents and Sri R. K. Singh Suryavanshi, learned Counsel representing the U. P. Public Service Selection Board.

(2) By means of Writ-A No.31192 of 2017 filed under Article 226 of the Constitution, the veracity of Sub-Rule 18 of

Rule 5 of the Uttar Pradesh Educational (General Education Cadre) Service Rules, 1992 has been challenged. The said Rule apparently provides for the ratio in which the Headmasters, Headmistresses and District Inspectors of Schools are to be considered for promotion to the post of Principal of Government Intermediate Colleges.

(3) The petitioners, who are working on the post of Block Education Officers in different Blocks in the State of U.P., are challenging the impugned Office Memorandum dated 14.09.2021 have filed Writ Petition No. 21232 (SB) of 2021 as also for declaring the Rule 5 (18) of the Rules, 1992 as *ultra vire*s for the reason that in the DPC held on 17.01.2018 for promotion on Group – B (Higher) posts, only Men and Women teaching branches were considered, while ignoring the candidates of inspecting cadre.

(4) In Special Appeal Nos. 507 of 2023 and 513 of 2023, the appellants who are direct recruits have challenged the impugned orders, in respect of their posting, passed against them.

(5) In nutshell the case of petitioners of Writ-A No. 31192 of 2017 is that on 18.04.1992, the State Government promulgated "The Uttar Pradesh Educational (General Education Cadre) Service Rules, 1992" [briefly, it is stated as 'Rules, 1992'] for the purpose of recruitment to Group 'A' and Group 'B' (higher) posts. Rule 5 of Rules, 1992 provides the source of recruitment to various posts of Group 'A' and Group 'B' (higher) posts. Sub-Rule 18 of Rule 5 of the Rules, 1992 stipulates 61%. 22% and 17% quota for Headmasters, Headmistresses and the incumbents posted on other equivalent teaching and non-teaching posts respectively for promotion on the post of Principal, Government Intermediate College (for Boys or Girls) as well as on other equivalent Group – B posts.

(6) In the year 1992, the State Government for the purpose of appointment on the post of Lecturer in Government Intermediate Colleges also promulgated The Uttar Pradesh Special Subordinate Educational (Lecturer's Cadre) Service Rules, 1992 [here-in-after it has been referred to as **'Lecturer Service Rules']** and Rule 5 of the said Rules provides source of recruitment for the post of Lecturer and there are two separate branches for the post of Lecturer, i.e., Men and Women.

(7) In the year 1993, the Uttar Pradesh Educational Teaching (Subordinate Gazetted) Service **Rules, 1993** [in short, it is referred to as '**Rules, 1993**'] were promulgated governing appointment to the Headmasters and Headmistresses in Government Higher Schools and Rule 5 of the said Rules provides the source of recruitment to the post Headmasters and Headmistresses of Government Higher Secondary Schools.

(8) As per Rule 5 (1) of the **Rules, 1993**, the post of Headmaster of Government Higher Secondary School would be filled up by promotion through Selection Committee in the ratio of 45% and 55% respectively from amongst substantively appointed men's branch (I) Lecturers who have completed three years service as such and Assistant Masters (L.T. Grade) who have completed twelve years service as such on the first day of the year of recruitment.

(9) According to Sub-Rule (3) of Rule 5 of **Rules, 1993**, the promotion would be made through Selection Committee in the ratio of 45% and 55% respectively from amongst substantively appointed (i) Lecturers who have completed three years service as such and Assistant Mistress (L.T. Grade) who have completed twelve years service as such on the first day of the year of recruitment.

(10) During the period 1997 to 2001, the petitioners were initially appointed on the post of Lecturer (Women Branch) in Government Inter Colleges in the State of U.P. through Public Service Commission under the provisions of Rule 5 of the Lecturer Service Rules. Since then, they are discharging their duties on their respective posts.

(11) By passage of time, the petitioners were promoted on the next higher post of Headmistress, Government Girls Higher Secondary Schools during the period 2013 to 2016 and were posted at different schools in the State of U.P.

(12) On 18.07.2017, final seniority list of incumbents of The Uttar Pradesh Educational Teaching (Subordinate Gazetted) Service Women's Branch for the year 2013-14 was prepared and circulated. However, final seniority lists of Men's branch of the said Cadre for the years 2013-14, 2014-15 and 2015-16 were finalized and circulated vide letters of same date. Thereafter, they were sent to the Commission for consideration of promotion of the incumbents of both branches on Group – B (higher) posts.

(13) The apprehension of the petitioners is that on account of fixation of 61% quota for promotion of the incumbents on Men's branch, several persons junior to the petitioners are to be considered for promotion on higher post defeating the rightful claim of the petitioners for being considered for promotion on the said higher post alongwith their male counterparts who are on equal footing in the seniority positions.

(14) According to Sri S. K. Kalia, learned Senior Advocate, assisted by Sri Birendra Pratap Singh, learned counsel for the petitioners, the ratio of 22% provided for the Headmistresses is arbitrary, unreasonable and without any rationale in view of the fact the number of Headmistresses is much large than the Headmasters in the State of the Government Higher Secondary Schools for Girls and Boys.

(15) Considering the increased number of the posts of Headmistresses and the present number of the posts of Headmasters as well as Sub-rule under challenge, the Director, Secondary Education, U.P., Lucknow has already recommended the State Government to provide the quota, as per present sanctioned strength of the posts of Headmistresses, for promotions to the posts of Principal of Government Inter College and in this regard, he placed reliance on the letter dated 20.02.2019, contained in Annexure No.RA-1 to the rejoinder affidavit.

(16) Sri S.K. Kalia, learned Senior Counsel, assisted by Sri Birendra Pratap Singh, has submitted that reconsideration of the rule under challenge by the State Government has not shown any positive result despite the fact that as of now insofar as the figure of female headmistresses working in the feeding cadre is concerned, the same corresponds to 824 whereas the

eligible candidates in the category of male, corresponds to 768 resulting into an imbalance in the matter of promotion on the post of Principal in intermediate colleges from two different sources of which the eligibility stands at par.

(17) The prescribed percentage for female candidates is 22% whereas 61% posts are reserved for male candidates which is an apparent discrimination to which the functional female candidates are meted with, though being senior. This discrimination deserves to be viewed in the light of relevant data and the actual strength of eligible candidates working in the two feeding cadres.

(18) Sri Kuldeep Pati Tripathi, learned Additional Advocate General appearing for the State-respondents and Sri R. K. Singh Suryavanshi, learned Counsel representing respondent No.3/Selection Board have submitted that Uttar Pradesh Educational (General Education Cadre) Service Rules, 1992 provides that 50% of the Group B posts shall be filled in by direct recruitment through U.P. Public Service Commission and remaining 50% of Group B posts shall be filled in by making promotions in consultation with Public Service Commission from amongst (a) Headmaster, Government Higher Secondary Schools and government Normal Schools and other equivalent posts of men's teaching branch (b) Headmistress Government Higher Secondary Schools for girls and Government Girls Normal School and other equivalent posts of women teaching branch and (c) Deputy Inspector of Schools (Boys & Girls) and other equivalent posts of inspecting and non-teaching side in ratio of 61%, 22% and 17% respectively.

(19) They have further submitted that the Departmental Promotion Committee (DPC) in its meeting held on 17.01.2018 had completed the selection proceedings for promotion on Group B posts. However, candidates belonging to (c) category, i.e., Deputy Inspector of Schools (Boys & Girls) had filed two writ petitions, namely, Writ Petition No. 1617 of 2018, *Uttar Pradesh Vidyalaya Nirikshak Sangh and others v. State of U.P. and others*, wherein vide order dated 12.01.2018, a co-ordinate Bench of this Court had stayed declaration of result of promotions & Writ Petition No. 1226 (SB) of 2018, *Padma Shekhar and others v. State of U.P. and others* respectively.

(20) The next submission of the learned counsel for the respondents is that in exercise of powers conferred under Article 309 of the Constitution of India, the aforesaid Rules, 1992 have been framed, thus it cannot be said that the Rules are violative of Articles 14 and 16 of the Constitution of India.

(21) He has contended that when on a particular post promotions are to be made from different sources, then it is the domain of the rule making authority to fix the quota of promotion from different posts by considering various relevant factors. Rule 5 of Rules, 1992 related to Group B posts so far as it fixes quota of different posts in the feeding cadre is perfectly constitutional and does not call for any interference by this Court.

(22) The next contention of the learned Counsel for the respondents is that the cadre of men's branch is different to that of women's branch and seniority of both the cadres is prepared separately, therefore, it is absolutely incorrect to say that persons junior to them in the men's branch were more beneficial compared to them.

(23) While continuing his submissions, he has emphasized that at present 768 posts of Headmasters in male branch, 824 posts of Headmistresses in female branch and 788 posts of Government Inter College (both male and female branch) are sanctioned. In this context, relying on the catena of judments passed by the Apex Court, he has stated that any provision of Rules cannot be held to be arbitrary on the ground that the same is less beneficial to one particular group of employees. He further submitted that Rule Making Authority frames the Rules after taking into various factors and therefore, merely saying that it is beneficial to one particular group, the said Rules cannot be held to be violative of Articles 14 and 16 of the Constitution of India.

(24) In rebuttal, learned Counsel appearing for the petitioners have submitted that the Rules under challenge providing the higher quota to the Headmasters for consideration of their promotion on Group – B posts including the post of Principal, Government Inter College (Boys & Girls) is irrational, arbitrary and violative of Articles 14 and 16 of the Constitution of India. Further, it vitiates the rightful claim of the petitioners for being considered for promotion on the aforesaid posts whereas there is no bifurcation of male and female on Group – B posts including the post of Principal, Government Inter College (Boys & Girls) and the posts of the Headmistresses (herein petitioners) are much more than Headmasters.

(25) In continuity, he has submitted that where the promotion is to be made from different cadres, the quota of each cadre should be in ratio as per the cadre strength and the quota should not be irrational and arbitrary. In the present case, the cadre strength of the petitioners (Headmistress) is much higher than the cadre strength of male branch and by means of the Rules under challenge, the higher quota for male branch has been provided for promotion on the post of Principal, Government Inter College (Boys & Girls) and Group – B posts which vitiates the rightful claim of the petitioners for being considered for their promotion on Group – B posts including the post of Principal, Government Inter College (Boys & Girls).

(26) Further contention of learned counsel for the petitioners is that at the time of promulgation of impugned Rules, the cadre strength of Headmasters and Headmistress were 470 and 154 respectively as provided in **Rules, 1993** and now the cadre strength of the Headmasters and Headmistress have been increased to 768 and 824 respectively as has been stated by the learned Additional Advocate General. In view of this, providing higher quota to the Headmasters (Male cadre) for consideration of their promotion on the higher post is illegal and arbitrary and cannot be sustained in the eyes of law.

(27) **In the above context, the Director/respondent No.2 has sent a proposal in the form of letter dated 20.02.2019 to the State Government for providing quota of 33%, 33% and 34% to the Male Branch, Female Branch and Inspection Branch respectively.**

(28) By moving an impeladment application, Vidhyalay Nirikshak Sangh through its Secretary has brought on record that initially, the total cadre strength of the Deputy Inspector of Schools in U.P. was 179 and in 2011, the State Government has

merged the posts of Sub-Deputy Inspector in Deputy Inspector in Deputy Inspector/Block Education Officer and extended the cadre strength as 1031 posts.

(29) Considered the submissions made by the learned Counsel for the parties and perused the records available on record.

(30) The object of law sometimes comes in conflict with the plain and literal meaning of the statutory language and in such situations, the intention of legislation is bound to be derived from its object rather than the literal meaning of rules. Need to revisit such laws becomes imminent and the law makers ought not to show a repulsive role. The recruitment of the Principals of Government Inter Colleges is regulated under the Rules, known as, Uttar Pradesh Educational (General Education Cadre) Service Rules, 1992 [here-in-after it is referred to as 'Rules, 1992']. Rule 5 of the **Rules, 1992** prescribes the extent of percentage from various categories who can be considered for promotion as per Rule 16 of the said Rules.

(31) It is well stated case of the State in the counter-affidavit that at the time of prescription of percentage between 'headmasters' and 'headmistresses' working in the feeding cadre, the relevant consideration was the strength of Government High Schools for boys and girls and with the passage of time, the strength of High Schools for Girls has considerably increased meaning thereby, that the High Schools established by the Government for girls are more in number than the boys as on date. The percentage prescribed under Rule 5 is thus questioned to have come in conflict and such a rule would serve no purpose under which the proportional prescription is based on sex. It is further argued that once Rule 16 lays down a non-discriminatory criteria, observance of Rule 5 on the aspect of percentage is violative of Articles 14 and 15 of the Constitution of India.

(32) At the time when the writ petition was filed, a recommendation was forwarded by the Director, Secondary Education proposing an equitable percentage for all the three sources of recruitment, namely, males, females and the officers from Inspection Wing. This recommendation made by the Director of Secondary Education does not seem to have sailed through for the reasons best known to the Government. On the contrary, the premise which was relevant for promulgation of the aforesaid Rule has lost its significance and the object of law demands that the percentage so stipulated having become obsolete has to be read in the reasonable manner that may serve the purpose of law.

(33) We are conscious of the fact that the Constitutional Courts cannot act as legislators to add or subtract anything from the plain reading of the Statute but the purpose of law, if it can be read without exceeding to the limits of judicial domain, a provision may be read as a whole so as to serve its objects. The Court would hasten to reproduce the relevant Rules 5 and 16 of the Rules 1992 as under:

"5. Source of recruitment – Recruitment to the various categories of posts in the Service shall be made from the following sources :

1	Director of Education (Secondary), Director of Education (Basic), Uttar	By promotion through the Selection Committee from amongst substantively

	Pradesh, Director, State Council of Educational Research and Training, Uttar Pradesh, Director Adult Education, Uttar Pradesh and Director, Urdu and Oriental Languages, Uttar Pradesh.	appointed additional Directors mentioned at serial Numbers 6 to 12 of the Appendix I who have completed three years Service as such, on the first day of the year of recruitment.
2	Additional Director of Education (Secondary), Additional Director of Education (Basic), Additional Director of Education (Correspondence Course), Additional Director of Education (Non-Formal Education), Additional Director of Education (Vocational Education), Additional Director of Education (Hills) and Additional Director of Education (Women Education).	By promotion through the Selection Committee from amongst persons who are substantively appointed to the posts mentioned at serial Numbers 13 to 16 of the Appendix I and who have completed five years service, as such on the first day of the year of recruitment.
3	Joint Director of Education (Finance, Training, Women and Basic Education), Secretary, Board of High School and Intermediate Education, Uttar Pradesh, Director, State Educational Technology Institute, Lucknow and Principal, State Institute of School Sports, Faizabad.	
4	Director, State Institute of Science Education.	By transfer from amongst officers mentioned at serial number (3) who possess the qualifications mentioned against the posts in the Appendix II. By promotion through the Selection Committee from amongst persons who are substantively appointed to the posts mentioned at Serial numbers 25 to 33 of the Appendix I and who have completed six years service, as such, on the first day of the year of recruitment.
5	Deputy Directors of Education, Regional Deputy Director of Education, Regional Inspectress of Girls Schools, Principal, State Institute of Education, Allahabad, Additional Secretary, Board of High School and Intermediate Education Regional Offices, Additional Secretary (Administration) at Headquarters, Secretary Board of Basic Education, Uttar Pradesh and Senior Advisor (Non-Formal Education), State Institute of Education.	
6	Director, Bureau of Psychology, Allahabad.	By transfer from amongst officers mentioned at serial number (5) who possess the qualifications mentioned in the Appendix II against the post.
7	District Inspector of Schools (boys and girls), Regional Assistant Director of Education (Basic), Principal and Senior Research Officer, Govt. Central Pedagogical Institute, Allahabad, Text-Books Officer, Additional Secretary Text-Book, Additional Secretary (Recognition) Board of High School and Intermediate Education, Uttar Pradesh, Adviser (Non-formal Education), Vice-Principal and Associate Director of State Institute of Education, Allahabad, Registrar, Departmental Examinations, Assistant Director of Education at Head quarters, Joint Secretary, Board of Basic Education, Uttar Pradesh, Principal Government Training College for Women, Allahabad.	By promotion through the Selection Committee from amongst persons who are substantively appointed to the posts mentioned at serial numbers 44 to 63 of the Appendix I and who have completed six years service, as such, on the first day of the year of recruitment.
8	Assistant Director, State	By transfer from amongst

	Institute of Science Education.	officers mentioned at Serial number (7) who possess the qualifications mentioned against each post in the Appendix II.
9	Professor of Mathematics at the State Institute of Science Education.	
10	Professor of Physics at the State Institute of Science Education.	
11	Professor of Chemistry at the State Institute of Science Education.	
12	Professor of Botany at the State Institute of Science Education.	
13	Senior Research Psychologist, Bureau of Psychology, Allahabad.	
14	Director, State Hindi Institute, Varanasi.	
15	Principal, Government Basic Training College, Varanasi.	
16	Principal, Government Constructive Training College, Lucknow.	
17	Principal, English Language Teaching Institute, Allahabad.	
18	District Basic Education Officer, Associate Inspector of Schools. Principals Government Intermediate Colleges (for boys or girls), Assistant Deputy Director of Education, Personal Assistant to Director of Education (Secondary and Basic), Deputy Text-Books Officer, Deputy Secretary, and Additional Deputy Secretary, Board of High School and Intermediate Education, Uttar Pradesh at Headquarters and Regional offices, Assistant Deputy Director of Education (Correspondence Course), State Institute of Education, Uttar Pradesh, Allahabad, Education Expansion Officer, Vice Principal Government Basic Training Colleges, Varanasi, Research Professor, Government Basic Training College, Varanasi, Senior Research Professor, State Institute of Education, Allahabad, Vice Principal/Professor, Government Central Pedagogical Institute, Allahabad, Principal Junior Basic Training Colleges Officer on Special Duty (Non-Formal Education), District Non-Formal Education Officer, Associate Regional Inspectress of Girls School, Vice Principal and Professor, Government Training College for Women, Allahabad, Principals for Government Training Colleges for Women.	(i) 50% by direct recruitment through the combined State Services Examination conducted by the Commission. (ii) 50% by promotion through the Commission from amongst substantively appointed : (a) Head Masters, Government Higher Secondary Schools and Government Normal Schools and other equivalent posts of Men's Teaching Branch. (b) Head Mistress, Government Higher Secondary Schools for Girls and Government Girls Normal Schools and other equivalent posts of Women teaching Branch, and (c) Deputy Inspectors of Schools (Boys and Girls) and other equivalent posts on the inspecting and non-teaching side, in the ratio of 61%, 22% and 17% respectively, who have completed three years service, as such, on the first day of the year of recruitment.
19	Science Promotion Officer, Professor State Institute of Science Education, Psychologist and Regional Psychologist, Professor and Associate Professor, English Language, Teaching Institute Assistant Director, State Hindi Institute, Inspector Sanskrit Pathshalas, Uttar Pradesh, Inspector Arabic Madarsas, Law Officer Directorate of Education, Uttar Pradesh, Principal, Government Physical Training College, Rampur, Professor Craft Government Constructive Training College, Lucknow, Statistical Officer, State	By transfer from amongst officers mentioned at serial number (18) who possess the qualification mentioned against each post in the Appendix-II.

	Institute of Education and Directorate of Education, Uttar Pradesh, Allahabad, Principal, Government College of Physical Education for Women, Allahabad, Principal Government Women College of Home Science, Allahabad and Principal, Government Nursery Training College, Allahabad and Agra, Reprography Officer :	

Provided that if sufficient number of suitable eligible persons in respect of the posts mentioned at serial Nos. (1), (2), (3), (5) and (7) are not available for promotion, the requisite length of service may be relaxed by the Government.

16. Procedure for recruitment by promotion through the Commission – *Recruitment by promotion through the Commission shall be made on the basis of seniority subject to the rejection of unfit in accordance with the Uttar Pradesh Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970 as amended from time to time."*

(34) From the record, it comes out that for increasing the quota of promotion against Group B posts of U.P. Educational (General Education Cadre) under the Inspecting Branch, Writ-A No. 1617 of 2018, U.P. Vidyalaya Nirikshak Sangh and others v. State of U.P. and others, Writ-A No. 9561 of 2021, Arjun Singh and others v. State of U.P. and others have been filed at Allahabad, whereas Writ-A No. 21232 of 2021, Lalmani Ram v. State of U.P. and others and Writ Petition No. 1226 (SB) of 2018, Padma Shekhar and others v. State of U.P. & others have been filed at Lucknow.

(35) With regard to the anomalies caused due to determination of the seniority amongst the employees of the U.P. Subordinate Inspection Branch, Writ Petition No. 15196 of 2016, Shiv Nandan Singh v. State of U.P. & others has been filed at Allahabad wherein an order dated 05.04.2016 was passed to the extent that till 31.07.2016, the final seniority list appended to the order of Director of Education (Basic), Uttar Pradesh, Lucknow dated 12.02.2016 shall not be implemented.

(36) Further, it reveals from the record that **a Committee was constituted by the State Government vide its Office Memorandum dated 05.10.2021 under the Chairmanship of Special Secretary, Department of Secondary Education, U.P., Lucknow and the said Committee has submitted its recommendation on 26.10.2021.**

(37) From the record, it also comes out that the issue in the present writ petition is not only related to the determination of quota of promotion amongst the employees of the Department of Secondary Education and the Department of Basic Education but it also involves the complex exercise of re-structuring of cadre and a policy decision is required to be taken in the matter. By moving an application dated 01.11.2021, the opposite party No.1 prays that interest of justice would suffice, **if this Court grants reasonable time to complete the process of amendment in the Rules of 1992 and re-structure the cadre by making necessary amendments in the Rules of 1992 and to take a decision in terms of the order dated 14.07.2021 passed by this Court.**

(38) On 18.10.2019, 22.11.2019, 06.07.2021, 14.07.2021, 07.10.2021,

01.08.2023 and 28.10.2023, different Co-ordinate Benches have passed the following orders for amendment in Rules, 1992 by the competent authority. For ready reference, they are reproduced as under:-

18.10.2019

"Heard Shri S. K. Kalia, learned Senior Advocate assisted by Shri Birendra Pratap Singh, learned counsel for the petitioner and Shri Manjiv Shukla, learned Addl. Chief Standing Counsel.

By means of the present writ petition, the petitioners have challenged the validity of Sub-rule 18 of Rule-5 of the Uttar Pradesh Educational (General Education Cadre) Service Rules, 1992 (hereinafter referred to as "Service Rules, 1992").

The challenged has, broadly, made on the ground that when the Service Rules, 1992 was framed, at that point of time, there were 470 posts of Headmasters and 154 posts of Headmistresses. Keeping in view the number of posts of Headmasters and Headmistresses, the provision of promotion to the post of Principal of Government Inter College (Boys & Girls) was made in the Service Rules, 1992.

As per provisions, 61% quota and 22% quota for Male Branch i.e. for Headmasters and for Female Branch i.e. for Headmistresses, respectively, was fixed in the Service Rules, 1992 for promotion to the posts of Principal of Government Inter College.

The position has now been changed regarding the posts of Headmasters and Headmistresses and at present, there are 1071 sanctioned posts of the Headmistress and 867 posts of Headmasters in the Government Inter College and on account of fixation of 61% quota of promotion for Headmasters, the claim of the petitioners is defeating as several junior persons to the petitioners would be promoted on the post of Principal of Government Inter College and being so, the Sub-rule under challenge in the present writ petition is in violation of Article 14 of the Constitution of India.

Shri S.K. Kalia, learned Senior Advocate assisted by Shri Birendra Pratap Singh, Advocate submitted that the ratio provided of 22% for the Headmistresses is arbitrary, unreasonable and without any rationale as the number of Headmasters are much less than the Headmistresses in the State in the Government Higher Secondary Schools for Girls and Boys.

Shri S.K. Kalia, learned Senior Advocate submitted that considering the increased number of the posts of Headmistresses and the present number of the posts of Headmasters as well as Sub-rule under challenge, the Director, secondary Education, U.P., 8-Park Road, Lucknow has already recommended the State Government to provide the quota, as per present sanctioned strength of the posts of Headmistresses, for promotions to the posts of Principal of Government Inter College and in this regard, he placed reliance on the letter dated 20.02.2019 as contained in Annexure No.RA-1 to the rejoinder affidavit.

Learned Additional Chief Standing Counsel requests that he may be granted a short time to seek instructions in the matter particularly with respect to letter dated 20.02.2019.

Time is granted to learned Addl. Chief Standing Counsel for the said purpose.

List in the week commencing 04.11.2019."

22.11.2019

"Vide order dated 18.10.2019, the learned Additional Chief Standing Counsel was directed to seek instructions

particularly with respect to the letter dated 20.2.2019 sent by the Director (Madhyamik) to the State Government regarding amendment in U.P. Educational (General Education Cadre) Service Rules, 1992 in order to remove discrepancies in the quota meant for promotion of male and female teachers on the post of Principal, Government Intermediate Colleges.

Learned Standing Counsel informs that he has not been able to get complete instructions in the matter.

Learned Standing Counsel shall seek complete instructions; particularly on the point as to whether the State Government is proposing to amend the said rules in this regard and whether in the meantime any promotions are going to be made on the basis of existing rules.

List on 3.12.2019."

06.07.2021

"The matter is taken up through video conferencing.

Vide order dated 22.11.2019, the Court had directed the learned Standing Counsel to seek complete instructions particularly on the point as to whether the state Government is proposing to amend the U.P. Educational (General Education Cadre) Service Rules, 1992 in order to remove discrepancies in the quota meant for promotion of male and female teachers on the post of Principal, Government Intermediate Colleges and whether in the meantime, any promotions are going to be made on the basis of existing rules.

Learned Standing Counsel has not received any instructions.

He prays for and is allowed one week and no more time to seek complete instructions failing which the matter shall be heard finally on the basis of pleadings and documents available on record.

List on 14.7.2021."

14.07.2021

"Heard Mr. S.K. Kalia, learned Senior Advocate assisted by Mr. Sameer Kalia, learned counsel for the petitioners and learned Standing Counsel on behalf of the State.

Vide order dated 6.7.2021, we had directed learned Standing Counsel to seek instructions in the matter whether the State Government is proposing to amend the U.P. Educational (General Education Cadre) Service Rules, 1992 in order to remove discrepancies in the quota meant for promotion of male and female teachers on the post of Principal, Government Intermediate Colleges and whether in the meantime, any promotions are going to be made on the basis of existing rules.

Learned Standing Counsel appearing on behalf of the State has placed before us the copy of instructions send to him vide letter dated 13.07.2021 by the Principal Secretary, Basic Education, Government of U.P. informing therein that the opinion from the Madhyamik Shiksha Vibhag are awaited and there is a proposal to amend the said Rules. Since it is a policy decision, as such, the opinion of the Madhyamik Shiksha Vibhag and Basic Shiksha Vibhag are required to be considered.

In view of above, it is clear that the State Government is contemplating to amend the said Rules.

We direct the State Government to take appropriate decision in this regard expeditiously, say, within a period of one month from today.

Till a decision with respect to the proposal for amending U.P. Educational (General Education Cadre) Service Rules, 1992 is not taken, no promotion of teachers on the post of Principal, Government Intermediate Colleges shall be considered or made on the basis of existing Rules.

List after one month."

01.11.2021

"Heard Shri S.K. Kalia, learned Senior Advocate, assisted by Shri Birendra Pratap Singh, learned Counsel for the petitioners and Sri Q.H. Rizvi, learned Standing Counsel for the State/respondents no.1 and 2.

On 22.09.2021, a Co-ordinate Bench of this Court has passed the following order :-

"Learned Additional CSC prays for and is granted two weeks and no more time to seek instructions in the matter and apprise the Court about the decision taken by the State Government in terms of order dated 14.07.2021, failing which Principal Secretary, Department of Secondary Education, U.P. shall appear before this Court with relevant records to assist the Court.

List this case on 07.10.2021."

Learned Standing Counsel, on the basis of instructions, has submitted that in compliance of the order dated 22.09.2021, steps have been taken by the State Government on the issue on 05.10.2021 but the State Government has yet to have arrived at the final decision in the matter, for which he seeks some more time.

In response, learned Senior Advocate appearing on behalf of the petitioner has argued that several orders have been passed by this Court on the issue in the instant writ petition but till date no final decision has been taken by the State Government on the issue.

Considering the aforesaid, in the interest of justice, three weeks further time is granted to the respondents to take decision in terms of the order dated 14.07.2021 and the decision so taken shall be brought on record by means of personal affidavit of the Principal Secretary, Department of Secondary Education, Government of U.P., Lucknow by the next date of listing, failing which the Principal Secretary, Department of Secondary Education, Government of U.P., Lucknow, shall appear in person.

Let the matter be listed on 01.11.2021 before the appropriate Bench."

01.08.2023

"1. Sri S.K. Kalia, learned Senior Counsel, assisted by Sri Birendra Pratap Singh, has submitted that reconsideration of the rule under challenge by the State Government has not shown any positive result despite the fact that as of now insofar as the figure of female headmistress working the feeding cadre is concerned, the same corresponds to 824 whereas the eligible candidates in the category of male, corresponds to 768. This has resulted into an imbalance in the matter of promotion on the post of Principal in intermediate colleges from the two sources of which the eligibility stands at par.

2. The prescribed percentage for female candidates is 22% whereas 61% posts are reserved for male candidates which is an apparent discrimination to which the functional female candidates are meted with though being senior. This discrimination deserves to be viewed in the light of relevant data and the actual strength of eligible candidates working in the two feeding cadres.

3. This is certainly a matter which the government ought to have considered having regard to the attending facts and figures. The rule of reservation is to balance the right of consideration equitably. We hope and expect that the State shall make an earnest endeavour to resolve any challenge to the rule made by any of the aggrieved party.

4. Sri Amitabh Rai, learned Addl CSC prays for a month's time to seek

instructions from the State in the light of what has been observed above.

5. List in the month of September, 2023."

28.10.2023

"1. Sri Kuldeep Pati Tripathi, learned Additional Advocate General has prayed for adjournment.

2. It is also pointed out that detailed reasons as per the record shall be apprised to the Court as to why the recommendation made by the Director of Secondary Education, U.P. vide letter dated 20.2.2019 for altering the quota percentage in promotion on the post of Principal, Government Inter Colleges from different sources was not found justifiable in the rules.

3. Application for impleadment i.e. C.M. Application No. IA/19/2023 is allowed to the extent of intervention. The newly added parties shall have a right to argue the case on legal issues.

4. List/put up on 1.11.2023 for further hearing."

(39) At the time of appointment of petitioners during the period 1997-2001 on the posts of Headmistresses of Government High Schools (Women Branch) or equivalent, separate criteria for men and women was fixed. By passage of time, they were also promoted to the higher post of Headmasters of the Government High Schools (Men Branch) or equivalent during the period 2013-16. When the seniority list prepared for the Women Branch for the year 2013-14 was circulated on 18.07.2017, they have come to know that the seniority lists of Men's Branch of the teaching cadre for the years 2013-14, 2014-15 and 2015-16 were finalized and circulated and sent to the Commission for consideration of promotion of the incumbents to the promotional post on Group 'B' higher posts, they filed Writ A No. 31192 of 2017 on the ground that fixation of 61% quota for promotion to Men's branch is arbitrary and unreasonable.

(40) Even, in the Rules, it has been mentioned that 61% is reserved for Men's branch and 22% is reserved for women's branch. Rest of 17% was reserved for Deputy Inspectors of Schools (Boys and Girls) and other equivalent posts on the inspecting and non-teaching side.

(41) During pendency of the aforesaid writ petition, the Director, Secondary Education has sent a proposal to the State Government for modifying the percentage to them as 33%, 33% and 34%, in place of 61%, 22% and 17% correspondingly vide his letter dated 20.02.2019, a copy whereof has been brought on record as Annexure No.RA1 to the rejoinder affidavit.

(42) Thereafter, number of orders have been passed by this Court to ascertain the position whether the State Government has approved the proposal sent by the Director or not, which evoked no response from them.

(43) The State Government has also constituted a Committee vide its Office Memorandum dated 05.10.2021 under the Chairmanship of Special Secretary, Department of Secondary Education, U.P., Lucknow and the said Committee after considering the entire matter and deliberating the views of members of associations at different levels has forwarded its suggestions to the State Government on 26.10.2021. So far more than two years have passed, but the State Government regard being had to the object of rules has not taken any decision in the matter.

(44) Before concluding, we would like to mention here that the petitioners are working on the post of Headmistresses of Government High Schools (Women Branch) or equivalent and they are being considered for promotion on the fixed quota of 22% on Group 'B' higher posts, whereas the Headmasters of Government High Schools (Men Branch) or equivalent are being considered on the fixed quota of 61%. In this regard, the Court is of the considered opinion that the role of the Constitution of India in ensuring gender justice owing its duty to the people must be accomplished through judicial process as is being recognized in modern times. It is thus appropriate that the rule making authorities should meaningfully address the gender discrimination and respond to challenges by stimulating the whole legal system towards equality and without leaving behind any trace of gender discrimination.

(45) Article 14 of the Indian Constitution guarantees Women the right to equality and Article 15 (1) explicitly prohibits discrimination on the basis of sexual orientation, and Article 15 (3) provides for measures seeking to protect women by empowering the state to provide them with special provisions. Article 16 of the Constitution provides for equal opportunities for all, in matters relating to public employment or appointment to any office and specifically prohibits discrimination on the basis of sex. These articles read together leave us with no manner of doubt that the Constitution of India recognizes equality for women in all the spheres of life besides employment and any practice that degrades women's rights must be discouraged.

(46) In view of what has been stated above, we **dispose of** Writ-A Nos. 31192 of 2017 and 21232 of 2021 and direct the State Government to take a decision on the suggestions made by the Director, Secondary Education, contained in Annexure No.RA1 to the rejoinder affidavit and the suggestions forwarded by the Committee in this regard on 26.10.2021 as also in the light of aforesaid orders passed by this Court, to amend the Rules, 1992 as early as possible.

(47) In the meantime, **we also direct the authorities concerned to consider the Headmasters and Headmistresses working in Boys and Girls Government High Schools under a combined eligibility list drawn in accordance with Rule 16 of the Rules, 1992 so as to exhaust the total (61 + 22 =83%) quota meant for the teaching staff (male & female) till the statutory Rules are suitably amended prescribing the respective percentage for teaching and non-teaching streams. Any interim order to the contrary passed by this Court on 14.07.2021 shall stand overruled and the process of selection shall be carried out as per the direction issued here-in-above. Non-teaching wing shall also be given the benefit of 17% quota till the rules are suitably amended.**

(48) Since the appellants of Special Appeal Nos. 513 of 2023 and 507 of 2023 are direct recruits and they have been appointed on the post of Principals of Government Inter Colleges by the U.P. Public Service Commission under 50% quota reserved for direct recruits, both the Special Appeals directed against the interlocutory orders are **allowed** and the impugned orders passed in their cases by the Writ Court are set aside. It shall be open to the State to streamline postings as per the administrative exigencies and take

appropriate decision in accordance with law.

(49) No order as to costs.

(2024) 1 ILRA 75
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1022 of 2023

M/s V.R. Enterprises, Kanpur, U.P. ...Petitioner
Versus
Addl. Commissioner Grade-2, (Appeal)-5, State Tax, Kanpur & Anr. ...Respondents

Counsel for the Petitioner:
Sri Aditya Pandey

Counsel for the Respondents:
C.S.C.

Civil Law - The Central Goods and Services Tax Act, 2017 - Challenge to cancellation of GST registration by order dated 14.03.2023 and dismissal of appeal by order dated 18.08.2023 - Cancellation order cryptic, lacking reasons, and non-compliant with requirement for reasoned order - Appellate authority erred in dismissing appeal as time-barred without verifying service or date of knowledge - Both orders set aside as unsustainable - Matter remitted to assessing authority for fresh consideration with show cause notice and hearing, to be completed within two months.

List of Cases cited:

1. M/s Chandra Sain, Sharda Nagar, Lucknow Thru. Its Proprietor Mr. Chandra Sain Vs U.O.I. Thru. Secy. Ministry of Finance, New Delhi & ors., decided on 22.09.2022.

2. M/s. Pearl and Co. Vs The Commissioner of Commercial Taxes & anr., W.P.(MD) No.19127 of 2022 and W.M.P.(MD) No.13962 of 2022

3. Tvl. Suguna Cutpiece Vs Appellate Deputy Commissioner (ST) (GST) & ors., W.P.Nos. 25048, 25877, 12738 of 2021 etc., decided on 31.01.2022

4. M/s Dial For Cool Vs St. of U.P. & ors., Writ Tax No.1338 of 2022

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Aditya Pandey, learned counsel for the petitioner and Shri Ravi Shankar Pandey, learned Additional Chief Standing Counsel for the respondents-State.

2. The GST registration of the petitioner was cancelled by order dated 14.03.2023. The appeal of the petitioner was dismissed by the appellate authority dated 18.08.2023.

3. The petitioner is aggrieved by the order dated 14.03.2023 and the order dated 18.08.2023 and has assailed the same in this writ petition.

4. The impugned order dated 14.03.2023 makes a cryptic finding to the effect that no reply to the show cause notice was submitted by the petitioner. The order thereafter cancels the GST registration of the petitioner without assigning any reason.

5. The order of cancellation of GST registration dated 14.03.2023 visits the petitioner with severe penal consequences. Even if the finding that no reply to the show cause notice was submitted is taken on its face value, the authority has to adhere its obligations in law to apply its mind to the facts of this case and render a speaking order. Failure to submit the reply to the show cause notice does not free the authority from its duty to apply its mind independently to the facts in the record and make a reasoned order while deciding the controversy. The authority of the first

instance did not pass a reasoned order. This Court has set its face against the order of cancellation of GST registration by non-speaking orders.

6. Reference can profitably be made to the authorities in point. The judgment of this Court rendered on 22.09.2022 in **M/s Chandra Sain, Sharda Nagar, Lucknow Thru. Its Proprietor Mr. Chandra Sain v. U.O.I. Thru. Secy. Ministry of Finance, New Delhi and 5 others** wherein Pankaj Bhatia, J. held as under:

"8. In the present case from the perusal of the order dated 13.02.2020, clearly there is no reason ascribed to take such a harsh action of cancellation of registration. In view of the order being without any application of mind, the same does not satisfy the test of Article 14 of the Constitution of India, as such, the impugned order dated 13.02.2020 (Annexure - 2) is set aside. The petition is accordingly allowed.

9. It is, however, directed that the petitioner shall file reply to the show-cause notice within a period of three weeks from today. The Adjudicating Authority i.e. Assistant Commissioner, Lucknow shall proceed to pass fresh order after giving an opportunity of hearing to the petitioner and after considering whatever defence he may take."

7. The said judgement is squarely applicable to the facts of this case. The order of cancellation being devoid of reasons is in the teeth of the law laid down by this Court in **M/s Chandra Sain (supra)**.

8. The narrative has also the benefit of the holding of the Madras High Court in **M/s. Pearl and Co. v. The Commissioner of Commercial Taxes and another (W.P.(MD) No.19127 of 2022 and W.M.P. (MD) No.13962 of 2022)**, wherein the consequences of cancellation of registration of a dealer and the approach of the revenue while considering such matters was set out as follows:

"6.Considering the submission and perusal of the materials, this Court is of the view that restoring the registration would not cause any harm to the department on the other hand it would be beneficial for the state to earn revenue. Further, in the case of Tvl.Suguna Cutpiece Vs Appellate Deputy Commissioner (ST) (GST) and others (W.P.Nos. 25048, 25877, 12738 of 2021 etc.. batch), dated 31.01.2022. There some of the petitioner filed an appeal beyond the period of limitation either for filing application for revocation of cancellation, while some of them had directly filed a writ petition against the order cancelling the registration. While some of them filed appeal beyond the statutory period of limitation, there was further delay in filing the writ petition. However, considering the over all facts and circumstances of the case, it was held that no useful purpose will be served by keeping those petitioners out of the Goods and Services Tax regime, as such assessee would still continue to do business and supply goods/services. By not bringing them back to the Goods and Services Tax fold/regime, would not further the interest of the revenue. Relief was granted under similar circumstances with the following directions:

"216. Since, no useful will be served by not allowing persons like the petitioners to revive their registration and integrate them back into the main stream, I am of the view that the impugned orders are liable to be quashed and with few safeguards.

217. There are adequate safeguards under the GST enactments which can also be pressed against these petitioners even if their registration are revived so that, there is no abuse by these petitioners and there is enough deterrence against default in either paying tax or in complying with the procedures of filing returns.

218. Further, the Government requires tax to meet its expenditure. By not bringing these petitioners within the GST fold, unintended privilege may be conferred on these petitioners unfairly to not to pay GST should they end supplying goods and/or services without registration. For example, a person renting out an immoveable property will continue to supply such service irrespective of registration or not.

219. Therefore, if such a person is not allowed to revive the registration, the GST will not be paid, unless of course, the recipient is liable to pay tax on reverse charge basis. Otherwise, also there will be no payment of value added tax. The ultimate goal under the GST regime will stand defeated. Therefore, these petitioners deserve a right to come back into the GST fold and carry on their trade and business in a legitimate manner.

220. The provisions of the GST Enactments and the Rules made there under read with various clarifications issued by the Central Government pursuant to the decision of the GST Council and the Notification issued thereunder the respective enactments also make it clear, intention is to only facilitate and not to debar and de-recognised assesses from coming back into the GST fold."

9. The order rejecting the appeal fails to redeem the errors committed by the assessing authority. The appellant authority dismissed the appeal as being time barred. The appellate authority by rejecting the appeal by the order dated 18.08.2023 was misdirected in law. The appellate authority failed to reference the mode of service and also did not record its satisfaction of service of the order upon the petitioner. The appellate authority has made no finding regarding the date of knowledge of the order. The impugned order is in the teeth of the law laid down by this Court in **M/s Dial For Cool v. State of U.P. and 2 others (Writ Tax No.1338 of 2022).**

10. The period of limitation shall be reckoned only from the date of knowledge or service of the order upon the petitioner and not from the date the order was passed.

11. The order of the assessing authority dated 14.03.2023 and the order of the appellate authority dated 18.08.2023 are unsustainable in law. The orders dated 14.03.2023 and 18.08.2023 are liable to be set aside and are set aside.

12. The matter is remitted to assessing authority for fresh consideration.

13. The assessing authority shall issue a show cause notice and decide the controversy in light of the observations made in this judgement and upon giving an opportunity of hearing to the petitioner.

14. The entire exercise shall be completed within a period of two months from the date of receipt of a certified copy of this order.

15. The writ petition (tax) is allowed.

(2023) 1 ILRA 78
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.12.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 201 of 1994
connected with
Criminal Appeals No. 182, 191 and 206- all of 1994

Mohd. Haleem & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
N. Mohan, A.K. Tiwari, Ayodhya Prasad Mishra, Rashid Ahmad

Counsel for the Opposite Party:
G.A.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8/18, 8/21, 8/22, 42 & 57 - U.P. Narcotic Drugs and Psychotropic Substances Rules, 1986 - Rule 77 - Code of Criminal Procedure, 1973 - Sections 100 & 105 - Appellants challenged conviction under NDPS Act for manufacturing morphine, alleging procedural violations. Court held: (1) Sub-Inspector (PW-1) was not authorized under Section 42 of NDPS Act to conduct search, seizure, and arrest on 03.06.1986, as Rule 77 amendment empowering Sub-Inspectors was effective only from 17.10.1989, rendering the entire process ultra vires (Kamlesh Pratap Singh Vs Superintendent of District Jail, Lucknow, Habeas Corpus Petition No. 1323 of 1987). (2) Non-compliance with Section 42(2) was fatal, as PW-1 failed to reduce informer's information to writing or forward it to a superior officer despite sufficient time, violating mandatory requirements (Karnail Singh Vs St. of Har., (2009) 3 SCC (Cri) 887). (3) Link evidence was incomplete due to discrepancies in witness St.ments (PW-4, PW-5, PW-6) regarding sample handling, failure to produce Malkhana register, and absence of sample seal proof (St. of Raj. Vs Gurmail Singh, 2005 (1) JIC 844). (4) Lack of independent witnesses and non-production of alleged owner or contraband holder further weakened prosecution's case. Conviction set aside; appellants acquitted. (Paras 18-38)

Criminal Appeals Allowed.

List of Cases cited:

1. Boota Singh Vs St. of Har., 2021 SCC OnLine SC 324 (Para 24)

2. St. of Raj. Vs Babu Lal, (2009) 14 SCC 215 (Para 25)

3. Karnail Singh Vs St. of Har., (2009) 3 SCC (Cri) 887 (Para 25)

4. Sukhdev Singh Vs St. of Har., (2013) 2 SCC 212 (Para 25)

5. Kamlesh Pratap Singh Vs Superintendent of District Jail, Lucknow, Habeas Corpus Petition No. 1323 of 1987 (Para 30)

6. Shyam Kumar Vs St. of U.P., 2007 SCC OnLine All 1784 (Para 30)

7. Nandan Singh Vs The St., 2008 (3) UC 1758 (Para 31)

8. St. of Raj. Vs Gurmail Singh, 2005 (1) JIC 844 (Para 35)

9. Valsala Vs St. of Kerala, 1993 Supp (3) SCC 665 (Para 35)

(Delivered by Hon'ble Karunesh Singh Pawar, J.)

1. Criminal appeal No.201 of 1994 and the connected criminal appeals No.182, 191 and 206 - all of 1994, were heard together and a common judgment is being passed as the appeals arise out of same sessions trial. Criminal Appeal No.201 of 1994 is the leading case.

2. Present criminal appeals have been preferred against the judgment and order dated 19.4.1994 passed by Special Judge/Additional Sessions Judge, Barabanki in Sessions Trial No.296 of 1987 whereby the accused appellants have been convicted and sentenced to undergo 10 years R.I. with Rs.1 lac fine in each of the offences under sections 8/18, 8/21 and 8/22 of N.D.P.S. Act, with default provision.

3. Heard learned counsel for the appellants and learned AGA for the State.

4. During pendency of this appeal, appellant no. 1 and appellant no. 3 of criminal appeal No.201 of 1994 have died and the appeal with regard to appellant no. 1 and appellant no. 3 has already been abated vide order dated 14.03.2013. The Court thus proceeds to hear the appeal qua appellant no. 2 Mohd. Habeeb and appellant no.4 Lal Mohammad as regards the leading criminal appeal.

Likewise, in criminal appeal No.206 of 1994, the appellant No.2 Mohammad Kaleem has died and the appeal qua the said appellant has abated vide order dated 18.9.2023. Thus, the appeal with regard to Mohammad Aneesh, appellant No.1 is taken up for hearing along with other criminal appeals.

5. Prosecution case is that on 03.06.1986, when the S.O. R.P. Shukla was present in police station and at 12:15 hours in the day, a secret informer informed that in the house of one Mohammad Ali son of Bhaggan, Village Tikra Usma, P.S. Jaidpur, Barabanki, Ante through 22-25 persons are making morphine. On this information, he took the present police personnel namely SI Sri Harishankar Singh, SI Sri A.K. Singh, Sri Jagpal Singh, Constable-187 Ramkrishn Mishra, Constable-344 Jitendra Singh, Constable-507 Kavaldev Singh, Constable-595 Dhanpat Lal, Constable-556 Ramashankar Yadav, Constable-114 Udaybhan Singh and also constables G-Company of second Batallion PAC who were present at the police station HC-9738 Tassavur hussain Khan, Constable-9804 Ram Prasad Tiwari, Constable 9959 Ram Kewal Singh, Constable 9794 Hardev Ram and Jeep Driver Constable Ram Prakash along with Govt. Jeep No. UTD-5018 reached to the house of Mohammad Ali and entered from the west gate and on seeing police personnel, Atik Ante son of Yaseen, Javir son of Wahid, Moharram Ali son of Bhaggan, Mahbube son of Moharram Ali, Younis son of Moharram Ali ran away from the north stairs of the house and jumped towards eastern side. Efforts were made to catch them, however, it went in vain. Other accused persons who were making morphine and were trying to escape at about 1:05 hours were caught along with the equipments and chemicals. Upon questioning they told their names as (i) Mohd. Aleem son of Sohrav, (ii) Mohd. Haleem son of Mohd. Saleem, (iii) Mohd. Haveev son of Shafi (iv) Abdul Mabood son of Mohd. Mustafa, (v) Shahe Alam son of Bhaggan, (vi) Mohd Ajeem son of fSohrav, (vii) Mohd. Akeel son of Mohd. Naseer, (viii) Mohd. Jaleel son of Mohd. Saleem, (ix) Mohd. Anees son of Mohd. Vaseer, (x) Mohd. Younis son of Cheda, (xi) Mohd. Suleman son of Abdul Gaffur, (xii) Mohd. Anees son of Bhaggan Sakinan Tikra Usma, P.S. Jaidpur, Barabanki, (xiii) Abdul Majeed son of Mod. Raseem, (xiv) Mohd. Haneef son of Suleman, (xv) Mohd. Kaleem son of Saleem Sakinan Tikra Murtaza, P.S. Jiadpur Barabanki and (xvi) Lal Mohammad son of Fakeere, P.S. Safdarganj, Barabanki. Upon inquiry it was informed that the morphine belongs to Atiq

@ Ante. From the spot, following recovery was made:-

मौके से बनी हुई मार्फिया, मार्फिया बनाने के उपकरण, रसायन मार्फिया बनाने के बाद बचा हुआ पदार्थ, सात प्लास्टिक के बड़े जरीकैन जिसमें से छः में अफीम का घोल भरा हुआ है तथा प्लास्टिक की पांच बड़ी वाल्टियां, एक लोहे की वाल्टी, पांच प्लास्टिक के टब दो तसला तामचीनी के एक तसला तावे का एक अल्युमूनियम की बड़ी पतीली जिसमे पानी एक बन्टीदार स्टोव पर गरम हो रहा, एक बड़ा तराजू लोहे का एक किलो के दो वाट पांच सौ ग्राम के दो वाट, दो सौ ग्राम का एक वाट, सौ ग्राम का एक वाट एक पीतल का छोटा तराजू एक प्लास्टिक की कीप उन्नीस अदद कपड़े के चौकोर टुकड़े अफीम का घोल छानने वाले जिनमें अफीम लगी हुई. दस भरे व दो खाली पैकेट जिस पर *Ammonium Chloride* का लेविल लगा, उन्नीस पैकेट भरे हुए बन्द तथा एक पैकेट खुला हुआ आधा आधा किलो के जिन पर *Sodium Carbonate anhydrous* का लेविल लगा, ग्यारह खाली बोतले जिन पर Solvent ether का लेविल लगा तथा एक रबड़ का काले रंग का बड़ा दस्ताना जिस पर अफीम लगी है, ग्यारह बोतले भरी हुई सील्ड तथा दो बोतल खुली हुई जिनमें बारह बोतलों पर *Acetic anhydride* का लेविल लगा एवं एक सील्ड बोतल का लेविल फटा हुआ अपठनीय है। छः बोतले जिनमें जिनमें एक खुली हुई जिन पर *Acetyl chloride* का लेविल लगा. पाच बोतले Hydrochloric acid का लेविल लगी जिनमें तीन बोतले खुली हुई पांच बोतल सील्ड गरी हुई जिन पर *Ammonia Solution* का लेविल लगा दो प्लास्टिक के खुले डिब्बे जिस पर *Charcoal Activated GR* का लेविल लगा एवं एक अदद *Plate bottom flask, 6000 ML* का च करीब 40kg चूना एक टाट के बोरे में बरामद हुआ। मौके पर बनी हुई माफिया तथा मार्फिया बनाने के बाद बचे हुए पदार्थ (अवशेष) तथा अफीम को तौला गया तो माफिया जो एक पालीथीन पेपर पर फैलाई हुई है. 16 किलो ताजी तथा नमः पायी गयी एवं मार्फिया बनाने के बाद बच्चा हुआ अवशेष जो एक प्लास्टिक की बोरी मे रखा है. 27 किलो ताजा व नम पाया गया तथा 4 किलो अफीम जो पालीथिन के एक थैले में रखी हुई है को कब्जा पुलिस में लिया गया। बरामद मार्फिया व अफीम आदि की अनुमानित कीमत करीब 16 लाख है। मुल्जिमान का यह कार्य *ND & PS Act* के अन्तर्गत दण्डनीय अपराध है अतः गिरिफतारी का कारण बताते हुए बाजाफता हिरासत पुलिस में लिया गया वरामद सुदा मार्फिया में से 100 ग्राम मार्फिया व अफीम मे से 50 ग्राम व मार्फिया बनाने के बाद अवशेष पदार्थ से 200 ग्राम बतौर नमूना अलग अलग पालीथिन के पेपर में रखकर कपड़े में अलग अलग सर्वमुहर किया गया तथा जरीकैन में रखे हुए अफीम के घोल से बतौर नमूना से थोड़ा थोड़ा निकाल कर एक शीशी में सर्वमुहर किया गया बरामद सुदा उपरोक्त माल मार्फिया को पालीथिन के पेपर मे रखकर खाद के प्लास्टिक के बोरे में, अफीम को पालीथिन के पेपर में रखकर कपड़े में, माफिया बनाने के बाद बचे अवशेष को प्लास्टिक की बोरी में, अफीम के घोल रखे छः जरीकैन को अलग अलग सर्वमुहर, एक बोरी में दस बोतल जिनमे हाइड्रोक्लोरिक एसिड व अमोनिया अल्यूशन व दो प्लास्टिक के *Charcoal Activated GR* डिब्बे को रखकर एक बोरे मे खाली बोतले ईथर की व एक रबड़ का दस्ताना रखकर एक बोरे में *Sodium carbonate anhydrous* व *Ammonium chloride* के पैकेट रखकर एक बोरे में *Acetic Anhydride* की बारह बोतल व एक बोतल फटे हुए लेबिल का तथा छः बोतले *Acetyl chloride* की रखकर एक बोरे में तराजू, कीप, वाट, स्टोव रखकर एक बोरी मे अफीम का घोल छानने के कपड़ो को रखकर एवं एक बोरे मे तसलों व पतीली को रखकर, चूने की उसी बोरे में ही रखकर अलग

अलग सर्वमुहर कर नमूना मोहर तैयार किया गया। चूंकि ग्राम टिकरा व उसके आस पास के अधिकतर लोग अफीम की तस्करी में लिप्त रहते हैं जिनका संगठित गिरोह है तथा इनका क्षेत्र में काफी प्रभाव व आतंक है। इस कारण कोई भी पेज फटा के वावजूद भी गवाही देने के लिए तैयार नही हुआ। फर्द मुस्तव कर वाद सुनाने मजमून फर्द अलामात आलाकतल अधिकारी व कर्मचारीगण बनवाये जा रहे है। संलग्नक फर्द बरामदगी 2 वर्क 51/- आर०पी० शुक्ला So 3.6.80 व हरिशंकर सिंह स० So 3.6.86, अरूण कुमार सिंह So 3.6.86 राम आसरे सिंह So 3.6.86 जयराम सिंह So व C/ जितेन्द्र सिंह व कवलदेव सिंह, राम प्रकाश तसपुर हुसैन खां उदय भान सिंह, वजरंगी सिंह यादव दलवीर सिंह यादव, हरदेव राम रामकेवल सिंह, C/ धनपत लाल, रामशंकर यादव, रामप्रसाद तिवारी, शिव मोहन पाण्डेय, रामकृष्ण मिश्रा, शाहे आलम नि०अ० मो० हलीम, नि०अ० मो० अलीम, मो० अजीम, मो० अनीस, मो० अकील नि०अ०म० हनीफ मो० युसुफ, मो० जमील, मो० अनीस, सुलेमान हबीस अब्दुल माबूद अब्दुल मजीद, मो० अनीस ४० लाल मोहम्मद उर्दू में।

नोट- *Note* मुल्जिमानो के फर्द की नकल दी गई जो फाड़कर फेंक दिये।

Sd. आर०पी०शुक्ला *So 3.6.86*

नोट- मै *HIM* प्रमाणित करता हूं कि नकल फर्द चिक हस्ताक्षर अंकित की गई।"

6. Recovery memo was prepared which is exhibited as Ex. Ka-1. On the basis of recovery memo, first information report was lodged which is exhibited as Ex. Ka-2. The I.O. prepared the site plan which is exhibited as Ex. Ka-15. The recovered opium and morphine was sent for chemical examination. The opium examination report is exhibited as Ex. Ka-16, Ka-17, Ka-18 and Ka-19. After completing formalities and recording the statement of the witnesses, the investigating officer submitted charge sheet.

7. Since the matter was triable by sessions, hence, committal order was passed on 12.08.1987 and charges were framed by 6th Additional District and Sessions Judge, Barabanki on 23.02.1988 against the accused Alim, Mohd. Habib, Abdul Mabeed, ShahAlam, Mohd. Azim, Mohd. Halim, Mohd. Akeel, Mohd. Jalil, Mohd. Anis, Mohd. Yusuf, Mohd. Suleman, Mohd. Anis son of Mohd. Bashir, Mohd. Hanif, Abdul Majid, Mohd. Kalim and Lal Mohd.

8. Prosecution to prove its case has produced six witnesses. PW-1 Ramesh Prasad Shukla, Station Officer Incharge and S.I. as well as the complainant. PW-2 A. K. Singh hamrahi(associate) who is fact witness. PW-3 Teerath Raj Pandey, Head Constable who has proved chick FIR, PW-4 Constable-595 Dhanpat Lal who prepared docket and took the sample for examination to Gazipur, PW-5 Constable-545 Triyogi Narain Pandey who prepared docket and took sample to Gazipur where sample was not deposited and he took it back. PW-6 Ram Vilas Singh, the investigating officer.

9. The accused in his defence has also produced DW - Mohammad Yasin.

10. Statements of the accused persons namely Suleman, Habib, Mabood, Haleem, Aleem, Ajeem, Lal Mohammad, Anees, Mohd. Haneef, Shah Alam, Kaleem, Mohd. Anees, Mohd. Akeel and Yousuf under Section 313 Cr.P.C. were recorded where their case was of total denial and false implication due to enmity.

11. PW-1 in his examination-of-chief has repeated the prosecution version as narrated in the recovery memo and the F.I.R. In cross-examination, he has stated that at the time of search, seizure and arrest, his rank was of Sub-Inspector. After receiving information, he went to Tikra Village and prior to that he did not go with any officer nor took any authority letter. Information received from the informer was not reduced into writing. He further stated that reference of the same was entered into GD by *him* and apart from that, he has not reduced anything else into writing. He further stated that GD has not been produced before the Court. He took the search without any search warrant and no search memo was prepared.

He further stated that the on the samples which were brought by *him* to the police station, no seal was affixed of police station. Sample and the mall (seized contraband) remained at police station which was sent to the Court along with the accused. Thereafter it remained deposited in the Malkhana of police station. It was not deposited in Sadar Malkhana as no permission was taken by the magistrate for depositing the alleged contraband. He denied the suggestion that to show good work, false story was made and innocent people have been implicated.

12. PW-2 S.I. A.K. Singh has also repeated the same prosecution version as narrated in the recovery memo and the F.I.R. In the cross, he has stated that he does not remember as to who had put seal on the contraband. He does not remember that SO (PW-1) had put any seal or not. He further stated that he had no search warrant.

13. PW-3 Teerath Raj Pandey, Head Constable has stated that on the basis of the recovery memo dated 03.06.1986, an F.I.R. bearing No. 62 was registered as case crime No. 101/1986, under Section 8/18/21/82 NDPS Act. In the cross, he has stated that rawanagi of R.P. Shukla and other police personnel took place on 03.06.1986 at 12:30 hours in the day and was written by A.K. Singh SI in GS.

14. PW-4 is Constable-595 Dhanpat Lal who has stated that while he was posted as Constable at P.S. Jaidpur, he got prepared the docket of sample of Mall along with SI Jagmail Singh for examination after producing it before CJM Barabanki. The docket is exhibited as Ex.Ka-4. He deposited it into Gazipur factory on 24.07.1986 which is exhibited as Ex. Ka-5. In the cross, he has stated that sample of the contraband remained with *him* and not with the Sub Inspector.

15. PW-5 Triyogi Narayan Pandey in his statement has stated that he took sample of contraband (maal) after receiving it from the police station and went to the CJM for preparing docket and after producing it before the Court, docket was prepared. On that day since it was late, the contraband was deposited in the police station. On 19.06.1986 again he took maal along with docket and sample seal from the police station and went to FSL laboratory Gazipur along with Hamrahi SI Sri Harishankar Singh. He went to Gazipur for examination of the maal where it was examined. On 23.06.1986, he returned from Gazipur and deposited maal along with sample seal and docket in the police station. He further stated that sample was in his possession and was not tampered. In the cross, he has admitted that sample seal is not in the Court record. He was directed by the CJM to take sample to Gazipur since it was late and without any order, he along with said

Inspector deposited Maal in the police station and from their on 19.06.1986, he received sample mall, docket and sample seal. He further stated that sample seal is not on the record before the CJM. Maal was not opened. Only sample was opened and the same was again sealed by the CJM.

16. PW-6 is I.O. who conducted inspection of the place of occurrence for chemical examination. Maal was produced in the Court, however, docket could not be prepared. On 03.07.1986, S.I. Hari Shankar Singh got prepared the docket for chemical examination at Agra. On 18.07.1986 again, for preparing the docket, a report was given. On 21.07.1986, the maal was directed to be examined by the commissioner in Gazipur factory again. On 23.07.1986 after preparing docket from the CJM, he took it to Gazipur, but no examination could be done. He filed charge sheet. In the cross, he has stated that there was no time to take search warrant for the place wherefrom recovery was made. He has not taken any document relating to that house. Villagers told *him* that this is house of Moharram Ali. He does not know the name of villager who told this. He denied the false implication.

17. DW-1 Mohammad Yaseen has stated that at about 12-12:30 hours in the day, four constables came in the village. He was sitting at his door. He sustained some injury in his leg. He was called by them and Haneef was also called by them whose house is in front of his house and they were taken to the north side of the village where some persons were already sitting. All of them were taken to the police station. Since his left leg was injured, therefore, he was not taken.

18. Learned counsel for the appellants submits that search and seizure was effected on 03.06.1986 by Sub Inspector/PW-1 of the Police Station on the basis of the information received from the secret informer. It has been submitted that PW-1 was not authorized under Section 42 of NDPS Act read with Rule 77 of UP NDPS Rules 1986. It has been submitted that only Inspector of Police was authorized to conduct search and seizure as per rules framed on 08.10.1986.

It is further submitted that Sub Inspector was not authorized to make search and seizure under NDPS Act. Provisions of Section 42 of NDPS Act have not been complied with at all which vitiates the trial. There is gross violation of Section 57 of NDPS Act.

It is further submitted that Sections 100 and 105 Cr.P.C. has also been violated. He further argued that link evidence is not complete. Sample was not drawn according to Rule 81 of the U.P. Narcotic and Drug Control Rules, 1986 read with Section 282 of U.P. Excise Manual. Maalkhana register was not produced by the prosecution before the Court. No docket was prepared before the Court and duplicate sample or sample or seal along with original seal was not produced before the Court. No independent witness has been examined. Owner of the house Moharram Ali and owner of the alleged contraband Atik @ Ante have not been produced by the prosecution.

19. Per contra Shri Alok Tewari, learned A.G.A. has opposed the submission advanced by learned counsel for the appellant submitting that information was reduced into writing in the Ravanagi GD. It is a heinous offence. The accused persons have been caught from the spot. Slight defect in the investigation will not be beneficial for the accused.

20. The following questions fall for consideration:-

i) Whether prior information received by PW-1 was reduced by *him* in writing and the same was forwarded to his superior officers?

ii) Whether PW-1 who was S.I. at the relevant time was empowered and authorized under Section 42 of NDPS Act read with U.P. NDPS Rules, 1986 Rule-77?

iii) Whether link evidence is complete?

21. Section 42 of NDPS Act empowers notified officers of Central Govt. or the State Govt. to entry, search, seizure and arrest. The said section 42 of NDPS Act is extracted below:-

42. Power of entry, search, seizure and arrest without warrant or authorization.

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intellegence oany other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a StateGovernment as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given byany person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset:

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act: Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief

under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.]

22. Perusal of sub section (2) of Section 42 of NDPS Act shows that the officer has to take down information received by *him* in writing under sub section (1) of Section 42 and within 72 hours shall send a copy thereof to his immediate officer superior.

23. A perusal of the statement of PW-1 who has received the information on that day i.e. on 03.06.1986 at about 11 am at police station shows that in his chief he has stated that he has not reduced information into writing, though, he has said that he has mentioned it into general diary of the police station and that general diary has not been filed in the Court. Thus, it is clear that information received by PW-1 under proviso to sub section (2) of Section 42 NDPS Act has not been reduced into writing. PW-1 also nowhere has stated that such information received by *him* has been forwarded to his superior officer.

24. Supreme Court in ***Boota Singh v. State of Haryana, 2021 SCC OnLine SC 324,*** has held that total non-compliance of Section 42 cannot be accepted. Para 14 of the said judgment is extracted below:-

"14. What Section 42(2) requires is that where an officer takes down an information in writing under sub-section (1) he shall send a copy thereof to his immediate officer senior. The communication Ext. P-15 which was sent to the Circle Officer, Nohar was not as per the information recorded in Ext. P-14 and Ext. P-21. Thus, no error was committed by the High Court in coming to the conclusion that there was breach of Section 42(2).

25. Likewise in ***"State of Rajasthan v. Babu Lal, (2009) 14 SCC 215,*** it was held by the Supreme Court that since the provisions of Section 42 sub section (2) of NDPS Act were not complied with, therefore, the Supreme Court refused to entertain the appeal of the State Govt. against the acquittal order passed by the High Court and order of the High Court was affirmed.

In ***"Karnail Singh Vs. State Haryana, reported in (2009) 3 SCC (Cri) 887"***, in para *35-C and 35-D, it was held by the Supreme Court that compliance of section 42(1) and 42(2) of NDPS Act with regard to writing down the information received and sending a copy thereof to the superior officer should normally precede the entry, search and seizure by the officer. But, in special circumstances where there are emergent situations, the relaxation of postponing the said action by the police officer for a reasonable period was given, however, it was held that the total non-compliance of requirement of sub section (1) and sub section (2) of section 42 of NDPS Act is impermissible. The relevant para no. 35-C and 35-D are extracted below:-*

35(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

The Supreme Court in ***"Sukhdev Singh v. State of Haryana, (2013) 2 SCC 212"*** in para 25 has held that where there is total non-compliance of Section 42 of NDPS Act, it is a patent illegality in the case of prosecution and also held that such illegality is incurable. Relevant para 25 is extracted below:-

25. There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total non-compliance, thus the question of substantial compliance would not even arise for consideration of the Court in the present case. The twin purposes of the provisions of Section 42 which can broadly be stated are that: (a) it is a mandatory provision which ought to be construed and complied with strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery (sic prior to recovery).

26. Thus, from perusal of the prosecution case and the statement of PW-1, it is clear that neither the information received by PW-1 in the police station at 11 am was reduced into writing nor the same was sent to any officer superior to PW-1. Hence, in view of the Constitution Bench judgment in the case of ***Karnail Singh (supra)*** as well as other judgments referred herein above, it can be safely said that on this ground alone, the judgment of the trial court is liable to be set aside.

27. It is significant to *note* that Section 42 sub section (1) empowers any officer being superior rank to peon, sepoy or constable of the various departments of central Govt. or of any revenue, drugs control, excise, police or other departments of a State Govt. as is empowered in this behalf by general or special order of the State Govt. to enter, search, seize and arrest in the NDPS Act. However, in this case, as argued by learned counsel for the appellants, there was no general/special order of the State Govt. in that regard authorizing PW-1 to enter, search, seize and arrest the accused persons.

28. A perusal of the statements of PW-1 shows that when he took the search and made the arrest, he was Sub Inspector. The incident took place on 03.06.1986; the State Govt. promulgated the Uttar Pradesh

N.D. Rules, 1986 on 8.10.1986, however, vide amendment made on 17.10.1989, Rule 77 was amended and for the first time Sub Inspector of Police Department of State of U.P was authorized to act under Section 42 of the Act. Rule 77 of 1986 Rules is extracted below:-

*"77. **Power of entry, search, seizure and arrest without warrant or authorisation.-** Any Officer of the Excise or Police Department not below the rank of Inspector or of the Police Department not below the rank of Sub-Inspector or of the Drug Control Department not below the rank of Inspector or of the Revenue Department not below the rank of Tahsildar may exercise the powers under Section 42 of the Act."*

29. The amendment made in 1989 by the State Govt. in Rule 77 of 1986 Rules being prospective in nature makes it clear that PW-1 who was Sub Inspector at the time of incident which took place on 03.06.1986 was not authorized under 1986 Rules to act under Section 42 of NDPS Act. Thus, the entire search, seizure as well as arrest is vitiated since the beginning in this case.

30. In ***Kamlesh Pratap Singh Vs. Superintendent of District Jail, Lucknow and others,*** Habeas Corpus petition No. 1323 of 1987, this court, vide its judgment and order dated 12.08.1988 has held that Sub Inspector before the amendment of Rule 77 of 1986 Rules was not empowered to act under Section 42 of NDPS Act. This preposition of law has been followed by another Bench of this Court in *"Shyam Kumar v. State of U.P., 2007 SCC OnLine All 1784".* Relevant para 12 of the judgment is extracted below:-

12. Therefore, only the rank of Inspector in police department was authorised to take search and seizure under section 42 of N.D.P.S. Act at the time of alleged incident. P.W. 3 S.O. who was arresting officer, was admittedly sub-inspector, his companions were also sub-inspector and head constable and home-guards etc., they were not authorised to take search of the appellant at the time of alleged incident under section 42 of, N.D.P.S. Act. Therefore, such search and seizure was illegal. It was also held by Hon. Mr. Justice Kamleshwar Nath, judge of this Court. Lucknow Bench in case of Kamlesh Pratap Singh v. Superintendent of District Jail, Lucknow that "Sub-Inspector of Police, not competent to arrest for offences under sections 8 and 20, whether covered by section 42 or 43 Cr. P.C. 197, sections 4(2) and 5-Constitution of India, Article 21." After delivering this decision, amendment was made in Rule 77 which was applicable since 8.10.86. It is not applicable with retrospective effect. Therefore, above decision in case of Kamlesh Pratap Singh v. Superintendent of District Jail, Lucknowis fully applicable in the case and Sub-Inspector of police was not competent to arrest for the offence as above and he was also not competent to make search and seizure regarding contraband article. There fore, contention of learned Counsel for the appellant has great force.

31. The judgment in ***Kamlesh Pratap Singh (supra)*** was further relied in the judgment of Uttrakhand High Court in ***Nandan Singh Vs. The State, reported in 2008 (3) UC 1758.***

32. In the opinion of this Court, for launching prosecution or for initiating the proceedings under Section 42 of the NDPS Act, PW-1 who was Sub Inspector at that time was not an empowered officer as

mentioned therein to act under Section 42 NDPS Act. It is only after the amendment in Rule 77 of 1986 Rules on 17.10.1989 for the first time, the Sub Inspector was empowered. Rule 77 of 1986 Rules being not retrospective in nature; rather it is prospective makes the search, seizure and arrest of the person contrary to the NDPS Act.

33. From perusal of the evidence on record, it is alleged by the prosecution that sample was drawn on spot on 03.06.1986. It is further alleged that it was deposited in Malkhana along with recovered contraband. It was sent to the Court at the time of remand, however, perusal of the statement of PW 6 at page 44 of the paper book shows that although the contraband was produced before the Court, however, the docket could not be prepared. Again the docket was prepared on 18.06.1986 in the Court of CJM and after taking the sample Sub Inspector Harishankar Singh along with mall and docket went Gazipur for chemical examination of the sample. He returned back on 30.06.1986 and told that in Gazipur, only afeem is examined. On 03.07.1986, again docket was prepared for examination at Agra and again on 23.07.1986, the docket was prepared and was taken for examination and he came with the examination report on 25.07.1986.

34. On the contrary, PW-5 at page no. 39 has stated that on 17.06.1986 docket was prepared and was again taken from the concerned P.S. The contraband along with docket and sample seal was taken to the laboratory for chemical examination and returned on 23.06.1986 and sample was not deposited.

On the other hand PW-4 Dhanpat Rai at page No. 36 has stated that the docket was prepared on 23.07.1986 and was deposited on 24.07.1986 at the examination centre and on 25.07.1986, the report was given and he returned on 26.07.1986 to the police station and deposited it at the police station.

Thus statements of all three witnesses PW-4, PW-5 and PW-6 are quite contrary. No link evidence has been produced. Although the incident is of 03.06.1986, the sample has been sent for chemical laboratory on 24.07.1986, that too after inordinate delay. The Malkhana Register is neither signed nor proved. It has also not been proved as to on what occasions, the sample was drawn and when it was deposited. The sample seal has also not been proved. The original seal has neither been given to the independent witnesses nor it has been deposited in the Malkhana.

35. In State of ***Rajasthan Vs Gurmail Singh reported in 2005 (1) JIC 844 (relevant in para 3)***, it was held by the Supreme Court that since Malkhana register was not produced and no sample of seal along with sample of excise laboratory was sent for comparison, link evidence was missing and therefore, the acquittal order passed by the High Court was upheld. Relevant para 3 is extracted below:-

"3. We have perused the judgment of the High Court. Apart from other reasons recorded by the High Court, we find that the link evidence adduced by the prosecution was not at all satisfactory. In the first instance, though the seized articles are said to have been kept in the malkhana on 20-5-1995, the malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW 6 on 5-6-1995. We further find that no sample of the seal was sent along with the sample

to the Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. Therefore, there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. These loopholes in the prosecution case have led the High Court to acquit the respondent."

Similarly in ***"Valsala v. State of Kerala, 1993 Supp (3) SCC 665"*** (para 4), it was held by the Supreme Court that the seized articles have not been kept in proper custody and proper form so that the Court can be sure that what was seized only was sent to the chemical examination. Big gap and the missing links were also *note*d while setting aside the conviction of the accused under Section 21 of the NDPS Act. Para 4 of the said judgment is extracted below:-

4. We have seen the report of the Chemical Examiner and there no doubt it is mentioned that one sealed parcel was received containing a powder and it was analysed to be brown sugar. But from the records it is clear and it is also noted by both the courts below that the seized article was produced in the court only on January 14, 1988 i.e. after a period of more than three months and there is no evidence whatsoever at all to show with whom the seized article was lying and even assuming that it was in the custody of PW 6, the Officer in charge of the police station who seized it, there is again nothing to show whether it was sealed and kept there. The learned counsel for the State no doubt argued that the provisions of Section 55 of the Act are not mandatory but only directory. We need not go into this legal question in this case. Suffice it to say that the article seized appears to have been not kept in proper custody and proper form so that the court can be sure that what was seized only was sent to the Chemical Examiner. There is a big gap and an important missing link. In the mahazar Ex. P-2 which is immediately said to have been prepared, there is nothing mentioned as to under whose custody it was kept after seizure. Unfortunately for the prosecution even PW 6 does not say that he continued to keep it in his custody under seal till it was produced in the court on January 14, 1988. The evidence given by PW 6 Police Sub-Inspector, who seized the article is absolutely silent as to what he did with the seized article till it was produced in the court. As a matter of fact he did not produce it in the court. PW 3, A.S.I. is supposed to have produced the same in the court. But PW 3 does not say anything about this. It is only PW 7 the Circle Inspector who comes into the picture at a later date, who admitted in the cross-examination that the seized article was sent by PW 3 (A.S.I.) to the court and PW 7 in his cross-examination further admitted that he did not even see if the recovered material object was sealed but still he claims that he made the necessary application for sending the material object for chemical examination and it is only through PW 7 that the Chemical Examiner's report is marked. PW 7 further admitted that he did not even know when it reached the court. We are constrained to say that the investigation in this case has been perfunctory and on important aspects the evidence of the concerned officers is highly discrepant and unconvincing and does not throw much light. Therefore the evidence adduced is wholly insufficient to conclude that what was seized from the appellant alone was sent to the Chemical Examiner. Though this is purely a question of fact but this is an important link. Both the courts below have not examined this aspect in a proper perspective. No doubt

the trafficking in narcotic drugs is a menace to the society but in the absence of satisfactory proof, the courts cannot convict.

36. Thus, from the discussions made herein above, it is evident that PW-1 who was admittedly the Sub Inspector at the relevant time was not authorized to act under Section 42 of the NDPS Act as the notification amending Rule 77 of 1986 Rules empowering the Sub Inspector of U.P. Police to act and exercise the powers under Section 42 of the Act came into effect on 17.10.1989. The arrest, search and seizure admittedly was prior to that. Precisely on 03.06.1986, PW-1 was not competent to act and exercise powers under Section 42 of the Act. The act of PW-2 was ultra-virus and accordingly, the entire entry, search, seizure and arrest made by PW-1 and the team was in defiance of Section 42 of the Act and as such has vitiated the entire investigation.

37. Likewise, there is total non-compliance of Section 42 sub section (2) of 1985 Act. PW-1 has not reduced information received by *him* in writing, although, there was ample time as the information was received according to the statement of PW-1 at 11 am and the raid was conducted at 1:05 pm. Thus, there was ample opportunity and the time with PW-1 to record information in writing, which he did not do so and therefore, in view of the judgments referred to herein above, there is total non-compliance of Section 42 of 1985 Act and thus, in view of the Constitution Bench Judgment of ***Karnail Singh (supra)***, the entire investigation is vitiated. Lastly, the link evidence is also missing. The prosecution has failed to prove its case beyond reasonable doubt.

38. In view of the discussion made herein above, the appeals are allowed and the judgment dated 19.4.1994 (supra) is set aside. The appellants are acquitted of the charges levelled against them. They are on bail. Their bail bonds are discharged.

39. Let a copy of this order be sent to the District Judge, Barabaki along with the lower court's record.

A copy of the judgment be also sent to the concerned Superintendent, Jail, immediately.

40. A copy of this order be also placed on the record of each of the connected appeals.

(2024) 1 ILRA 90
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 20 of 2023

Sanno ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Pradeep Yadav

Counsel for the Opposite Parties:
G.A., Sri Hemant Kumar Singh

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision , Section 156 (3) - Indian Penal Code, 1860 - Sections 34, 323, 504, 506 & 354 - The Protection of Children From Sexual Offences Act, 2012 - Section 7/8 - Sexual assault / Punishment for sexual assault - Magistrate may issue a direction if the case is made out to proceed immediately, based on the credibility of the available information or the interest of

justice, and if it is deemed appropriate to conduct the investigation immediately - Magistrate has to apply his mind to the allegations in the complaint - Magistrate not bound to pass order for registration of F.I.R. in every application u/s 156 (3) Cr.P.C. .(Para - 9,10)

Application moved by revisionist u/s 156 (3) Cr.P.C. - for registration of case against opposite party - dismissed by trial court - ground - one of accused had registered a criminal case against father of petitioner and 5 others - Court found both parties are relatives and live in the same village - indicating no likelihood of alleged offence against relatives near their house - hence revision. **(Para -3,4)**

HELD:-Trial court did not commit any illegality, irregularity, or impropriety in passing the impugned order, and therefore, the criminal revision is deemed meritless. (Para-12)

Revision dismissed. (E-7)

List of Cases cited:

1. Lalita Kumari Vs Govt. of U.P. & ors. , 2014 2 SCC 1

2. Ramdev Food Products Pvt. Ltd. Vs St. of Guj. , (2015) 6 SCC 439

3. Rambabu Gupta Vs St. of U.P., 2001 Cr.L.J. 3363

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Pradeep Yadav, learned counsel for the revisionist, Sri Hemant Kumar Singh, learned counsel for the opposite party nos. 2, 3 and 4 and learned A.G.A. for the State.

2. This criminal revision has been filed against the impugned order dated 21.09.2022 passed by the Special Judge (POCSO Act), Azamgarh, in Criminal Misc. Case No. 39 of 2022 (Sanno Vs. Shahnawaz and others) u/s 156 (3) Cr.P.C.

3. By the impugned order, the trial court dismissed the application of the revisionist u/s 156 (3) Cr.P.C. for registration of case against opposite party nos. 2, 3 and 4.

4. It has been submitted by learned counsel for the revisionist that from the averments made in the application u/s 156 (3) Cr.P.C., a cognizable offence was made out against the opposite party nos. 2, 3 and 4 but the trial court without any legal ground rejected her application for registration of a criminal case and investigation thereof by the S.O. of the concerned police station. It has next been submitted that the trial court rejected the application merely on the ground that one of the accused, namely, Ansar, had registered a criminal case bearing Case Crime No. 125 of 2022 u/s 34, 323, 504, 506, 354 I.P.C. and 7/8 POCSO Act, Police Station- Atrauliya, District- Azamgarh, against the father of the petitioner, Noorul Huda Kayim and 5 others. It has also been submitted that the application u/s 156 (3) Cr.P.C. cannot be dismissed merely on the presumption that it was registered to take revenge for the first information report previously registered by the opposite party nos. 2 to 4 against revisionist's father. Learned counsel for the revisionist has placed reliance on the judgement of the Hon'ble Apex Court in the case of **Lalita Kumari Vs. Govt. of U.P. & Others, 2014 2 SCC 1.**

5. Per contra, Sri Hemant Kumar Singh, learned counsel for the opposite party nos. 2, 3 and 4 has submitted that the trial court has passed the impugned order after considering the facts in the light of the

law laid down by the Hon'ble Apex Court regarding registration of first information report. It has been next submitted that the date of occurrence of the alleged offence in the application u/s 156 (3) Cr.P.C. is 01.07.2022 whereas for the first time, the revisionist/applicant gave application to S.S.P., Azamgarh on 16.07.2022 after a gap of 16 days and no explanation has been given for the aforesaid delay. In the application, it has not been mentioned that the applicant earlier tried to get her first information report registered by submitting application to the S.O. of concerned police station. It has also been submitted that the Class VIII examination marksheet filed by the revisionist which is issued by Madarsa Islamia Faizan-I-Raza does not bear the stamp of the Principal of the school. It has also been submitted that the revisionist resides in District- Azamgarh. No reason has been given why marksheet has been issued from school situated in District- Ambedkar Nagar in proof of her date of birth.

6. The averments made in application u/s 156 (3) Cr.P.C. filed by the revisionist, Sanno, in brief is that applicant, Sanno, daughter of Noorul Huda Kayim, resident of village- Sakin Saraiya Ratnawa, Police Station- Atrauliya, District- Azamgarh, who has passed Class- VIII in 2022, was on 01.07.2022 at 8 p.m. going towards west of her house to Siwan. Her neighbour, opposite party no. 2, Shahnawaz, was sitting concealing himself for ambush. As soon as revisionist/applicant reached there, he held her hands and forcibly put her on the ground and removed her clothes. He started making obscene gestures with her. On hue and cry being raised by the revisionist/applicant, her mother, Avtaran, reached there. Then accused, Shahnawaz, fled from the place of occurrence. The revisionist's mother, Avtaran and her grandfather, Wazir, visited the house of Shahnawaz to complain against him to his parents. There opposite party nos. 3 and 4, namely, Ansar and Takdirun, threatened revisionist's mother and her grandfather that if they again dared to complain against their son, Shahnawaz, they will kill them.

7. The ruling of **Lalita Kumari (supra)** cited by the revisionist relates to registration of first information report u/s 154 (1) Cr.P.C. on the application of the informant by the S.O. In the aforesaid case of **Lalita Kumari (supra)**, the Hon'ble Apex Court has given requirements for registration of first information report by the S.O. of concerned police station. In this case, the Hon'ble Apex Court has not given directions to the Magistrate regarding passing of the order on the application u/s 156 (3) Cr.P.C. The Hon'ble Apex Court has expressed the desirability of registration of first information report u/s 154 (1) Cr.P.C. by the S.O. on the application of the applicant/informant. The Hon'ble Apex Court had issued following guidelines for registration of first information report by the S.O. concerned u/s 154 (1) Cr.P.C. :-

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

the officer concerned is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

53. Investigation of offences and prosecution of offenders are the duties of the State. For "cognizable offences", a duty has been cast upon the police to register FIR and to conduct investigation except as otherwise permitted specifically under Section 157 of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.

8. Admittedly, the impugned order was passed by Special Judge (POCSO Act), Azamgarh, on the application u/s 156 (3) Cr.P.C. submitted by the revisionist/applicant. Admittedly, revisionist and opposite party nos. 2 to 4 are relatives and are residents of the same village. From the perusal of the record, it transpires that on 01.04.2022, opposite party no. 3, Ansar, had lodged a first information report bearing Case Crime No. 125 of 2022 u/s 34, 323, 504, 506, 354 I.P.C. and 7/8 POCSO Act, Police Station- Atrauliya, District- Azamgarh, against the father of the petitioner, Noorul Huda Kayim and 5 other persons in which after investigation, the Investigating Officer has submitted charge-sheet under the aforesaid sections and trial is pending in the concerned court.

9. In **Ramdev Food Products Pvt. Ltd. Vs. State of Gujarat, (2015) 6 SCC 439**, the Hon'ble Apex Court has held that :-

"The direction u/s 156 (3) is to be issued only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone instance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued. In other words, where on account of credibility of information available, or weighing the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued."

10. In case of **Rambabu Gupta Vs. State of U.P., 2001 Cr.L.J. 3363**, the Full Bench of the Allahabad High Court has held that the Magistrate has to apply his mind to the allegations in the complaint. He may at once take cognizance or order that the case be sent to the police station for being registered and be investigated. The order of the Magistrate has necessarily to indicate the application of mind. Thus, Magistrate is not bound to pass order for registration of F.I.R. in every application u/s 156 (3) Cr.P.C.

11. In its impugned order, the trial court has given reasons that revisionist/applicant has presented application u/s 156 (3) Cr.P.C. in July, 2022 against opposite party nos. 2 to 4 as a counterblast to the aforesaid first information report lodged by the opposite party no. 3, Ansar on 01.04.2023 against revisionist's father, Noorul Huda and 5

others in which after investigation, charge-sheet has been filed. The trial court has also mentioned that both parties are relatives and live in the same village. There is no likelihood of opposite party nos. 2 to 4 committing alleged offence against their relatives near their house.

12. Considering the impugned judgement and facts and circumstances of the case in the light of the law propounded by the Hon'ble Apex Court regarding registration of first information report u/s 156 (3) Cr.P.C., the Court is of the view that while passing the impugned order, the trial court has not committed any illegality, irregularity or impropriety. There is no merit in the criminal revision and the same is liable to be dismissed.

13. The criminal revision is **dismissed,** accordingly.

14. Let a copy of this order be sent to the concerned trial court for necessary action.

(2024) 1 ILRA 94
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 467 of 2023

State of U.P. ...Revisionist
Versus
M/S Khetan Chemicals Fertilizers Ltd. Jhansi ...Opposite Party

Counsel for the Revisionist:
G.A., Ram Asarey Verma

Counsel for the Opposite Party:

(A) Criminal Law - Code of Criminal Procedure, 1973 - Sections 397(1) /401 - Revision - Section 397(2) - powers of revision conferred by sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding , U.P. Essential Commodities Act, 1955 - Section 6-A - Confiscation of essential commodity - Additional District Magistrate declined to release the seized goods of the respondent - which order has been reversed in appeal. **(Para - 9)**

HELD:-Order of seizure or release of goods does not affect the case's merits and is an interlocutory order. Revisions filed against an order of seizure under Section 6-A of the Essential Commodities Act or an appellate order reversing the order would not be maintainable under Section 397 (2) Cr.P.C. **(Para - 9)**

Revision dismissed. (E-7)

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

1. Heard Sri Ajay Kumar Srivastava, the learned Additional Government Advocate appearing on behalf of the State of U.P. and Sri Ram Asarey Verma, the learned counsel for the respondent.

2. Sri Arvind Kumar Chaudhary, the District Agriculture Officer, Lakhimpur Kheri is also present in compliance of the order dated 22.12.2023, passed by this court.

3. The instant revision has been filed by the State under Section 397 (1), 401 of Cr.P.C. assailing the validity of the order dated 03.04.2023, passed by learned Additional Sessions Judge/Court No.4/Special Judge, E.C. Act, Lakhimpur Kheri in Criminal Appeal No.21 of 2023.

4. The aforesaid appeal was filed against an order dated 06.03.2023, passed

by learned Additional District Magistrate, Finance and Revenue, Lakhimpur Kheri in Case No.132 of 2023, under Section 6-A of U.P. Essential Commodities Act, 1955. The aforesaid order states that a team of officials had carried out surprise inspection of M/s Govind Industries, Rajapur, Development Block Rajapur, Lakhimpur Kheri. During inspection fake fertilizers, packing material and illegal storage of fertilizers were found. Some raw material meant to be used in manufacturing of fertilizer was also found during inspection.

5. Amongsts numerous articles seized by the Inspection Team a truck loaded with fertilizer belonging to the respondent was also included. By means of an order dated 06.03.2023, the Additional District Magistrate has ordered that the sealed fertilizer/raw material used for manufacturing of fertilizer was subject to natural decay and accordingly it was ordered to be confiscated. The request for release of the other seized articles, including the truck of the opposite party and the goods loaded on it, was turned down.

6. The respondent filed an appeal no.22 of 2023 against the order of seizure of goods loaded on the respondent's truck and he filed an Appeal No.21 of 2023 against seizure of truck. Both the appeals have been allowed by means of separate orders dated 03.04.2023, passed by learned Additional Sessions Judge/Court No.4/Special Judge, E.C. Act, Lakhimpur Kheri and the respondent's truck and goods have been ordered to be released in its favour.

7. It has been held in the appellate order that the appellant's truck loaded with some goods was parked in the premises of Govind Industries, Rajapur. The appellant had produced GST invoice, bills insurance, e-way bill etc which indicated that the goods had been transported from UPSIDC Industrial Area Malwa, District Fatehpur to Maigalganj, Lakhimpur Kheri. A slight deviation in the destination would not establish that the goods were being taken elsewhere. The fertilizer loaded in the truck was subject to decay. While ordering release of goods, the appellate court has laid down certain conditions.

8. The State has filed a revision under Section 397 Cr.P.C. against the aforesaid order.

9. Sub Section (2) of Section 397 Cr.P.C. provides that the powers of revision conferred by sub- section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. By means of the order dated 06.03.2023, the Additional District Magistrate had merely declined to release the seized goods of the respondent, which order has been reversed in appeal. The order of seizure of goods or their release does not affect the merits of the case either way and it is purely an interlocutory order. Therefore, in view of the provisions contained in Section 397 (2) Cr.P.C. the revision filed against an order of seizure of goods under Section 6-A of Essential Commodities Act or an appellate order reversing the order of seizure would not be maintainable.

10. Accordingly, the revision is not maintainable and the same is accordingly ***dismissed.***

(2024) 1 ILRA 96
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.01.2024

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 794 of 2018

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

Counsel for the Revisionist:
Nadeem Murtaza

Counsel for the Opposite Parties:
Govt. Advocate, Kailash Chandra, Mayank Pandey

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Section 311 - Power to summon material witness, or examine person present , Section 233 - Entering upon defence , Indian Penal Code, 1860 - Section 302 - Murder - "Fair trial" - includes fair and proper opportunities allowed by law to prove her innocence - Adducing evidence in support of the defence is a valuable right - Denial of that right means denial of fair trial - It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them" . (Para - 6, 7)

(B) Criminal Law - Code of Criminal Procedure, 1973 - Section 233(3) - If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice - application should not be refused on grounds not covered by three excluding clauses in section 233(3) Cr.P.C., as the defense sought witnesses were never examined as prosecution witnesses, despite being witnesses of inquest. (Para - 5,6)
Revisionist accused facing trial under section 302 IPC - applied to summon five public witnesses as prosecution witnesses - trial court rejected - accused requested summoning as defense witnesses - prosecution objected - claiming they were witnesses of inquest report and switched sides - order under challenge by defence - case continues under section 313 Cr.P.C. **(Para - 2)**

HELD:-Trial court's order that summoning witnesses will tantamount to review is misconceived. Court failed to apply law correctly and ignored the difference in scope and implications between section 311 Cr.P.C. and section 233(3) Cr.P.C., resulting in a legal flaw and unsustainable order. Order Set-Aside. Revisionist to submit names of 2 defense witnesses within a week of certified copy. Trial court to issue summons for their production. **(Para - 8,11)**

Revision disposed of. (E-7)

List of Cases cited:

1. St. of M.P. Vs Badri Yadav & anr., (2006) 9 SCC 549

2. Ram Charitra Singh Vs St. of U.P. & anr. , Application U/S 482 No. 28214 of 2019

3. Kalyani Baskar Vs M.S. Sampoornam, (2007) 2 SCC 258

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

1. Heard Sri Nadeem Murtaza, learned counsel for the revisionist and Ms. Charu Singh, learned AGA for the State.

2. This revision has been filed by the revisionist challenging the order dated 03.08.2018 passed by the Additional District and Sessions Judge, F.T.C.-II,

Ambedkar Nagar in Session Trial No. 102 of 2012 (State vs. Anupam Singh) arising out of case crime no. 475 of 2011 under section 302 IPC, whereby the permission to examine 5 defence witnesses, was refused.

3. Relevant facts are as below:-

The revisionist accused is facing trial in S.T. No. 102 of 2012 under section 302 IPC. During the trial an application on his behalf dated 02.06.2018 was moved with the submissions in brief that the inquest was done in presence of 5 public witnesses and they have been named as prosecution witnesses. The aforesaid 5 prosecution witnesses have not been produced by the prosecution, therefore at least one of them may be summoned and examined as court witness. The aforesaid application was rejected by order dated 27.06.2018 by the trial court. After recording all the statements under section 313 Cr.P.C., the accused moved another application with a request that the witnesses namely, Surendra Pratap Singh, Balram Nishad, Ramdhari Yadav, Ram Siromani Upadhyaya and Ram Suresh Nishad may be summoned as defence witnesses. This application to produce them as defence witness was objected to by the prosecution, submitting that all of them were in fact witness of the inquest report and that they have switched side and have come in collusion with defence and further that the previous application moved by the defence for summoning them, has already been rejected, therefore this application may not be allowed. The learned trial court heard both the sides and rejected this application by order dated 03.08.2018. Now this order dated 03.08.2018 is under challenge by the defence.

4. Most vehement and brief contention of the defence is that the first application was moved under section 311 Cr.P.C. and the second one though moved for production of the same witnesses but the prayer has been made under the provisions of section 233 Cr.P.C. There cannot be comparison between the two and that the accused has indefeasible right to produce witness in his defence. Further contention is that if the summons are not issued to call those persons as defence witnesses, the accused shall be highly prejudiced in his defence and his valuable right as regard fair trial shall stand defeated. The revisionist relies on a judgment of the Supreme Court in ***State of M.P. vs. Badri Yadav and Another; (2006) 9 SCC 549.***

5. Section 311 Cr.P.C. is as below:-

"311. Power to summon material witness, or examine person present. - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

Under the provisions of section 311 Cr.P.C., the court has a plenary power to summon any person at any stage of the proceedings as a witness. This power includes recall and re-examination of any person who has already been examined. This power is to be exercised when the court finds it necessary to summon/recall any witness for **just decision of the case.** The law puts no fetters on the powers of the courts to call for any witness to attain the highest goal of justice. In my opinion this provision of law gives expression to the

inherent power of the courts which is available to them by virtue of being the supreme authority who has been entrusted with responsibility to do justice. The power lies with the Court alone as juxtaposed to rights or powers of parties. The others stake holders whether prosecution or defence, have a limited role of drawing the attention of the court and putting the relevant material before it which may assist it in arriving at a correct inference. On the other hand, section 233 Cr.P.C. works in a different plane altogether. For better understanding of difference between the two sections, I find it appropriate to reproduce section 233 Cr.P.C. as below:-

"233. Entering upon defence. (1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

Section 233 Cr.P.C. finds place under Chapter XVIII titled as 'trial before a court of session'. This provision is essential part of session trial and is applicable when the prosecution evidence is complete and the accused is given an opportunity to produce the evidence in its defence. Undoubtedly this right has been given to the defence to produce its witnesses as part of fair trial and as part of legal principle of hearing both the sides. In my opinion, here the right belongs to the accused and not to the court concerned, in the sense that the court concerned shall ordinarily issue process and can decline to summon the witness only for the reason that the request is made for the purpose of vexation or delay or for defeating the ends of justice. The difference between the powers of the court and the right of the accused is too obvious. Under section 311 Cr.P.C., the power lies in the courts only and under section 233 Cr.P.C., the right lies with the accused and the court's interference is limited. The court can only refuse to issue summons where it ought to have refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice only.

6. In my view, if the application is refused on the grounds which are not covered by three excluding clauses, as provided in latter part of section 233(3) Cr.P.C. such approach shall be alien as far as scope of section 233 Cr.P.C. is concerned. This fact is undisputed that the witnesses who are sought to be summoned by the defence under section 233(3) Cr.P.C. were not examined as prosecution witnesses, at any stage. In fact, though they were witnesses of inquest but never produced by the prosecution.

7. The Allahabad High Court in ***Application U/S 482 No. 28214 of 2019 (Ram Charitra Singh vs. State of U.P. and Another)*** dated 30.07.2019, while considering the right of the accused to produce witnesses observed that there is no law or any precedent which prohibited the prosecution witnesses cited in the chargesheet and discharged during the trial for any reason whatsoever, cannot be examined as defence witnesses.

In ***Kalyani Baskar vs. M.S. Sampoornam; (2007) 2 SCC 258***, the Supreme Court while elaborating the meaning of fair trial observed as below:-

"Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them."

8. I went through the impugned orders. The observation of the learned trial court that summoning the witnesses will tantamount to review is misconceived. The trial court failed to apply the law in right perspective and ignored the difference in scope and implications in which the provisions of section 311 Cr.P.C. and section 233(3) Cr.P.C. are meant to be applied. Hence the order of the trial court suffers from legal flaw and is not sustainable.

9. It is further submitted by the revisionist that though he applied to the court for summoning all the 5 witnesses but it will suffice if any 2 of them are summoned for examination as defence witnesses.

10. In view of the above submission, the revisionist is given liberty to point out to the court concerned which of the 2 witnesses (out of total 5 witnesses), he seeks to produce in this defence.

11. Taking all the facts and circumstances in consideration, this revision is ***disposed of*** as below:-

(i) The order dated 03.08.2018 is ***set-aside;***

(ii) The revisionist shall, by moving an application, within a week of production of certified copy of this order, give name of 2 persons (out of 5 named)he seeks to summon as defence witness;

(iii) The trial court shall issue summons for their production as defence witnesses.

12. This case pertains to an incident, which occurred in 2012, therefore the court concerned is directed to expedite the matter and would not let any side to deliberately delay the proceedings.

(2024) 1 ILRA 99
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.01.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 1059 of 2023

Umesh @ Umesh Kumar ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Vijay Kumar Pandey

Counsel for the Opposite Parties:
G.A., Sri Muktesh Kumar Singh

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Section 319 - Power to proceed against other persons appearing to be guilty, Section 155(2) - No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial, Indian Penal Code, 1860 - Sections 323, 325, 504, 506 & 308 .

(B) Criminal Law - Code of Criminal Procedure, 1973 - Section 319 - scope and ambit - Power under Section 319 Cr.P.C, 1973 is a discretionary and an extraordinary power - 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 - even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in F.I.R. but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 Cr.P.C. - even those persons named in the F.I.R. but not implicated in charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.(Para -9, 10, 11)

Application by revisionist under 319 Cr.P.C. - for summoning opposite party as additional accused for trial - rejected by trial court - ground - insufficient evidence to summon - hence revision.(Para - 2)

HELD:-Trial court can summon persons who have been charge-sheeted as accused based on a witness's examination-in-chief, without cross-examination. Required evidence is more than prima facie case, but it is short and if not rebutted, the person summoned for trial may be convicted. No illegality, irregularity or impropriety in the impugned order passed by the trial court.**(Para - 12,13)**

Revision dismissed. (E-7)

List of Cases cited:

1. Hardeep Singh Vs St. of Punj. & ors., (2014) 3 SCC 92 S.

2. Mohammad Ispahani Vs Yogendra Chandak ,(2017) 16 SCC 226

3. Rajesh Vs St. of Har., (2019) 6 SCC 368

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Vijay Kumar Pandey, learned counsel for the revisionist, Sri Muktesh Kumar Singh, learned counsel for the opposite party nos. 2 to 5 and learned A.G.A. for the State.

2. This criminal revision has been filed against the order dated 07.12.2022 passed by Additional Sessions Judge- IVth, Jaunpur in Sessions Trial No. 320 of 2012, State Vs. Indrasen & others.

3. By the impugned order, the learned Additional Sessions Judge has rejected 43-ख application filed by the revisionist u/s 319 Cr.P.C. for summoning opposite party nos. 2 to 5 as additional accused for trial.

4. It has been submitted by learned counsel for the revisionists that without considering the evidence on record, the trial court has rejected the revisionist's application u/s 319 Cr.P.C. It has also been submitted that on the basis of complaint dated 09.08.2010, N.C.R. No. 120 of 2010 u/s 323, 504 I.P.C. was lodged against accused, Indrasen s/o Ram Yash, Rana Pratap s/o Ram Yash, Praveen alias Mulayam s/o Indrasen and Anil Kumar s/o Rajendra. The revisionist/informant on 16.09.2010 submitted application u/s 155 (2) Cr.P.C. in which he mentioned the name of four other accused, namely, Akhand Yadav, Chandrabhan and Nar Singh, sons of Ram Yash, Vikas son of Indrasen, Arun alias Pintu Yadav son of Chandrabhan but after investigation, the Investigating Officer submitted charge-sheet only against four accused against whom N.C.R. was registered in the police station. The Investigating Officer illegally did not submit charge-sheet against the opposite party nos. 2 to 5 whose names were mentioned in the informant's application u/s 155 (2) Cr.P.C. It has also been submitted that the informant P.W.1 Umesh Kumar in his evidence dated 16.02.2017

and P.W.2 Ram Swarath in his evidence dated 01.09.2021 has mentioned that opposite party nos. 2 to 5 participated in the commission of the offence.

5. Per contra, learned counsel for the opposite party nos. 2 to 5 has submitted that the trial court after considering the evidence on record has rightly rejected the application u/s 319 Cr.P.C. for summoning opposite party nos. 2 to 5 as additional accused in the case. The informant P.W.1 Umesh Kumar has not mentioned name of opposite party nos. 2 to 5 in his written report on the basis of which aforesaid N.C.R. was lodged against the accused, Indrasen, Rana Pratap, Praveen alias Mulayam and Anil Kumar. It has also been submitted that after a gap of about 1 month after submitting the written report, the informant P.W.1 Umesh Kumar has falsely named the opposite party nos. 2 to 5 as accused in the offence. It has also been submitted that after a gap of about 7 years, the revisionist/informant in his evidence as P.W.1 has assigned opposite party nos. 2 to 5 the role in the commission of offence, which is an afterthought and cannot be relied upon. It has also been submitted that P.W.1 Umesh Kumar and P.W.2 Ram Swarath both are accused in the criminal case lodged by the opposite party nos. 2 to 5 against the revisionist and his companions. Therefore, as a counterblast and to pressurize the opposite party nos. 2 to 5, the revisionist has falsely named opposite party nos. 2 to 5 as accused in his application u/s 155 (2) Cr.P.C. which he had submitted after a gap of more than 37 days of the occurrence. Since no evidence was available against opposite party nos. 2 to 5, the Investigating Officer did not file charge-sheet against them.

6. The revisionist/informant, Umesh Kumar had not mentioned in his written report dated 09.08.2010 complicity of opposite party nos. 2 to 5 in the crime. He has for the first time mentioned their names as accused in his application u/s 155 (2) Cr.P.C. submitted in the Court on 16.09.2010.

7. Thus, after a gap of 37 days from the date of occurrence, the revisionist/informant P.W.1 Umesh Kumar in his statement recorded on 16.09.2017 and P.W.2 Ram Swarath in his statement recorded on 01.09.2021 had implicated opposite party nos. 2 to 5 as being involved in the commission of offence. The revisionist/informant, Umesh Kumar in his application u/s 155 (2) Cr.P.C. has assigned general role to opposite party nos. 2 to 5 in the commission of the offence. Similarly, P.W.1 Umesh Kumar and P.W.2 Ram Swarath have only assigned general role to the aforesaid accused in the commission of offence. Admittedly, on the basis of the first information report lodged on the side of opposite party nos. 2 to 5, charge-sheet u/s 323, 325, 504, 506, 308 I.P.C. arising out of Case Crime No. 742 of 2010 has been filed against revisionist/informant P.W.1 Umesh Kumar, P.W.2 Ram Swarath and their companions.

8. The trial court in its impugned order has stated that since informant, Umesh Kumar in his written report dated 09.08.2010 had not implicated opposite party nos. 2 to 5 in the commission of offence and their names surfaced on 16.09.2010 only for the first time in the informant's application u/s 155 (2) Cr.P.C. submitted in the Magistrate's court and since P.W.1 Umesh Kumar and P.W.2 Ram Swarath who are accused in the first information report lodged on behalf of

opposite party nos. 2 to 5, have assigned only general role to the persons mentioned in the application u/s 319 Cr.P.C., there is not sufficient evidence for summoning them u/s 319 Cr.P.C. for trial.

9. The scope and ambit of Section 319 Cr.P.C. has been well-settled by the pronouncement of Constitution Bench of the Hon'ble Apex Court in **Hardeep Singh Vs. State of Punjab and others, (2014) 3 SCC 92** and paras 105 and 106 which are relevant for the purpose is reproduced hereunder :

"105. Power under Section 319 Cr.P.C, 1973 is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C., 1973. In Section 319 Cr.P.C., 1973, the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 Cr.P.C., 1973 to form any opinion as to the guilt of the accused."

10. In **S. Mohammad Ispahani Vs. Yogendra Chandak (2017) 16 SCC 226,** the Hon'ble Apex Court has observed as under :

"35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 of the Cr.P.C. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

11. In the case of **Rajesh Vs. State of Haryana (2019) 6 SCC 368**, after considering the observations made by the Apex Court in **Hardeep Singh (supra)** referred to hereinabove, the Apex Court has further observed and held that even in a case where the stage of giving opportunity

to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in F.I.R. but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 Cr.P.C. and even those persons named in the F.I.R. but not implicated in charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

12. From the above rulings of Hon'ble Supreme Court, it can be concluded that the trial court can summon persons who have been charge-sheeted as accused on the basis of examination-in-chief of a witness. It is not necessary that the witness should be cross-examined before such person can be summoned under Section 319 Cr.P.C. The evidence required for summoning such persons under Section 319 Cr.P.C. is more than prima facie case but it is short of such evidence which if not rebutted will result in conviction of the persons summoned for trial.

13. Considering the law propounded by the Hon'ble Apex Court in the aforesaid cases, facts and circumstances of the case and the evidence available on record, this Court finds no illegality, irregularity or impropriety in the impugned order passed by the trial court.

14. There is no merit in the criminal revision. It is liable to be dismissed.

15. The criminal revision is **dismissed,** accordingly.

16. Let a copy of this order be sent to the concerned trial court for necessary action.

(2024) 1 ILRA 103
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 3986 of 2023

Ashok Kumar Shukla ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Ulajhan Singh Bind, Sri Arvind Kumar Tripathi, Sri Kunwar Tejandra Bahadur, Sri Shivam Kumar Shukla

Counsel for the Opposite Parties:
G.A., Sri Ashish Bajpayee

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Indian Penal Code, 1860 - Sections 467, 468, 471, 420 & 120-B, Indian Evidence Act,1872 - Section 73 - Comparison of signature, writing or seal with others admitted or proved - Object of provision (Section 397 Cr.P.C) - Aims to correct patent defects, errors of jurisdiction, or legal perversity - Allows court to examine records of inferior courts for legality and regularity - Sub-section 2 bars revisions against interlocutory orders in appeals, inquiry trials, or other proceedings.(Para - 9)
Trial Court compared Sale Deed - admitted and disputed thumb impressions - Noted dismissal of Vendor's lawsuit for sale deed cancellation - Discussed evidence to find out if sale deed was executed through impersonation and forged thumb impression - Disputed and admitted left thumb impression were identical in the Sub Registrar office's - comparison of admitted right thumb impression with disputed right thumb impression not possible. **(Para - 10,11)**

HELD: -Limited scope for examining patent illegality and irregularity in impugned orders.

Revisional court may intervene if order is passed without jurisdiction. Limited scope for detailed examination of facts or evidence in trial or appellate courts. No illegality, irregularity or impropriety in the impugned orders passed by the trial court as well as appellate court. **(Para-10,12)**

Criminal Revision dismissed. (E-7)

List of Cases cited:

1. Usha Chakraborty & anr. Vs St. of W.B. & anr. , 2023 0 AIR (SC) 688

2. Raj. Vs Fateh Karan Mehdu , AIR 2017(SC) 688

(Delivered by Hon'ble Surendra Singh-I, J.)

1. The present criminal revision has been filed against the judgment and order dated 25.8.2021 passed by the Additional Sessions Judge/Fast Tract Court No.2, Etawah in Criminal Appeal No. 12 of 2019 (Har Prakash Shukla and others Vs. State of U.P. and others) as well as impugned order dated 29.1.2019 passed by the Additional Chief Judicial Magistrate, Court No.2, Etawah in Criminal Case No. 1952 of 1998, arising out of Case Crime No. 191 of 1985 under Sections 467, 468, 471, 420 & 120-B I.P.C. Police Station Vidhoona, District Etawah.

2. The facts in brief is that the informant Lalman S/o Ram Charan r/o Jagipur,Mauza Devrau, Police Station-Vidhuna, District- Etawah aged about 70-75 years lodged a First Information Report on 2.11.1985 that he is neither married nor has any other successor. He is the land holder in possession of Khata Khatuni No. 634-A comprising three plots of land having area of one acre and 1/2 portion of land of Khata Khatuni no. nil comprising two plots having area of 4.01 acres. His relatives accused Krishna Dutt, Prabhudayal and Vinod Kumar and others used to pressurize him to execute the sale deed of his land in their favour. Thereafter, they threatened the informant that if he did not execute a sale deed they will kill him and will get the sale deed executed by impersonating any other person in his place as Vendor, due to threat of aforesaid accused and their companion ante-social elements, the informant got frightened and started living with his nephew (Bhanja) Sri Narayan at Hisawa, Police Station-Mangalpur, District- Kanpur Dehat.

3. On 3.10.201985, the informant without any pressure and free will executed two sale deeds of the aforesaid plots for Rs. 2,00,000/- (two lacs) and 39,000/- respectively in favour of Hari Prakash and Ved Prakash s/o Vijay Bahadur Shukla and a house for Rs. 8000/- in favour of Ramswaroop Shukla s/o Dularelal.

4. On 29.10.1988, the informant was informed that the accused Krishna Dutt told that on 27.7.1985, the informant had already executed a sale deed of his entire property in favour of his brother Prabhu Dayal and his nephew (Bhatija) Vinod Kumar. When the informant made an inquiry in Tehsil-Vidhuna, it was found that accused Krishna Dutt with the help of co-accused Ram Singh, deed writer and clerk Amar Singh, Sarwanam Singh and Vijendra Pratap Singh in conspiracy with his brother Prabhu Dayal and nephew Vinod Kumar by impersonating him by some other person as Vendor presented a forged sale deed in the Registrar office on 27.7.1985 which was registered on 29.9.1985. The accused Brijendra Pratap Singh and Sarnath Singh are the attesting witnesses of the said sale deed.

5. On the basis of written report a FIR Case Crime No. 191 of 1985, under Sections 467, 468, 471, 420 & 120-B I.P.C was registered in Police Station Vidhoona, the then District Etawah now District-Auraiya. After investigation, charge-sheet was submitted against the accused persons namely Krishna Dutta, Prabhu Dayal, Vinod Kumar, Brijendra Pratap Singh @ Lalli Singh, Sarnam Singh @ Rajpal Singh, Amar Singh and Ram Singh. The Additional Chief Judicial Magistrate Court no.2, Etawah tried the accused in charge framed under the aforesaid sections. The accused were acquitted by the trial court vide order dated 29.1.2019.

6. Against the acquittal order dated 29.1.2019, Ashok Kumar Shukla who is the purchaser of the portion of land from the informant filed an appeal in the Court of Session which was dismissed vide judgment and order dated 25.8.2021 passed by the Additional Sessions Judge/Fast Tract Court No.2, Etawah.

7. It has been submitted by learned counsel for the revisionist that the trial court without considering the evidence on record has illegally acquitted the accused on the ground that the original suit filed by the informant against accused for cancellation of sale-deed was dismissed by the civil court and that the decision of the civil court was binding on the criminal court. It has been further submitted that the trial court has not considered the expert opinion regarding finger print of the vendor on the ground that the expert has not given any reason in favour of his finding in report and he wrongly acquitted the accused. It has been further submitted that the appellate court also without considering the evidence on record has illegally dismissed the appeal filed against the acquittal order.

8. Per contra, learned counsel for opposite party nos. 2 to 5 submitted that the trial court has discussed the expert report in detail as well as evidence of expert witness, P.W.-3 Rajendra Kumar Tiwari but since the expert opinion is not supported with reasons given by him it was disbelieved. It has been further submitted that the trial court itself examined the thumb impression of Vendor Lalman on the sale deed under the provisions of Section 73 of the Indian Evidence Act. The accused persons have rightly been acquitted from the charges levelled against them. In support of his contention he has placed reliance upon the judgment of Hon'ble Apex Court in **Usha Chakraborty and Another Vs. State of West Bengal and Another, 2023 0 AIR (SC)688;** the provisions regarding jurisdiction of the High Courts and Sessions Courts regarding criminal revision is given in Section 397 Cr.P.C. which is as below:-

*"397. **Calling for records to exercise of power of revision** – (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."*

9. The Hon'ble Apex court has held in State of **Rajasthan Vs. Fateh Karan Mehdu reported in AIR 2017(SC) 688**,

the object of this provision is to set right a patent defect or an error of jurisdiction or law or the perversity which has crept in the proceeding. The section vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. Sub-section 2 of this Section bars the revisions against any interlocutory order passed in any appeal, inquiry trial or other proceedings.

10. Thus, the scope of criminal appeal is limited and patent illegality irregularity in the impugned order, the revisional court shall also intervene if the impugned order is passed without jurisdiction. There is not much scope for detail examine the facts of the or the evidence adduced in the trial court or the appellate court.

11. The trial court has discussed the report of the finger print expert as Exhibit Ka- (5) along with the evidence of P.W. Rajendra Kumar Tiwari who has proved expert report as well as the then Sub Registrar P.W.-4 Ram Dayal at page no. 11 of paragraph no.11(2) and last paragraph page no. 14. It has been also observed by the trial court in its judgment that the finger print expert in his report Exhibit Ka-5 which is merely two pages has not discussed Ridges Characteristics, bifurcation, Ridges Ending, Enclosures, Island, Ridges Counting, Ridges tracing and Diverting Ridges of thumb impression of the Lalman Vendor Diverting Riges of the admitted and disputed thumb impression of the Vendor Lalman without discussing this similarity between these features admitted and disputed thumb impression, no allegation could be drawn that the disputed thumb impression is not that of Vendor Lalman. The trial court has mentioned in its judgment that after considering the aforesaid features of the disputed and admitted left thumb impression it was found that they were identical in the Registered No. 8 maintained in the Sub Registrar office, no thumb impression was given on the sale deed only right thumb impression of the Vendor has been affixed, therefore, comparison of admitted right thumb impression with the disputed right thumb impression was not possible. The trial court had made comparison between the silent features admitted and disputed thumb impression by himself observing them under the magnifying glass. The trial court has also mentioned in its judgment that a suit filed by the Vendor for cancellation of sale deed was dismissed by the civil court and this fact was also by the trial in consideration. Similarly the trial court has discussed the evidence on record to find out whether the sale deed was executed by impersonating and forged thumb impression thereon.

12. Considering the the impugned orders of the trial court as well as appellate court in light of the statutory provisions regarding criminal revision as well as argument of learned counsel for the parties, this Court finds that there is no illegality, irregularity or impropriety in the impugned orders passed by the trial court as well as appellate court.

13. There is no merit in the criminal revision, it is liable to be dismissed.

14. The present criminal revision is dismissed accordingly.

15. Copy of this order be sent to the court concerned for necessary compliance.

(2024) 1 ILRA 107
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Revision No. 5359 of 2022

Mohd. Akib ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri S.S. Rajput

Counsel for the Opposite Parties:
G.A., Ms. Aishwarya Saxena, Sri Ajit Kumar, Sri Ram Behari Saxena

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Indian Penal Code, 1860 - Section 326-A - Voluntarily causing grievous hurt by use of acid, etc. - entire purpose of criminal trial is to go to the truth of the matter - Once there is satisfaction of the Court that there is evidence before it that an accused has committed an offence, the court can proceed against such a person - At the stage of summoning an accused there has to be a prima facie satisfaction of the court. (Para -18,)

(B) Criminal Law - Code of Criminal Procedure, 1973 - Section 319 - scope and ambit - *'doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted)* - this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.- It is the duty of the court to do justice by punishing the real culprit - Where the inestigating 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. (Para - 18,19,20)

Accused named in FIR - name was dropped during investigation - only co-accused was charge sheeted under Section 326A IPC - Court below not taken note of fact - respondent No. 2 named in FIR and primarily responsible for throwing acid on PW-2 (injured) - completely lost an eye - PW-1 (eye witness) and PW-2 (injured witness) testimony indicates respondent's complicity - application moved by revisionist/informant under Section 319 Cr.P.C. - rejected - hence revision. **(Para - 2,16,17)**

HELD: -Trial Court directed to reconsider matter afresh and pass appropriate orders in the light of observations made Hon'ble Apex Court's judgments ***(Hardeep Singh Vs St. of Punj. & ors).***(Para -21)

Revision disposed of. (E-7)

List of Cases cited:

1. Hardeep Singh Vs St. of Punj. & ors. , (2014) 3 SCC 92

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri S.S. Rajput, learned counsel for the revisionist, learned AGA for the State and Sri Ram Behari Saxena, learned counsel for opposite party no. 2.

2. The present criminal revision has been filed by the revisionist against the order dated 11.11.2022 passed by the learned Additional Session Judge, Court No. 7, Aligarh in Sessions Trial No. 2689 of 2021 (State vs. Mumshad alias Banti) arising out of Case Crime No. 345 of 2021, under Section 326A IPC, Police Station Gandhi Park, District Aligarh whereby application moved by the revisionist/informant under Section 319 Cr.P.C. has been rejected.

3. The revisionist/informant gave a Tehrir dated 09.06.2021 stating that on 08.06.2021 at 9.00 P.M. at the Old Roadways Bus Stand when he, his brother Tazeem and cousin Javed were waiting for the bus, in the meantime, Mumshad alias Banty and Amil Husain reached identifying his brother Tazim. Amil threw an acid pouch on the face of Tazim. They tried to throw the pouch at him too, but fled away in fear. The revisionist/ informant at once reached the nearby police Chowki and with their help Tazim was admitted for treatment at Malkhan Singh Hospital. On the very night, his brother was referred to J.N. Medical College, Aligarh. The condition of his brother was serious who completely lost an eye, even the face was distorted.

4. An FIR was registered on 10.6.2021 at 11.13 A.M. bearing Case Crime No. 0345 of 2021 under Section 326A IPC, Police Station Gandhi Park, District Aligarh naming Mumshad alias Banty and Amil Husain.

5. After investigation only Mumshad alias Banty was charge sheeted, the name of Amil Husain was dropped. The charge was framed and the trial proceeded.

6. The first informant Mohd. Akib, an eye witness was examined as P.W-1. In his examination-in-chief recorded on 21.3.2022, he supported the prosecution version with specific allegations against Amil Husain.

7. The injured witness Tazim Ahmed was examined as P.W.-2. His examination-in-chief was recorded on 02.06.2022. He also supported the prosecution version with specific allegations against Amil Husain.

8. Subsequently, an application was moved by the prosecution under Section 319 Cr.P.C. stating that accused Mumshad alias Banty and Amil Husain were named in the FIR but the Investigating Officer dropped the name of Amil Husain by filing the final report, therefore, Amil too be summoned and tried as an accused.

9. Raising objection, counsel for the accused Amil in his defence stated that he was falsely implicated for the reason that he lodged an FIR bearing Case Crime No. 492 of 2019 under Sections 354, 376, 377, 504 and 506 IPC against Tazeem Ahmad for committing rape on his sister, Shahin Husain. In order to mount pressure for compromise, he was falsely implicated. He further pleaded that on the date of incident he was on his job at H.F.A. Formulation Private Limited Dehradun.

10. Learned counsel for the revisionist/informant argued that the learned Trial Court rejected his application under Section 319 Cr.P.C. on the following grounds:

(i) Firstly, in the examination-in-chief, the prosecution witnesses admitted that in the year 2019 his brother Tazeem(injured) was roped in a rape case which was still pending.

(ii) The said witnesses admitted that the FIR was not lodged on the date of occurrence.

(iii) PW-1 admitted that the FIR was lodged after consulting his brother Tazeem as to who should be roped as an accused.

(iv) P.W-2(injured) in his cross-examination admitted that Km. Shahin who was a nurse in a Medical College lodged an FIR in the year 2019 regarding commission of rape and further admitted that Amil Husain was her brother and the rape case was still pending.

(v) P.W-2 further admitted that he knew Fatima but denied that she left him near the Masjid. Fatima was carrying a Mobile No. 7599967521 and gave a written application to the Investigating Officer stating that on 08.06.2021 she took dinner at the Medical College Road with Tazim, as he had to go to Delhi. She left Tazim at the Masjid who was all alone. Thereafter Fatima returned back to her home on her Activa UP 12 AU 7559. After a while, she received a call from Tajeem that acid has been thrown on him and he was admitted at the Malkhan Hospital. She went to Malkhan Hospital where Tazim informed that he could not see very clearly but he knew who had thrown the acid. She remained at the Medical College till 1.00 A.M. She did not see the brother or his relative at the Hospital and Tajeem was all alone.

(vi) The Trial Court found that during investigation the statement of the mother of Amil Husain, namely, Zubeda Begum was recorded who stated that her son was falsely implicated in order to create pressure to compromise the rape case. And that her son Amil Husain was on job on the date of incident at H.F.A. Formulation Private Limited, Dehradun.

(vii) A certificate issued by an Authorised Officer of H.F.A. Formulation Private Limited, Dehradun was procured by the Investigating Officer stating that Amil Husain was available there on 08.06.2021 at 9.07 A.M. to 7.11 P.M. Certain other documents along with the attendance report was also placed. Few affidavits of landlords and other persons were also taken into account stating that Amil Husain was residing in that House from 08.06.2022 to 10.6.2022.

(viii) The call details reports procured by the Investigating Officer from Idea Mobile Services Company showed the location of Amil Husain from 08.06.2021 to 09.06.2021 at Dehradun. As the accused Amil Husain was available at Dehradun, the presence of Amil Husain was doubtful. As PW-2 injured Tazeem was an accused in a rape case, therefore, in order to create pressure for compromise, the accused Amil Husain was also robed.

11. Learned counsel for the revisionist submitted that the Trial Court had rejected the application under Section 319 Cr.P.C. in a cursory manner, ignoring the evidence on record and without application of judicial mind.

12. Reference was made to deposition of P.W.-1 and P.W. 2 which is as follows:

"बयान गवाह ..... मोहम्मद आकिब पुत्र अब्दुल समीम उम्र 22 वर्ष पेशा व्यापार निवासी कमालपुर थाना अमापुर जिला कासगंज ने सशपथ बयान किया कि घटना दिनांक 08.06.2021 समय 09 बजे रात्रि पुराना बस स्टैण्ड रोडवेज गांधी पार्क की है। मैं व मेरा भाई दिल्ली जाने के लिए रोडवेज बस का इन्ताजर कर रहे थे। बहनोई जावेद हमें साथ छोड़ने हमारे साथ आये। इतने में हमारे गांव का मुमशाद बंटी अपने साथ आमिल हुसैन को लेकर हमार तरफ बढा तथा कहा यह रहा ताजीम इतने में आमिल ने तेजाब से भरा पाउच ताजीम के मुंह पर फेंक कर मारा ताजीम जोर से चिल्लाया तो ये और पाउच लेकर हमारी ओर फेंके। उसने खुद कहा वह हमारी ओर पाउच लेकर बढे इनको बढता देखकर हम डर कर भाग गये। चीख पुकार पर लोगों को मौके पर काफी लोगों के आने पर मुमशाद आमिल के साथ मोटर साईकिल पर भाग गया। मैं व मेरे बहनोई जावेद ताजीम मेरे भाई को लगी थी। पुलिस चौकी रोडवेज थाना गांधी पार्क लेकर पहुंचे तो हमें पुलिस वालों ने मलखान सिंह में

भर्ती करा दिया था। ताजीम की गम्भीर हालत को देखते हुये डाक्टरों ने ताजीम को जे०एन मेडिकल रेफर कर दिया था। ताजीम की तबीयत ज्यादा खराब होने के कारण हम लोग उसकी देखरेख में रहे। ताजीम की सीधी आंख व चेहरा खराब हो गया था। मैं घटना के अगले दिन रिपोर्ट लिखाने थाना गांधी पार्क गया था। पत्र उपलब्ध कागज संख्या 04/3 अ को देखकर गवाह ने कहा यह वही टाईपशुदा तहरीर है जो थाना पर दी थी जिस पर मेरे हस्ताक्षर है जिसकी मैं शिनाख्त करता हूँ जिस पर प्रदर्श-1 डाला गया। घटना के सम्बन्ध में पुलिस ने मेरा बयान लिया था।

जिरह दोनों अधिवक्ताओं की याचना पर ..... की जाती है। जिरह जारी। बयान मेरे बोलने पर प्रश्नोत्तर द्वारा अंकित किया। "

सुनकर तस्दीक किया।

"बयान गवाह .....ताजीम अहमद पुत्र अब्दुल शमीम उम्र 30 वर्ष पेशा व्यापार निवासी कमालपुर थाना उमापुर जिला कासगंज ने सशपथ बयान किया कि घटना दिनांक 08.06.2021 समय रात्रि 09 बजे की घटना है। मैं व छोटा भाई आकिब व बहनोई जावेद पुराना बस स्टैण्ड थाना गांधीपार्क पर दिल्ली जाने के लिए खडे थे। बस का इन्तजार कर रहे थे। तभी मुमशाद व बन्टी, आमिल के साथ मेरी तरफ यह कहना बढा कि यह ताजीम है आमिल ने तेजाब से भरा पाउच मेरे चेहरे पर मारा मैं जलन होने के कारण चिल्लाया चीख पुकार पर मेरे भाई व बहनोई मेरी तरफ बढ़े उनको आगे बढता देख उन पर भी मुमशाद व बंटी ने तेजाब के पाउच फेके। मौके पर उक्त लोग भी आये जिन्हें लेकर यह लोग भागे। भाई व बहनोई पुलिस चौकी गये मुझे बेहोशी हो रही थी वहां से अस्पताल ले गये। वहां से मेडिकल रेफर कर दिया गया। घटना के संबंध में पुलिस ने पूछताछ की थी।"

13. From the perusal of record, we find that during trial, the P.W.-1 (first informant/eye witness) supported the prosecution version. In examination-in-chief, he specifically roped the respondent no. 2 Amil Husain. Even P.W.-2 (injured witness) in his examination-in-chief supported the prosecution case and had also specifically roped the respondent no. 2 Amil Husain.

14. From the order impugned, it is apparent that the learned trial court while dealing with the application under Section319 Cr.P.C. had taken into account the material collected during the investigation. Reference has been made to the statement of Fatima and the mother of respondent No. 2, namely, Amil Husain Zubeda Begum which cannot be seen at this stage. Even the defence version of the accused cannot be seen at this stage. The plea of alibi taken by the accused that he was present at Dehradun and the call detailed reports showing the location of Amil at Dehradun are to be seen and considered during trial.

15. Per contra, learned counsel for the accused/Amil argued that the application moved by the revisionist has been rightly rejected and there is no illegality in the impugned order.

16. Upon hearing the counsel for the parties and upon perusal of record, we find that the accused Amil Husain was named in the FIR but during the course of the investigation his name was dropped and only the co-accused Mumshad alias Banty was charge sheeted under Section 326A IPC.

17. In the case, at hand, the Court below has not taken note of the fact that the

respondent No. 2 was named in the FIR and was assigned the main role of throwing acid on PW-2 (injured). The testimony of PW-1 (eye witness) and PW-2 (injured witness) clearly indicate the complicity of the respondent No. 2 as is apparent from the evidence.

18. Recently, the Hon'ble Supreme Court in Sandeep Kumar vs. the State of Haryana and another, 2023 SCC Online SC 888 has observed that the entire purpose of criminal trial is to go to the truth of the matter. Once there is satisfaction of the Court that there is evidence before it that an accused has committed an offence, the court can proceed against such a person. At the stage of summoning an accused there has to be a prima facie satisfaction of the court. The evidence which was there before the court was of an eye witness who clearly stated before the court that the crime has been committed by the revisionist. Therefore, the court need not cross examine this witness. It can stop the trial at that stage itself if such application had been moved under Section 319 Cr.P.C. The detail examination of the witness and other witnesses is a subject matter of the trial which has to begin afresh. The scope and ambit of Section 319 Cr.P.C. has been discussed and dealt with an detail in the Constitution Bench judgement of **Hardeep Singh vs. State of Punjab and others reported in (2014) 3 SCC 92** where it said:

"12. 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 Cr.P.C.

13. It is the duty of the court to do justice by punishing the real culprit. Where the inestigating 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."

19. In **Hardeep Singh (supra)**, this court further said that the Court only has to see at the state of Section 319, whether a prima facie case is made out although the degree of satisfaction has to be much higher.

"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C. though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in Vikas v. State of Rajasthan, held that on the objection satisfaction of the court a person may be "arrest" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

In para 106 it stated as under:

Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from

exercising power under Section 319 Cr.P.C. 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" it 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."

20. Thus, the main object for exercise of powers under Section 319 of the Code is that the real perpetrator of the offence should not go away unpunished specially in a situation where the investigating agency for any reason whatsoever had not arraigned any culprit as an accused. The Court would not be powerless in calling the accused to face trial, rather it is the duty of the Court to do justice by punishing the real culprit.

21. In view of the aforesaid facts and circumstances as well as in the light of Hon'ble Apex Court judgements, it is hereby directed to the Trial Court concerned to consider the matter afresh and pass appropriate orders in the light of observations as aforesaid.

22. Accordingly, the revision is **disposed of.**

(2024) 1 ILRA 112
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 14212 of 2023

Abhay Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Vikram Singh

Counsel for the Respondents:
G.A.

A. Constitution of India, 1950-Article 226-Indian Penal Code, 1860-Sections 498-A, 304-B, 120-B r/w Section ¾ D.P. Act-deceased died under mysterious circumstances at the petitioner's residence within seven years of her marriage-during the investigation certain evidence collected by the I.O. with regard to demand of dowry and cruelty-petitioner contended that brother of his deceased-wife had an affair with a lady who had no connection of whatsoever nature with the in-laws family-certain social media posts amounts to conduct of a mini-trial within the purview of writ jurisdiction, which is impermissible in law-its evidentiary merits and pertinence will undergo scrutiny during the trial in accordance with the Evidence Act, 1872.(Para 1 to 37)

The writ petition is dismissed. (E-6)

List of cases cited:

1. Babubhai Vs. St. of Guj. & ors.(2010) 12 SCC 254

2. Manu Sharma Vs. St. (NCT of Delhi) (2010) 6 SCC 1

3. K.Chandrasekhar Vs St. of Ker. & ors.(1998) 5 SCC 223

4. Ramachandran Vs R. Udhayakumar & ors.(2008) 5 SCC 413

5. Mithabhai Pashabhai Patel & ors.Vs St. of Guj. (2009) 6 SCC 332

6. Kishan Lal Vs Dharmendra Bafna (2009) 7 SCC 685

7. Jamuna Chaudhary & ors. Vs St. of Bih. (1974) AIR SC 774

8. H.N. Rishbud & Inder Singh Vs The St. of Delhi (1954) SCC Online SC 34

9. St. of Bih. etc Vs P.P. Sharma,IAS & anr. (1992) Supp 1 SCC 222

10. Mohan Lal Vs St. of Punj. (2018) 17 SCC 627

11. Vishnubhai Haribhai Malviya & ors .Vs St. of Guj. & ors.(2019) 17 SCC 1

12. Noor Aga Vs St. of Punj. (2008) 16 SCC 417

13. St. of Bih. & anr. Vs. JAC Saldanha & ors.(1980) 1 SCC 554

14. Bhaskar Ramappa Madar Vs St. of Karn. (2009) 11 SCC 690

15. Hardip Singh Vs St. of Punj.(2008) 8 SCC 557

16. B.St. Vs Jayapaul (2004) 5 SCC 223

17. St. of Punj. Vs Baldev Singh (1999) 6 SCC 172

18. Surender Vs St. of Har. CRLA No. S-318-SB of 2004

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Sanjay Vikram Singh, learned counsel for the petitioner and learned AGA for the State.

2. This petition stems from the impugned FIR bearing Case Crime No. 0079 of 2022, under Sections 498A, 304B and 120B IPC read with Section 3/4 of D.P. Act, 1961 registered at P.S. Kurawali, District Mainpuri. Following the completion of the investigation, the police filed a charge sheet against the petitioner and aggrieved by the filing of the charge sheet, the petitioner-husband preferred the instant petition for fair investigation under Article 226 of the Constitution of India, seeking a direction for a fair investigation in the impugned FIR. For clarity, the relief sought before this Court is delineated as follows:

"(i) Issue, a writ, order or direction in the nature of Mandamus directing the respondent no. 3 to conduct further investigation in Case Crime No. 79 of 2022, under Sections 498A, 304B IPC and Section ¾ D.P. Act, P.S. Kurawali, District Mainpuri."

3. The petitioner, Abhay Gupta, entered into a matrimonial alliance with Harshita Gupta on 1.12.2020 in accordance with Hindu rites and rituals, and during the marriage, the complainant's family spent approximately Rs.20 lakhs, and dowry items were also presented to the petitioner's family within their means. Subsequently, the petitioner and his family subjected Harshita Gupta (deceased-wife) to both mental and physical cruelty. No child was born out of the said wedlock, although the wife was five months pregnant at the time of the death; however, the insufficient dowry made the in-laws unsatisfied, and following this, the complainant's sister was murdered by the in-law's family, in which Satish Chandra (father-in-law); Shri Abhay Kumar and Gaurav Gupta (brothers-in-law -Jeth), Ajay Gupta (brother-in-law- Devar); Smt Stuti Nidhi- wife of Gaurav Gupta (sister-in-law-Jethani); Manju wife of Satish Chandra (mother-in-law); and sister-in-law (Nanad) and brother-in-law (Nandoi) are arrayed as accused/suspect in the FIR.

4. Following the registration of the impugned FIR, the police conducted an investigation and, on its conclusion, filed a

charge sheet under Section 498-A, 304-B IPC read with Section 3/4 D.P. Act, 1961 against the petitioner and exonerated all accused persons/suspects named in the FIR. The doctor opined the cause of death was ***asphyxia due to ante mortem hanging.***

5. That the petitioner- husband aggrieved by the filing of the charge sheet against him, has preferred the instant petition for fair investigation on the following grounds:

5.1 No dowry demand was made, nor was any harassment meted out to the deceased by the petitioner.

5.2 The postmortem report of the deceased is silent about the fact of pregnancy alleged in the FIR, making the entire prosecution story false and frivolous.

5.3 The FIR was registered against the petitioner with *malafide* intention and oblique purpose.

5.4 Soon before the unfortunate incident, the petitioner immediately informed the parents of the deceased wife and also made the call to the Women Power Line 1090; the Investigating Officer has not looked into the material given by the petitioner, which could have facilitated a fair investigation, enabling the Investigating Officer to reach just and logical conclusion.

5.5 The complainant- brother of the deceased had an affair with one Mamta, and subsequently, the relationship got spoiled with her. The said Mamta started posting certain inappropriate comments against the deceased on social media by creating a fake account, and that is why, to save her honour, the deceased committed suicide. The letter dated 19.10.2022 annexed with the petition finds reference to the online complaint dated 31.3.2022 bearing Complaint No.2022/IC/072020 with regard to the deceased-wife's brother's girlfriend, who had posted certain inappropriate posts before her death, i.e., on 23.3.2022.

5.6 The police have not followed Rule 107 of the U.P. Police Regulations, 1861 in true spirit, which mandates fair investigation by the police, and to extract the truth out of the allegations that surfaced in the complaint.

6. *Per contra*, learned A.G.A. supports the prosecution case and asserts that the allegations are serious in nature, the deceased has died under mysterious circumstances at the petitioner's residence within seven years of her marriage, and during the investigation, certain inculpatory evidence has been collected by the Investigating Officer with regard to demand of dowry and cruelty upon the deceased against the petitioner. He next submits that the petition is not maintainable at the behest of the accused, and in criminal law, the accused has no right to seek further investigation after filing the charge sheet on the basis of certain documents which are not sufficient for the purpose of making the entire prosecution case false and motivated.

7. The learned counsel for the petitioner has relied upon the judgment of the Supreme Court passed in the *Babubhai1 case*. Besides other judgments discussed herein in support of his contentions, the concept of fair investigation and fair trial are concomitant to the preservation of the fundamental rights of the accused under Article 21 of the Constitution of India.

8. The criminal justice administration system in India places human rights and dignity for human life on a much higher pedestal. In our jurisprudence, an accused

is presumed to be innocent till proven guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play a balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence, and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India.2

9. It is not only the responsibility of the investigating agency but also that of the courts to ensure that the investigation is fair and does not in any way hamper the freedom of an individual except in accordance with the law. Equally enforceable canon of the criminal law is that the high responsibility lies upon the investigating agency not to conduct an investigation in a tainted and unfair manner. The investigation should not prima facie be indicative of a biased mind, and every effort should be made to bring the guilty to the law as nobody stands above the law and dehors his position and influence in society2.

10. He further relied on ***K. Chandrasekhar v. State of Kerala & Ors.3; Ramachandran v. R. Udhayakumar & Ors.4; Nirmal Singh Kahlon (supra); Mithabhai Pashabhai Patel & Ors. v. State of Gujarat5; and Kishan Lal v. Dharmendra Bafna6*** wherein it has been emphasised that where the Court comes to the conclusion that there was a serious irregularity in the investigation that had taken place, the Court may direct a further investigation under Section 173(8) Cr.P.C., even transferring the investigation to an independent agency, rather than directing a re-investigation. Direction of a re-investigation, however, being forbidden in law, no superior court would ordinarily issue such a direction.

11. The above-referred judgments of the Supreme Court make it clear that the scheme of investigation, particularly Section 173(8) Cr.P.C., provides for further investigation and not for re-investigation. Therefore, if the Court, comes to the conclusion that the investigation has been done in a manner with the object of helping a party, the Court may direct for further investigation and ordinarily not for re-investigation.

12. In the *Babubhai (supra)* case, the Supreme Court has observed that if it is evident that in exceptional circumstances and the Court considers it necessary, it may direct for fresh investigation. For lucidity, the relevant portion of the judgment is extracted herein below:

"45. Not only fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, the investigation must be fair, transparent and judicious, as it is the minimum requirement of the rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. Where non-interference of the Court would ultimately result in failure of justice, the Court must interfere. In such a situation, it may be in the interest of justice that an independent agency chosen by the High Court makes a fresh investigation."

13. The duty of the Investigating Officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction

but to bring out the real, unvarnished truth.7

14. The investigation thereafter would commence, and the Investigating Officer to go step by step. The Supreme Court contemplates the following steps to be carried out by the Investigating Officer in ***H. N. Rishbud and Inder Singh v. The State Of Delhi8.*** The contextual paragraph is extracted herein below:

"If, upon the completion of the investigation, it appears to the officer in charge of the police station that there is no sufficient evidence or reasonable ground, he may decide to release the suspected accused, if in custody, on his executing a bond. If, however, it appears to him that there is sufficient evidence or reasonable ground, to place the accused on trial, he is to take the necessary steps therefore under Section 170 of the Code. In either case, on the completion of the investigation he has to submit a report to the Magistrate under Section 173 of the Code in the prescribed form furnishing various details. Thus, under the Code investigation consists generally of the following steps : (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a chargesheet under Section 173."

15. Whereas, learned A.G.A. has relied upon the ***State of Bihar etc. v. P.P. Sharma, IAS and another9,*** a significant judgment passed by the Supreme Court of India, in which it has been held that the High Court treating the affidavit filed and document produced before it by the petitioner-accused as evidence by quashing the proceedings has committed grave error in putting an end to the prosecution acted as such after going into the merits in a pre-trial consideration of affidavit and documents which, unless proved to be true and reliable cannot form the basis of any decision regarding commission of the offence. The salient paragraph is reproduced herein under:

"Malafides means want of good faith, personal bias, grudge, oblique or improper motive or ulterior purpose. The administrative action must be said to be done in good faith if it is done honestly, whether it is done negligently or not. An act done honestly is deemed to have been done in good faith. An administrative authority must, therefore, act in a bona fide manner and should never act for an improper motive or ulterior purposes or, contrary to the statute's requirements or the basis of the circumstances contemplated by law, or improperly exercise discretion to achieve some ulterior purpose. The determination of a plea of mala fide involves two questions, namely (i) whether there is a personal bias or an oblique motive and (ii) whether the administrative action is contrary to the objects, requirements and conditions of a valid exercise of administrative power.

An investigating officer who is not sensitive to the constitutional mandates,

may be prone to trample upon the personal liberty of a person when mala fides actuate him. But as stated, the accused, at the earliest, should bring to the notice of the Court of the personal bias and his reasonable belief that an objective investigation into the crime would not be had at the hands of the investigator by pleading and proving as of fact with necessary material facts. If he stands by till the chargesheet is filed, it must be assumed that he has waived his objection. After seeing the adverse report, he cannot turn down to plead the alleged mala fides. (Equally laying the information before the Station House Officer of the commission of cognizable crime merely sets the machinery of the investigation in motion to act in accordance with the procedure established by law.) The finding of the High Court, therefore, that the F.I.R. chargesheet violates the constitutional mandate under Article 21 is without substance."

16. Learned A.G.A. has also relied upon *Priti Singh v. State of U.P. and others,* passed by the co-ordinate Bench of this Court in *Writ Petition No.11652 of 2023*, wherein the co-ordinate Bench of this Court has held that the accused has no right to seek a fair investigation only on the ground that initially he was informant, and subsequently has been arrayed as accused in the impugned FIR.

17. If information is lodged at the police station and an offence is registered, the *malafide* of the informant would be of secondary importance if the investigation produces unimpeachable evidence disclosing the offence10.

18. It would be judiciously apt to refer to two judgments passed by the 3-judge Bench of the Supreme Court, ***i) Mohan Lal v. State of Punjab11, and ii) Vishnubhai Haribhai Malviya and others v. State of Gujarat and others12,*** they may shed light to reach a logical conclusion in the facts-circumstances of the case.

19. After relying upon the cases of ***Babubhai v. State of Gujarat (supra), State of Bihar v. P.P. Sharma (supra), and Noor Aga v. State of Punjab13,*** the Supreme Court in *Mohan Lal's case (supra)* has held that in a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during the investigation but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations himself and is asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and, contrary to normal human conduct, that he would at the end of the investigation, submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would, therefore be a foregone conclusion.

20. Further, after referring to ***Bhaskar Ramappa Madar v. State of Karnataka14; Hardip Singh v. State of Punjab15; B. State v. Jayapaul16; State of Punjab v. Baldev Singh17; Surender v. State of Haryana18***, the Supreme Court in *Mohan Lal's case (supra)* has culled out the underlined proposition:

"30. In view of the conflicting opinions expressed by different two-judge Benches of this Court, the importance of a fair investigation from the point of view of an accused is a guaranteed constitutional right under Article 21 of the Constitution of India; it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in-laws carrying a reverse burden of proof."

21. In *Vishnubhai Haribhai Malviya case (supra)*, the Supreme Court has considered whether, after the police file a charge-sheet, the Magistrate has the power to order further investigation, and if so, up to what stage of the proceedings. In *Vishnubhai Haribhai Malviya case (supra)*, pursuant to registration of the FIR, the investigation was conducted by the police, which resulted in a charge sheet being submitted before the Judicial Magistrate, and the Judicial Magistrate, after taking cognizance, issued a summons to the accused persons. Pursuant to the summons the accused appeared before the Magistrate and filed an application under section 173(8) of the Code of Criminal Procedure, 1973 for further investigation, and another application for discharge. The Magistrate dismissed the applications that were filed for further investigation, stating that the facts sought place by the applications were in the nature of defence and that would be taken in the trial, and likewise, a discharge application was also rejected.

22. Separate criminal revisions were filed before the Sessions Court, Surat. Both these revision applications were decided by the learned Additional Sessions Judge, Surat, by a common order, and found that a case is made out for further investigation. In compliance with the session's court order, the investigation was handed over to the police. The matter reached before the High Court, and the High Court found that the interim investigation reports virtually acquitted the accused persons; therefore, the High Court set aside the judgment of the Additional Sessions Judge, Surat and remanded the same for fresh consideration to the sessions court. The sessions judge rejected the application filed under section 156(3) Cr.P.C. on merits, and there is how, the matter reached before the Supreme Court. In the foregoing facts, relying upon catena of judgments, the Supreme Court has held that:

"42. There is no good reason in these decisions as to why a Magistrate's powers to order further investigation would suddenly cease upon the process being issued, and an accused appearing before the Magistrate, while concomitantly, the power of the police to further investigate the offence continues right till the stage the trial commences. Such a view would not accord with the earlier judgments of this Court, in particular, Sakiri Vasu v. State of U.P.19; Samaj Parivartan Samudaya v. State of Karnataka20; Vinay Tyagi v. Irshad Ali21; and Hardeep Singh v. State of Punjab22; Hardeep Singh v. State of

Punjab23, having clearly held that a criminal trial does not begin after cognizance is taken, but only after charges are framed. What is not given any importance at all in the recent judgments of this Court is Article 21 of the Constitution and the fact that the Article demands no less than a fair and just investigation. To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate, who will exercise such discretion on the facts of each case and in accordance with law. If, for example, fresh facts come to light that would lead to inculpating or exculpating certain persons, arriving at the truth and doing substantial justice in a criminal case are more important than avoiding further delay being caused in concluding the criminal proceeding, as was held in Hasanbhai Valibhai Qureshi v. State of Gujarat24. Therefore, to the extent that the judgments in Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel25; Athul Rao v. State of Karnataka26; and Bikash Ranjan Rout v. State (NCT of Delhi)27 have held to the contrary, they stand overruled. Needless to add, Randhir Singh Rana v. State (Delhi Admn.)28 and Reeta Nag v. State of W.B.29 also stand overruled.

44. Union of India v. W.N. Chadha30, is a judgment that states that the accused has no right to participate in the investigation till the process is issued to him, provided there is strict compliance with the requirements of fair investigation. Likewise, the judgments in Nagawwa v. V.S. Konjalgi31, Prabha Mathur v. Pramod Aggarwal32, Narender G. Goel v. State of Maharashtra33, and Dinubhai Boghabhai Solanki v. State of Gujarat34, which state that the accused has no right to be heard at the stage of investigation, has very little to do with the precise question before us. All these judgments are, therefore, distinguishable. Further, Babubhai v. State of Gujarat (supra) is a judgment that distinguishes between further investigation and re-investigation and holds that a superior court may, in order to prevent miscarriage of criminal justice if it considers necessary, direct investigation de-novo, whereas a Magistrate's power is limited to ordering further investigation. Since the present case is not concerned with re-investigation, this judgment also cannot take us much further. Likewise, Romila Thapar v. Union of India35, held that an accused cannot ask to change an investigating agency or to require that an investigation be done in a particular manner, including asking for a court-monitored investigation. This judgment

also is far removed from the question that we have decided in the facts of this case."

23. In *Varinder Kumar v. State of Himachal Pradesh*, a 3-judge Bench of the Supreme Court has considered and distinguished *Mohan Lal's case (supra)* and held that where the informant is acting as an investigating officer, the prospects of a fair investigation by the accused shall be governed by their individual facts and held that; the individual rights of the accused are undoubtedly important. But equally important is the societal interest in bringing the offender to book and for the system to send the right message to all in the society- be it the law-abiding citizen or the potential offender. *"Human rights"* are not only of the accused but, extent apart, also of the victim, the symbolic member of society as the potential victim and society as a whole36.

24. Law has to cater to a wide variety of situations as appear in society. The law being dynamic, the certainty of the legislation appears rigid at times whenever a circumstance (set of facts) appears which is not catered for explicitly. Expediency then dictates that the higher judiciary, while interpreting the law, considers such exception(s) as is called for without disturbing the pith and substance and the original intention of the legislature. This is required primarily for the reason to help strike a balance between competing forces- justice being the end and also because the process of fresh legislation could take a long time, which would mean failure of justice and, with it, erosion of public confidence and trust in the justice delivery system37.

25. The principle of fair trial now informs and energises many areas of the law. It is a constant, ongoing, evolutionary process continually adapting itself to changing circumstances and endeavouring to meet the exigencies of the situation- peculiar at times- and related to the nature of the crime, persons involved, directly or operating from behind, and so many other powerful factors which may come in the way of administration of criminal justice, wherefore the endeavour of the higher courts while interpreting the law, is to strike the right balance38.

26. Societal interest, therefore, mandates that the law laid down in *Mohan Lal's case (supra)* cannot be allowed to become a springboard by an accused for being catapulted to acquittal, irrespective of all other considerations pursuant to an investigation and prosecution when the law in that regard was nebulous. Criminal jurisprudence mandates balancing the rights of the accused and the prosecution. If the facts in *Mohan Lal's case (supra)* were telling with regard to the prosecution, the facts in the present case are equally telling with regard to the accused. There is a history of previous convictions of the appellant also. We cannot be oblivious to the fact that while the law stood nebulous, charge sheets have been submitted, trials in progress or concluded, and appeals pending, all of which will necessarily be impacted39.

27. The criminal justice delivery system cannot be allowed to veer exclusively to the benefit of the offender, making it a directional exercise. A proper administration of the criminal justice delivery system, therefore, requires balancing the rights of the accused and the prosecution so that the law laid down in *Mohan Lal's case (supra)* is not allowed to become a springboard for acquittal in

prosecutions prior to the same, irrespective of all other considerations. We, therefore, hold that all pending criminal prosecutions, trials and appeals prior to the law laid down in *Mohan Lal's case (supra)* shall continue to be governed by the individual facts of the case40.

28. Turning back to the issue before us, the record annexed with the petition suggests that the complainant married her sister to the petitioner on 1.12.2020, and on 23.3.2022, her sister Harshita Gupta was found dead at the petitioner's residence under some mysterious circumstances. On perusal of the postmortem report, it is observed that the deceased had the following external injuries:

"1. Ligature mark size 22 x 2 cm around the neck with a gap of 13 cm back of neck ligature mark lies 06 cm below the right ear, 05 cm below the chin, 03 cm angle of the left mandible. On the cut section, the skin is parchment-like and glistening.

2. Contusion 5 x 5 cm mid of right leg and size 4 x 2 obliquely on back of right thigh."

29. The doctor has opined the cause of death was ***asphyxia due to ante-mortem hanging.*** There are also allegations of demand for dowry and cruelty upon the deceased by the husband and his family members.

30. Undoubtedly, the Constitutional Courts have the power to give direction for fair investigation in the interest of justice where it finds a miscarriage of justice would be caused if the investigation conducted by the police is belied upon. But, the said power is not unregulated power and cannot be used in a routine manner. The said power shall be used sparingly and cautiously in exceptional circumstances to secure the end of justice. In *Babubhai (supra)* case, two incidents had occurred pursuant to the happening of the incident, two FIRs were registered, and both the incidents had occurred at the same place in close proximity of time. Therefore, there are two parts of the same transaction. Needless to say, two FIRs were registered by the police arising out of the same incident on the *tehrir* of respective parties, who were part of the fight.

31. The investigating agency filed the charge sheets against the respective parties, against the same set of accused in both cases. A charge sheet is the outcome of an investigation. If the investigation has not been conducted fairly, we are of the view that such a vitiated investigation cannot give rise to a valid charge sheet. Such investigation would ultimately prove to be a precursor of a miscarriage of criminal justice. In such a case, the Court would simply try to decipher the truth only on the basis of guesses or conjunctures, as the whole truth would not come before it. It will be difficult for the Court to determine how the incident took place wherein three persons died and so many persons, including the complainant and accused, got injured.

32. The petitioner's sole contention for seeking a fair investigation is rooted in the letter dated 19.10.2022, annexed to the petition, which refers to an online complaint dated 31.3.2022 bearing Complaint No. 2022/IC/072020. The complaint pertains to the deceased wife's brother's girlfriend, Mamta, who allegedly posted inappropriate content on social media before the deceased's death on 23.3.2022. The petitioner posits that

Mamta, due to a soured relationship with the deceased's brother, sought revenge by tarnishing the deceased's character on social media, leading to the tragic outcome of suicide. This argument serves as the petitioner's defence. While the rights of the accused are undeniably significant, so are the rights of the victim. The law must address a diverse range of societal situations, allowing for exceptions without compromising the essence and original intent of the legislature, as acknowledged in the *Vishnubhai Haribhai case (supra)*. The principle of a fair trial is a continuous and evolving process that adapts to changing circumstances. Higher courts strive to strike a balance between the accused's rights and societal interests, preventing the accused from unduly delaying the trial by filing frivolous petitions under writ jurisdiction.

33. In essence, *Mohan Lal's case (supra)*, as discussed herein above, the appellant assailed his conviction under section 18 of the NDPS Act, 1985, sentencing him to rigorous imprisonment for ten years with a fine of default stipulated therein. The issue of determination before the Supreme Court was whether a criminal prosecution would be in consonance with the principles of natural justice, fair play and fair investigation if the informant and the investigating officer were to be the same person. Specially in cases of the NDPS Act, carrying a reverse burden of proof. Therefore, Mohan Lal's judgment was considered and differentiated in *Varinder Kumar's case* because no straight jacket formula could be culled out in case of further investigation at the behest of the accused. It needs to be decided on a case-to-case basis, as in the case of dowry death, the burden is on the accused to prove innocence, unlike in NDPS cases. Thus, the facts of *Mohan Lal's case (supra)* and Vishnubhai Haribhai Malviya's case *(supra)* are distinct and different from the instant case. Therefore, the ratio culled out in both these cases would have no consequences in the facts- circumstances of the instant case. As rightly said in *Varinder Kumar's case (supra)*, the criminal justice delivery system cannot be allowed to be exclusive to the benefit of the offender, making it a unidirectional exercise. Thus, it cannot be allowed to become a springboard for the acquittal of accused persons in offences like dowry death.

34. Despite fair investigation and fair trial being integral to constitutional rights guaranteed under Articles 20 & 21 of the Constitution of India, criminal jurisprudence rests on the presumption of the accused's innocence until proven guilty. Those aggrieved by biased and flawed police investigations may seek permissible legal recourse at various stages enshrined in the Code of Criminal Procedure.

35. The writ jurisdiction in criminal cases plays a pivotal role in upholding the rule of law, safeguarding individual liberties, and ensuring the equitable and just conduct of legal proceedings. It acts as a constitutional check on administrative and lower court actions, providing a remedy when fundamental rights are violated or when there is a miscarriage of justice within the criminal justice system. Essentially, this jurisdiction serves as a constitutional safeguard, ensuring individuals are protected from any infringement of their fundamental rights and affirming that justice is not only achieved but also transparent and evident, at the same time, the writ jurisdiction ought to be exercised judiciously and

circumspectly, with a primary focus on serving the end of justice rather than causing harm to the legally prescribed procedural framework.

36. Unless an exceptional case is made out with compelling evidence of gross misuse of power, particularly when such misuse is evident on the face of the investigation, the Court should ideally intervene in the investigative process, a domain statutorily entrusted to law enforcement and the executive branch of government. In essence, in instances of a demonstrated malicious exercise of power by a police officer, the Court shall intervene in the change of investigation or fresh invention, as the facts of the case may demand.

37. If the legal proceedings are aborted at this stage at the behest of the accused, in the given facts-circumstances, in which a young lady has died under mysterious circumstances at in-laws' house within seven years of her marriage, and where there are allegations of dowry demand and cruelty, the petition cannot be allowed merely on the basis averments contended by the petitioner-husband that the brother of his deceased-wife had an affair with a lady who had no connection of whatsoever nature with the in-laws family, Additionally, considering the letter dated 19.10.2022 *(Annexure-17 to the writ petition)* and certain social media posts *(Annexure-12 to the writ petition)* amounts to conduct of a mini-trial within the purview of writ jurisdiction, which is impermissible in law. The letter dated 19.11.2022, at its zenith, could serve as the petitioner's defence. However, its evidentiary merits and pertinence will undergo scrutiny during the trial in accordance with the Evidence Act, 1872.

38. In the foregoing discussions, the petition is devoid of merit and hence ***dismissed.***

39. The observations made herein are expressly confined to the disposition of this case and hold no relevance or impact on the ongoing proceedings within the trial court under the jurisdiction of the District & Sessions Judge, Mainpuri.

(2024) 1 ILRA 123
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2023

BEFORE

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

Second Appeal No. 2053 of 1980

Smt. Jeet Kaur ...Appellant
Versus
Sri Mishri Lal ...Respondent

Counsel for the Appellant:
Sri G.N. Verma, Sri A.N. Verma, Sri Omuir Babu, Sri Vishnu Sahai

Counsel for the Respondent:
Sri S.N. Singh, Sri Ashok Kumar Srivastava, Sri R.N. Singh

A. Civil Law - Code of Civil Procedure, 1908-Section 100-Specific Relief Act,1963-Sections 16 & 20-Indian Evidence Act, 1872-Sections 91 & 92-Specific performance-Agreement to sell-Respondent executed a registered agreement of sell in favour of petitioner-Suit was decreed by Trial Court, but the decree has been modified in appeal by Lower Appellate Court, substituting the direction for specific performance with an order for refund of the admitted earnest money-Whether in a case where substantial part of the sale consideration is paid, discretion can be exercised by the

court against granting specific performance under section 20 of the Act of 1963-Whether court can go behind terms of agreement in view of sections 91 and 92 of Evidence Act?-Trial Court has found plaintiff is going by terms of suit agreement and also evidence of breach thereof followed by that about readiness and willingness-Defendant simply said that agreement embodies a transaction different from what the parties entered into-Trial Court rightly taken into account the terms of registered agreement executed inter partes without looking into parole evidence and other circumstances to judge if the suit agreement indeed embodied the transaction that is apparent-Since a substantial part of sale consideration was paid, discretion generally ought not to be exercised against granting specific performance under section 20 of Act of 1963-Impugned decree as passed by Lower Appellate Court set aside and that of Trial Court restored.(Para 26 to 42)

The appeal is allowed. (E-6)

List of Cases cited:

1. Smt Raghuberi deceased & ors. Vs Ved Pal & ors.(2011) AIR Utt 38

2. Bishwanath Prasad Singh Vs Rajendra Prsad & anr. (2006) 4 SCC 432

3. Dass Jain (dead) thru LRs Vs Sohan Lal (dead) by LRs (2000) 1 SCC 434

4. Roop Kumar Vs Mohan Thedani (2003) 6 SCC 595

5. Kashi Ram Vs Ramji Lal (2023) 9 ADJ 370

6. Gangabai Vs Chhabubai (1982) 1 SCC 4

7. Vimal Chand Ghevarchand Jain & ors. Vs Ramakant Eknath Jadoo (2009) 5 SCC 713

8. Placido Francisco Pinto Vs Jose Francisco Pinto (2021) SCC Online SC 842

9. Anantha Raju & anr. Vs T.M Narasimhan (2021) AIR SC 5342

10. Mangala Waman Karandikar Vs Prakash Damodar Ranade (2021) 6 SCC 139

11. Rajendra Singh Vs Chandra Pal (2016) 7 ADJ 564

12. Mahendra Singh Vs Ramesh Singh (2020) 10 ADJ 93

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

1. This is a plaintiff's second appeal arising out of a suit for specific performance of contract. The suit was decreed by the Trial Court, but the decree has been modified in appeal by the Lower Appellate Court, substituting the direction for specific performance with an order for refund of the admitted earnest.

2. By a registered agreement to sell dated 13.06.1974 executed by Mishri Lal in favour of Smt. Jeet Kaur, Jeet Kaur, the plaintiff, alleged that Mishri Lal had covenanted to transfer for a sale consideration of Rs.9000/- his one-fourth share in the property, subject matter of contract. The property, agreed to be sold in terms of the registered agreement dated 13.06.1974, shall be called hereinafter as 'the suit property'. The details of the suit property are:

Sl. No.	Plot No.	Area	Location
1.	854	3 Bigha 15 Biswa1 Biswansi	Village Bain Kalan, Pargana Gangeri, Tehsil Atrauli, District Aligarh
2.	856	14 Biswa 15 Biswansi	Do
3.	858-Ba	3 Bigha 13 Biswa 11 Biswansi	Do
4.	858-Aa	4 Biswansi	Do

3. According to Smt. Jeet Kaur, the sole plaintiff-appellant, now represented by her heirs and LRs, plaintiff-appellant Nos.1/1 and 1/2, who shall hereinafter be referred to as 'the plaintiff', executed an agreement to sell dated 13.06.1974, for short, 'the suit agreement' covenanting that the defendant, Mishri Lal had received in earnest a sum of Rs.7900/- until time of execution of the last mentioned agreement; the balance of Rs.1100/- was covenanted to be paid by the plaintiff to the defendant at the time of execution of the sale deed. The plaintiff's further case is that the defendant, Mishri Lal agreed that he would secure for the suit property a *bhumidhari sanad* and within the time period of a month of its receipt, would execute a registered sale deed, as covenanted, upon receipt of the balance sale consideration of Rs.1100/-. The defendant, Mishri Lal, who is now represented on record by his sole heir and LR, Natthi Singh, his son, as respondent No.1/1, shall hereinafter be referred to as 'the defendant'.

4. According to the plaintiff, the defendant had agreed that upon receipt of the *bhumidhari sanad*, he would inform the plaintiff by notice about the fact, calling upon the latter to execute the conveyance. The plaintiff averred in his plaint that the defendant, in terms of the suit agreement, did not give him any information about receipt of the *bhumidhari sanad*, despite the plaintiff verbally inquiring of the defendant time over again regarding the fact aforesaid. As such, the plaintiff caused a notice dated 31.01.1977 to be served upon the defendant to the effect that the defendant may, in terms of the suit agreement, receive the balance sale consideration from the plaintiff and execute the covenanted sale deed at the earliest, and get the same registered.

5. The plaintiff pleads that despite service of the said notice, the defendant is not ready to execute the covenanted sale deed, in breach of the suit agreement. There is then the plaintiff's case that she has, in terms of the suit agreement, been always ready and willing, and is still ready and willing to secure execution of the covenanted sale deed. It may be remarked here that the precise words in the pleading employed in Paragraph No.7 of the plaint are: सदैव बैनामा कराने को तैयार थी और अब भी है।

6. This Court noticed that the pleading on the point does not mention the Hindi equivalents of ready and willing, which are concomitants of the cause of action under Section 16 of the Specific Relief Act, 1963. The Hindi equivalents of ready and willing are 'तत्पर' and 'इच्छुक'. Here, the word employed is a single word 'तैयार', an Urdu vernacular, which may not precisely represent the two distinct ideas of readiness and willingness postulated by the statute. However, since there was no issue raised about this matter before the Courts below, this Court does not propose to examine the matter any further and leaves it to rest here.

7. The plaintiff's further case is that the defendant's estate has been enlarged into a bhumidhari in view of the 1977 Amendment to the U.P. Zamindari Abolition and Land Reforms Act, and that now without securing a *bhumidhari sanad*, the defendant is competent to execute the covenanted sale deed. Alleging a breach of the suit agreement by the defendant, the present suit for specific performance was instituted by the plaintiff on 02.07.1977.

8. A written statement was filed on behalf of the defendant, where the pleas

raised in the plaint were generally denied. In the additional pleas, it was averred that no cause of action arose to the plaintiff to bring the present action. The defendant never entered into the suit agreement covenanting to convey the suit property for a sum of Rs.9000/- or any other sum of money in the plaintiff's favour. According to the defendant, the value of the suit property was at least Rs.25,000/-, and, therefore, the defendant would never execute an agreement to sell covenanting to convey the suit property in favour of the plaintiff for a sum of Rs.9000/-. The defendant alleged that the plaintiff was his cousin, his father's brother's daughter. The defendant would trust her much. He was in need of a sum of Rs.4000/-. He received a sum of Rs.2500/- in loan from the plaintiff to be repaid with interest @ 2% per month. The sum of Rs.2500/- lent to the defendant at the time of execution of the registered instrument was done on the understanding that the balance sum of loan would be paid to the defendant by and by, against receipts to be executed by the defendant. Since, the defendant was not in need of any further sum of money, he did not receive the balance of the agreed loan from the plaintiff.

9. There is an averment to the effect in the written statement that the plaintiff's case that a sum of Rs.5400/- had already been paid to the defendant is absolutely incorrect, without basis and a falsehood. The defendant says that he is an illiterate and rustic villager. The entire transaction and execution of the suit agreement has been undertaken by the plaintiff's husband, Pratap Singh, an experienced litigant and a clever man. It is he, who has got the suit agreement executed employing a scribe and witnesses, who enjoy his confidence. The defendant has admitted that he would have no objection to repay the plaintiff the sum of Rs.2500/- and the accrued interest thereon. The defendant next avers that he is a member of a scheduled caste and by the law not competent to transfer the suit property in the plaintiff's favour. Therefore, according to the defendant, the suit agreement cannot be acted upon. It is again pleaded that the suit property is not worth less than Rs.25,000/-. The defendant is entitled to the benefits of Section 20 and 22 of the Specific Relief Act. The defendant says that the suit deserves to be dismissed with costs.

10. On the pleadings of parties, the following issues were framed:

"1. Whether the defendant agreed to sell the land in dispute for Rs.9000/- to the plaintiff as alleged and executed the agreement dated 13/6/74?

2. Weather the defendant is a member of scheduled caste and as such he is not competent to sell his land?

3. Whether the defendant is entitled to get benefit of Sections 20 and 22 of Specific Relief Act?

4. Whether the defendant was given only Rs.2500/- and not Rs.7900/- as alleged in paras 10 and 11 of WS?

5. To what relief, if any, is the plaintiff entitled?"

11. Issues Nos.1 and 4 were decided together by the Trial Court, answering Issue No.1 in the plaintiff's favour and No.4 against the defendant. The execution of the suit agreement contracting a sale of the suit property was held established and it was further held that the defendant received from the plaintiff a sum of Rs.5400/- and Rs.2500/-, the former, prior to execution of the suit agreement, and the latter, at the time of its registration, leaving a balance of

Rs.1100/- to be paid at the time of execution of the registered sale deed. Issue No.2 was decided against the defendant and likewise Issue No.3. The suit was, in consequence, decreed with costs directing the defendant to specifically perform his obligations by executing a sale deed in the plaintiff's favour upon receiving the balance sale consideration of Rs.1100/-, all to be done in the time period of 30 days from the date of the decree; in default the plaintiff was given liberty to secure execution of the sale deed in his favour at the defendant's expense through process of Court.

12. The defendant appealed the decree to the District Judge, Aligarh in *forma pauperis*. The appeal was, therefore, registered as Misc. Case No.135 of 1978. The application to appeal as an indigent was rejected by the learned District Judge vide order dated 15.12.1979. The defendant paid the requisite court-fee on 06.04.1980 leading to registration of the appeal on the file of the learned District Judge, numbered as Civil Appeal No.156 of 1980.

13. The appeal was heard and determined by the learned District Judge vide judgment and decree dated 14.07.1980. The learned Judge allowed the appeal, set aside the decree granting specific performance and substituted it by one directing refund of Rs.2500/- paid in earnest with interest @ 17% per *annum* from 13.06.1974 upto 02.07.1977. The plaintiff was also held entitled to *pendente lite* and future interest on the sum of Rs.2500/- @ 6% per *annum* until realization upon payment of court-fee in the execution department. The parties were held entitled to costs proportionate to their failure and success throughout. The learned District Judge in deciding the appeal formulated three points for determination, upon which he pronounced. These are: (1) *Whether plaintiff paid a sum of Rs.5400/- to defendant as advance on 13.6.1974 prior to the execution of the agreement for sale (Ex.1)?, (2) Whether defendant is entitled to the benefit of Sec.20 and 22 of Specific Relief Act? And, (3) To what relief, if any, is the plaintiff entitled?* The learned District Judge decided Point No.(1) in the negative holding that the advance of Rs.5400/- was not paid by the defendant to the plaintiff on 13.06.1974 at her home while her husband was away. Point No.(2) was decided in the affirmative holding that in the totality of circumstances and having regard to the conduct of parties, their relationship, the manner in which the defendant fell prey to the sharp practice of his brother-in-law, Pratap Singh, it is just and proper to refuse specific performance. Point No.3 was decided in the manner that the plaintiff was held entitled to the relief of refund of the earnest in the sum of Rs.2500/-. In addition to it, he was held obliged to pay interest at the rate of Rs.17/- per *annum* from 13.06.1974 to 02.07.1977. She was further held entitled to *pendente lite* and future interest on the principal at the rate of 6% per *annum* until payment, upon payment of necessary court-fee in the execution department.

14. On these findings, the learned District Judge set aside the decree for specific performance and substituted it with one for refund of the earnest. So much of the findings of the Lower Appellate Court on these points, would be alluded to during the course of this judgment as are necessary to answer the substantial questions, on which this appeal has been heard before us.

15. Aggrieved by the appellate decree, the plaintiff has preferred this second appeal.

16. This second appeal was admitted to hearing *vide order* dated 19.08.1980 saying in that order that Grounds Nos.1, 2 and 3 raise substantial questions of law. No substantial question of law, however, was formulated by the Court in accordance with the requirements of the statute. The appeal came up before this Court on 13.05.2022 for hearing, when it was noticed that substantial questions, though mentioned in the order of admission with reference to grounds taken in the appeal, had not been formulated by the Court. Accordingly, on 13.05.2022, the following substantial questions of law were framed:

(i) Whether in a case where substantial part of the sale consideration is paid at the time of the suit agreement or thereafter before the suit is instituted, discretion can be exercised by the Court against granting specific performance under Section 20 of the Specific Relief Act, 1963?

(ii) Whether Court can go behind the terms of the agreement executed between the parties in view of the provisions of Sections 91 and 92 of Indian Evidence Act, 1972?

17. Heard Mr. Raghav Arora, learned Counsel for the plaintiff and Mr. Ashok Kumar Srivastava, learned Counsel appearing on behalf of the defendant.

18. It would be more convenient to take up for consideration Substantial Question of Law No. (ii), first.

19. It is submitted by Mr. Raghav Arora, learned Counsel for the plaintiff that in order to understand the legislative scheme underlying Sections 91 and 92 of the Indian Evidence Act, one has to look to the principle behind the need for reducing transactions between parties into writing. The purpose of reducing a transaction into writing is to perpetuate the memory of the transaction so as to avoid confusion about what that transaction is. Also, if the transaction has to be proved, the mandate of Sections 91 and 92 of the Evidence Act is that it can be proved by the document alone; not by parole evidence. This, Mr. Arora says, is also called the principle of exclusivity of documentary evidence. He has invited the attention of the Court to Section 91 of the Evidence Act to say that it provides: *'when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself,……',* to borrow the precise phraseology of the statute. He submits that Section 91 embodies the rules of exclusivity of documentary evidence.

20. Mr. Arora next submits that Section 92 of the Evidence Act provides that when the terms of any such contract have been reduced to the form of a document and proved according to Section 91 of the Evidence Act, no evidence of any oral agreement or statement shall be admissible *inter partes* or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, the terms of the document. It is argued that Section 91 of the Evidence Act is a prohibitive provision. It places a bar upon parties proving the terms of a contract reduced to writing by extrinsic evidence. It permits proof of the

transaction reduced to writing by documentary evidence and prohibits it by any oral evidence.

21. Section 92 of the Evidence Act also carries a prohibition. It prohibits proof of a document proved under Section 91 by any other evidence, particularly, oral, that a party may seek to lead in order to modify, add to or subtract from anything what the document says. Mr. Arora has placed reliance upon the decision of the Uttarakhand High Court in **Smt. Raghuberi 'deceased' and others v. Ved Pal and others, AIR 2011 Utt 38**, where it is observed:

"8. Since the substantial question of law on which the second appeal has been admitted encompasses a narrow area, this Court will only take up this legal issue. The fact of the matter is that plain reading of Sections 91 and 92 clearly stipulates that once the contents of written document have been proved, as it has been proved in the present case in the form of registered agreement for sale dated 10.5.1978, nothing which is contrary to or varying to or adding or subtracting to this contract shall be taken into consideration by the court. The existence of any condition which is there in an unregistered document (Ex. A-1) stipulates that if the defendant returns the agreed amount i.e. ` 7,700/- within a period of 2 years, the plaintiff shall not press upon the execution of the sale deed, is a document which cannot be relied upon in view of the clear cut separate provision contained in the written agreement for sale which was registered. Any reliance on it will be in violation of Sections 91 and 92 of the Indian Evidence Act. Therefore, it is the clear opinion of this Court that registered document for agreement for sale was misinterpreted and the reliance on the unregistered document (Ex. A-1) was clearly wrong."

Bishwanath Prasad SinghBishwanath Prasad Singh

22. He has further relied upon the decision of the Supreme Court in **Bishwanath Prasad Singh v. Rajendra Prasad and another, (2006) 4 SCC 432,** which in turn refers to **Ishwar Dass Jain (dead) through LRs v. Sohan Lal (dead) by LRs, (2000) 1 SCC 434 and Roop Kumar v. Mohan Thedani, (2003) 6 SCC 595.** It is urged on the foot of all these authorities that this is a case where the suit agreement carries a recital to the effect that the defendant had received from the plaintiff Rs.5400/-. The suit agreement also covenants that the defendant will receive a sum of Rs.2500/- before the Sub-Registrar. The execution and registration of the document is admitted to the defendant. The suit agreement had been duly proved by the plaintiff during trial, a fact clearly found by the Trial Court in the plaintiff's favour. The parole evidence of the defendant to the effect that he never received a sum of Rs.5400/- from the plaintiff as per the recitals in the suit agreement, cannot be looked into or considered. The reason is that the terms of the contract cannot be contradicted or proved incorrect by oral evidence on the point, which is inadmissible under Sections 91 and 92 of the Evidence Act.

23. It is urged next that if for the sake of argument oral evidence regarding the terms of the suit agreement be held admissible, the defendant has averred in his written statement that he has not received the sum of Rs.5400/- from the plaintiff as recorded in the said agreement. This is a fact which had to be proved by the defendant. The defendant failed to prove this fact before the Trial Judge that he

actually did not receive the sum of Rs.5400/- from the plaintiff, a fact that is part of recitals in the suit agreement. It is next argued by Mr. Arora that Sections 103 and 106 of the Evidence Act would cast burden of proof upon the defendant to establish that he did not receive the sum of Rs.5400/- from the plaintiff, a fact otherwise established by the recitals in the suit agreement. It is further urged that the Lower Appellate Court, by going behind the terms of the suit agreement, shifted the burden away from the defendant that he bears under Sections 103 and 106 of the Evidence Act, placing it in manifest error upon the plaintiff's shoulders to prove that the plaintiff had paid Rs.5400/- to the defendant in terms of the suit agreement. According to learned Counsel, the plaintiff has duly discharged his burden by proving the execution of the suit agreement, a fact found for him by the Lower Appellate Court.

24. The learned Counsel for the defendant has submitted that the provisions of Sections 91 and 92 of the Evidence Act do not come into play at all in this case, forbidding the defendant from leading oral evidence, inasmuch as the defendant disputes the character of the suit agreement and says that it was never the intention of parties to enter into a bargain for the sale of the suit property. Since the case of the defendant is that the document that he executed was understood by him to be one securing repayment of the agreed loan of Rs.4000/-, out of which he received Rs.2500/- alone, the bar under Section 92 would never be attracted. If a party to a contract pleads that the document embodies a transaction different from that recorded, the principle is well settled that parole evidence about what was truly intended by parties can be given, unhindered by the provisions of Section 92 of the Evidence Act.

25. We have given our thoughtful consideration to the submissions advanced by learned Counsel and perused the record.

26. It is true for a salutary principle that the terms of a solemn document, which embodies the terms of a contract entered into between parties, must generally and always be considered according to its apparent tenor and read as a complete embodiment of the terms of contract that the parties entered into, to the exclusion of all other evidence about it. This is the substance of the Rules embodied in Sections 91 and 92 of the Evidence Act. While Section 91 of the Evidence Act postulates a rule of exclusion of oral evidence, where the terms of a contract etc., have been reduced to writing, the rule in Section 92 makes what is exclusively provable in accordance with Section 91, conclusive between parties. Thus, while Section 91 makes documentary evidence of a transaction reduced to writing exclusive about its proof, Section 92 makes it conclusive. There is little quarrel about these well established principles and we do not think that there is any cavil about these arising from whatever the learned Counsel for the parties have mooted before this Court. What seems to have been missed by the learned Counsel for the plaintiff in relying upon the complementary rules in Sections 91 and 92, is the fact that Section 92 does not prohibit a party from showing the true character of a transaction embodied in a document, if he says that it is different from what was really entered into between parties. A party, therefore, urging a plea of *non est factum* or saying that what he signed was understood by him to be something essentially different from what

the writing is, is not at all hindered by Section 92 of the Evidence Act from leading parole evidence about what he intends to prove.

27. I had occasion to consider this question in **Kashi Ram v. Ramji Lal, 2023 (9) ADJ 370,** where after reference to relevant and high authority bearing on the point, in particular, the decisions of the Supreme Court in **Gangabai v. Chhabubai, (1982) 1 SCC 4, Vimal Chand Ghevarchand Jain and others v. Ramakant Eknath Jadoo, (2009) 5 SCC 713, Roop Kumar** *(supra)*, **Ishwar Dass Jain** *(supra)*, **Placido Francisco Pinto v. Jose Francisco Pinto, 2021 SCC OnLine SC 842, V. Anantha Raju and another v. T.M. Narasimhan, AIR 2021 SC 5342 and Mangala Waman Karandikar v. Prakash Damodar Ranade, (2021) 6 SCC 139,** the principle was summarized thus:

"41. On principle, the prohibition on admitting parole evidence, where parties have entered into a solemn and written deed or contract, is the rule. About the exceptions, a close look at authority demonstrates that the conservative view is to permit oral evidence to be admitted contrary to the terms of a written deed, agreement or document, in case one or the other exceptions, mentioned in the six provisos to Section 92 of the Evidence Act is attracted, or one of the exceptions in Sections 93, 95, 96, 97, 98, 99 and 100 of the Act last mentioned. In a case, where the statutory exceptions to the rule in Section 92 do not apply, there is this judicially evolved principle operating in a very narrow field and subject to very exacting standards of burden on the party, seeking to introduce oral evidence, which applies in those cases alone, where a party does not seek to plead anything contradicting, varying, adding to or subtracting from the terms of the written document, but show that the parties in fact intended to enter into a transaction, very different from what is ostensible. Therefore, this exception, judicially recognized, applies to cases, where the party, intending to lead oral evidence, does not rely on the document, but says that it is sham, and that the intention of parties was entirely different than the recitals.

42. A reading of the principle in **Mangala Waman Karandikar**, *(Supra)* and, also somewhat in **Placido Francisco Pinto** *(Supra)* shows that the Court has leaned in favour of a strict approach to admit oral evidence, where parties have a written deed or contract governing their rights with exceptions only being those enumerated in the provisos to Section 92 of the Evidence or Sections 93, 95, 96, 97, 98, 99 and 100. But, it is equally true that the holding in **Placido Francisco Pinto** *(Supra)* also acknowledges the principle that oral evidence, contrary to a written agreement, may be led in those cases, where the document is claimed by one party to be sham and what the parties contracted really being entirely different. At this stage, it is necessary to notice the standards by which a person, who refuses to rely on a written record of the transaction or contract between him and the other party and says that what was contracted was entirely different, must prove that fact. In this connection, reference must be made to Gurdial Singh, where it is said that the inference of a different intention than the written contract "from the circumstances should be an irresistible one and not merely a matter of conjectures and surmises", to borrow the words of their Lordships."

28. In our opinion, the principles deduced by this Court in **Kashi Ram** *(supra)* does not require an elaborate

reference to all the authorities, on which it is based. We proceed, therefore, to hold that this is the principle, by which the substantial question here is to be answered.

29. In this case, therefore, what this Court is required to see is if the suit agreement here is one, where from the circumstances, there is an apparent and irresistible inference about the said agreement not being the embodiment of the contract that was really entered into between parties. If the inference on the circumstances is irresistible that the suit agreement does not embody what the parties bargained, but something entirely different, the rule in **Mangala Waman Karandikar** *(supra)* and **Placido Francisco Pinto** *(supra)* laid down by the Supreme Court and by this Court in **Kashi Ram** may be invoked to permit consideration of parole evidence about the terms of the contract; else, Section 92 of the Evidence Act would forbid any such consideration. The Trial Court has found for the plaintiff, going by the terms of the suit agreement, and, also, evidence of breach thereof followed by that about readiness and willingness. The Lower Appellate Court, however, has chosen to look beyond the suit agreement and considered parole evidence and other circumstances to judge what the transaction really was.

30. The Lower Appellate Court seems to have been impressed by the fact that out of the recorded earnest in the suit agreement, the sum of Rs.5400/- was paid to the defendant at home, regarding which a receipt was issued to the plaintiff, but not produced in evidence. The Lower Appellate Court has opined that the evidence of this receipt being returned to the defendant about time or just before the execution of the suit agreement, is not believable. The Lower Appellate Court has then gone about the exercise of considering the oral testimony of the three witnesses called by the plaintiff to prove the suit agreement, one of whom was the scribe and the other two, witnesses of the document, properly so called. The Lower Appellate Court has also taken into account the fact that the Sub-Registrar's endorsement mentions payment of the sum of Rs.2500/- out of the earnest of Rs.7900/-, that was made before him, but not the sum of Rs.5400/- paid at home. Though, the Lower Appellate Court, as the last Court of fact, certainly had jurisdiction to review evidence wholesomely, coextensive with that of the Trial Court, but it certainly had the same embargo to face, in looking into parole evidence which the Trial Court would have, in considering the suit agreement, in view of the Rules in Sections 91 and 92 of the Evidence Act.

31. In the clear opinion of this Court, the Lower Appellate Court did not point to any circumstances, from which an irresistible inference could be drawn that the suit agreement was not an embodiment of the real transaction that the parties entered into. The remarks of the Lower Appellate Court that the receipt was not mentioned by the plaintiff to her Counsel and was, therefore, not part of her pleadings, or to the scribe, who drafted the suit agreement, making the payment of a sum of Rs.5400/- back at home unbelievable, is besides the point.

32. The other remarks, disbelieving the case for return of a the receipt, evidencing payment of Rs.5400/- out of the earnest, immediately before execution of the suit agreement, is also a matter that does not make the suit agreement shrouded

by circumstances that may lead to the irresistible conclusion of it being the embodiment of a transaction different from what the parties entered into. Rather, if the evidence of parties for the limited purpose of judging if the rule in Section 92 bars a consideration of oral evidence, is looked into, the irresistible conclusion is that the receipt of whatever kind for the sum of Rs.5400/-, that was earlier executed in the defendant's favour, could very logically be returned to the plaintiff, once the parties formally reduced their bargain to a written and registered contract, where receipt of the sum of Rs.5400/- also found mention in the recitals. The mere fact that the Sub-Registrar in his endorsement, at the time of registration, mentioned the sum of Rs.2500/-, part of the total earnest of Rs.7900/- alone, is also not that kind of a circumstance, on which an irresistible inference about the document being a sham or the embodiment of a different transaction, could be drawn. Normally and invariably, as a rule, parties ought be bound by the terms of their written deed or contract, and it is only in the most extraordinary circumstances, suggesting a sham transaction or an entirely different one from what has been scripted in the contract or deed, that parole evidence may be considered contrary to the rule in Section 92 of the Evidence Act.

33. Of course, if a party does not rely on the terms of a contract on one or the other grounds postulated in the six provisos of Section 92 or one of the exceptions in Sections 93, 95, 96, 97, 98, 99 and 100 of the Evidence Act, oral evidence in support of those pleas must be permitted to be led. Here, that is not the case. The defendant has not specifically pleaded or sought to establish fraud, intimidation, illegality, want of due execution, want of capacity in him; but simply said that the agreement embodies a transaction different from what the parties entered into. Though, this is permissible in view of the judicially evolved principles, but only if by the most exacting standards an irresistible inference from circumstances could be drawn that the solemn contract is not the embodiment of the real transaction.

34. This Court is afraid that the Lower Appellate Court has not judged the case of parties by this standard before venturing to consider all kind of parole evidence and circumstances to hold against the solemn terms of the suit agreement. In the opinion of this Court, the Trial Court was right in going by the terms of the registered agreement, executed inter partes, without looking into parole evidence and other circumstances to judge if the suit agreement indeed embodied the transaction that is apparent.

35. In view of what we have held, there is no necessity to consider the decision of the Uttarakhand High Court in **Smt. Raghuberi** *(supra)* and the Supreme Court in **Bishwanath Prasad Singh** *(supra)* relied upon by the learned Counsel for the plaintiff on the substantial question under consideration.

36. In view of what has been held, **Substantial Question No.(ii) is answered in the negative**, subject to the remarks hereinabove.

37. So far as the first substantial question of law goes, this Court has to go by the finding of the Trial Court about the suit agreement and its terms. This is so because whatever the Lower Appellate Court has held to the contrary has not met with our approval on principle that the

Appellate Judge ought not to have looked into parole evidence, for reasons already given. The terms of the suit agreement, which is a registered instrument, clearly indicate that the bargain embodied therein is one for sale of the suit property for a total consideration of Rs.9000/-. Out of the agreed consideration, a sum of Rs.7900/- was paid in earnest, sparing a residue of Rs.1100/- to be paid at the time of execution of the sale deed. Now, one of the principles governing the exercise of discretion to grant specific performance is substantial compliance with his part of the contract by the price contractee, that is to say, the plaintiff. If out of the entire sale consideration, the price contractee or the vendee has paid almost the whole of the agreed sale consideration, with a negligible residue to be paid at the time of execution of the sale deed, discretion normally ought to be exercised in favour of the vendee. Of course, there could be cases disentitling the plaintiff to relief since specific performance on the terms of the statute, as it stands for the purpose of the present suit, is after all an equitable relief, and, therefore, discretionary. But, there is no denying the fact that in guiding that discretion substantial payment by the vendee is one of the robust factors that ought to weigh with the Court in opting for the grant of specific performance.

38. This question came up for consideration before this Court in **Rajendra Singh v. Chandra Pal, 2016 (7) ADJ 564,** where it was observed:

"11. In present case the readiness and willingness to perform his part of the contract, as required for the grant of relief of specific performance, is proved fact. Not only the lower Courts had given such finding in favour of plaintiff-appellant, but also this fact is explicitly clear and evident from the fact that out of total agreed sale consideration of Rs. 80,000/- the plaintiff-appellant had already paid Rs. 77,000/- which is 96.25 % of the sale consideration. This amount of sale consideration was used and usurped by defendant-respondent who had also been enjoying the possession of disputed property.

12. Thus almost slightly less than total consideration was utilized and enjoyed by the defendant-respondent, who had not only been enjoying the property in question, but had already been acting in bad faith and mala fide manner when he had been taking false defences of alleged loan and refund of amount etc., which were found incorrect and false by the two lower Courts. He had been repeatedly telling lie, and misusing process of Court by giving false evidences.

13. Section 20 (2) of the Specific Relief Act had provided certain conditions, as quoted above, in which Court may properly exercise discretion not to decree specific performance. Considering those conditions in light of present case it is found that (a) the terms of the contract or the conduct of the parties at the time of entering into the contract was not such could give the plaintiff an unfair advantage over the defendant, because the plaintiff had already received more than 96% of sale consideration, and it would be the defendant whould get unfair advantage over plaintiff-appellant if no relief of specific performance is granted; (b) in present matter there appeared nothing which the defendant-respondent could not foresee, and instead of defendant it would be the plaintiff-appellant who would suffer hardship by non-performance who had paid almost nearly whole the price of property, and when in present age of boom of property prices would get meager amount

of actual price of said land, even if the money is refunded with interest; and (c) the defendant-respondent, after receiving of almost more than 96% of sale consideration, had not entered into the contract under any circumstances which makes it inequitable to enforce specific performance."

39. This issue came up before me in **Mahendra Singh v. Ramesh Singh, 2020 (10) ADJ 93**. That was a case where out of the settled consideration of Rs.50,000/-, the defendant had received a sum of Rs.45,000/- at the time of execution of the contract. In **Mahendra Singh** *(supra)*, I held:

"70. Once this Court is assured that the Lower Appellate Court has rightly concluded that the defendant has received a sum of Rs. 45,000/-, out of the total sale consideration of Rs. 50,000/- agreed, the scales for the exercise of discretion in favour of specific performance are decisively tipped. The fact that the defendant has received a sum of Rs. 45,000/- for one part, excludes any doubt about the defendant being inequitably dealt with by the plaintiff on account of his illiteracy etc. At the same time, the fact that the defendant has received a sum, that accounts for ninety percent of the sale consideration, places the plaintiff in a position where he has done substantial acts in performance of his part of the contract. Nothing remains to be done on the plaintiff's part, except payment of the balance of Rs. 5000/- and meeting the expenses of execution and registration of the conveyance. The doing of all substantial acts in performance of the plaintiff's part of the contract is a relevant consideration, under sub-Section (3) of Section 20 of the Specific Relief Act."

40. In view of what has been said hereinabove, Substantial Question of Law No. (I) is also decided in the negative holding that where a substantial part of the sale consideration is paid when the suit agreement is executed or at any time before action is brought, discretion generally ought not be exercised against granting specific performance under Section 20 of the Specific Relief Act, 1963.

41. In view of what this Court has held on the two substantial questions of law, the logical conclusion is that the decree of the Trial Court ought to be restored and that of the Lower Appellate Court set aside.

42. In the result, this appeal succeeds and is allowed with costs throughout. The decree passed by the Lower Appellate Court is **set aside** and that of the Trial Court **restored.**

43. Let a decree be drawn up, accordingly.

(2024) 1 ILRA 135
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 6 of 2024

Vaishali Mishra ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Rajiva Dubey

Counsel for the Respondent:
G.A.

(A) Constitution of India, 1950 - Article 226 - Habeas Corpus - detenue under illegal detention in her house with her real brother and real uncle - not allowing her friend to meet her - wants to marry the detenue - averments in petition are nothing but a ploy to defame the image of detenue as well as her family members - photographs appear to be manufactured and tempered - no document shows any affiliation or affection between detenue and petitioner - forged and fabricated - nothing on record to demonstrate that detenue had made any complaint to any competent authority about her alleged illegal detention - detenue is a major girl aged about 29 years - knows her welfare very well - petitioner, aged about 32 years .(Para - 4,7)

HELD:-Case of the petitioner is nothing but a ploy to defame the image of the detenue and her other family members so that the family members of the detenue under pressure and fear of insult may compromise the situation.**(Para - 10)**

Petition dismissed. (E-7)

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

1. Heard Shri Rajiva Dubey, learned Counsel for the petitioner, Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondent No.1 and 2 and perused the material placed on record.

2. This Habeas Corpus Writ Petition has been filed on behalf of Vaishali Mishra through her next friend Ashish Kumar with following main prayers:-

"i. to issue a writ in the nature of Habeas Corpus, commanding opposite parties No.3 to 5 to produce the detenue/petitioner before this Hon'ble Court and to pass appropriate order for her release after recording her statement who has been illegally detained by opposite parties Nos.3 to 5 in the petitioner's house situated in Mohalla-Ayodhyapuri, City-Lakhimpur, Police Station-Kotwali Sadar, District-Lakhimpur Kheri and set her free.

ii. to issue any other writ, order or direction in favour of the petitioner as this Hon'ble Court may deem fit and appropriate in the nature and circumstances of the case.

iii. to allow this writ petition with costs."

3. Learned Counsel for the petitioner submits that detenue, namely-Vaishali Mishra aged about 29 years resident of Mohalla-Ayodhyapuri, City-Lakhimpur, Police Station-Kotwali Sadar, District-Lakhimpur Kheri, who is residing in the same house with her real brother and real uncle i.e. respondent No.3 and 4 and as per the case set up by the petitioner, the detenue has been kept under illegal detention. It is also alleged that respondent No.5 is the real maternal uncle of the detenue. He further submits that the detenue, namely-Vaishali Mishra is a major girl and as per her educational certificates her date of birth is 01.06.1994 and has completed her education in Bachelor of Science (B.Sc.) and Bachelor of Education (B.Ed.).

4. Learned Counsel for the petitioner submits that this writ petition has been filed by Ashish Kumar, the next friend of detenue, namley-Vaishali Mishra. He further submits that there is love affair between the detenue and the petitioner, namely-Ashish Kumar since 2011 and they want to marry each other but the family members of the detenue are not ready for their marriage, this averment finds mention at paragraph No.9 of the affidavit filed in

support of the present petition. He further submits that detenue, Vaishali Mishra and Ashish Kumar used to meet regularly and some photographs have also been annexed as Annexure No.4 with this writ petition. He further submits that the detenue is under illegal detention in her house with her real brother and real uncle and they are not allowing her next friend, namely-Ashish Kumar to meet her as he wants to marry the detenue, thus, this writ petition has been filed with aforesaid prayers and interference by this Court is necessary in the matter.

5. On the other hand, Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondent No.1 and 2 have opposed the submissions advanced by learned Counsel for the petitioner, namely-Ashish Kumar and submits that except some photographs and one letter allegedly written by the detenue-Vaishali Mishra no other document has been annexed with this petition to show that the detenue and the petitioner, namely-Ashish Kumar are in relationship or they have love affair between them and they were going to solemnize marriage with each other. He further submits that as per the averments made in this petition, the detenue and the petitioner, namely-Ashish Kumar were in relationship since 2011 and this petition has been filed in the year 2024 but they have not yet solemnized the marriage even after 13 years of their alleged relationship, thus, it appears that the entire story as narrated by the petitioner, namely-Ashish Kumar is false and fabricated only with the intention to defame the image of the detenue and her family members in the society, the next friend of the petitioner wants to take advantage of the order of this Court. He further submits that letter which has allegedly being written by the detenue appears to be forged and fabricated and apart from the said letter no other complaint was ever made by the detenue before any competent authority, which also demolishes the case of the petitioner, namely-Ashish Kumar, thus, he submits that the matter is very serious and no interference by this Court is required in the instant matter.

6. Learned A.G.A-I for the State-respondents also submits that we live in a society, which does not permit us to live or make relationship in the form, which has been narrated in the present petition. He further submits that the case of the petitioner, namely-Ashish Kumar is nothing but is a ploy to defame the image of the detenue and her other family members so that the family members of the detenue under pressure and fear of insult may compromise the situation, thus, this petition may be dismissed with heavy costs so that in future nobody tries to take advantage of this Court in such type of situations.

7. After considering the arguments of learned Counsel for the parties and after perusal of the material placed on record, this Court is satisfied with the argument made by learned A.G.A-I for the State-respondents and express its opinion that the averments made in this petition are nothing but a ploy to defame the image of the detenue as well as her family members, the Court is also not satisfied with the photographs as they appear to be manufactured and tempered, further, no document has been annexed with this petition, which shows that there is any affiliation or affection between the detenue and the petitioner, namely-Ashish Kumar. The letter which has allegedly being written by the detenue appears to be forged

and fabricated as the entire letter has been written in Hindi language but the signature and address in the said letter has been written in English language that creates a doubt in the mind of the Court, the said letter has been annexed with this petition only to create an impression that the detenue is willing to live with the petitioner, namely-Ashish Kumar and she has been detained illegally by her family members and apart from the said letter there is nothing on record to demonstrate this fact that the detenue had made any complaint to any competent authority about her alleged illegal detention as claimed by the petitioner. Further, it is not in dispute that the detenue is a major girl aged about 29 years and she knows her welfare very well and the petitioner, namely-Ashish Kumar is aged about 32 years as per the averments made in this petition.

8. Further, if both of them were in love affair since 2011 and this petition has been filed in the year 2024, there is no plausible explanation on the part of the petitioner, namely-Ashish Kumar as to who has stopped them from marrying each other for the last 13 years, thus, argument of learned Counsel for the petitioner has no force that the family members of the detenue are restraining them marrying each other. Further, it is also observed here that in the entire writ petition there is no averment that the detenue and the petitioner, namely-Ashish Kumar were in a live-in relationship, thus, this Court finds that the argument advanced by learned Counsel for the petitioner, namely-Ashish Kumar is made only with the intention to get some order in favour of the petitioner, namely-Ashish Kumar from this Court.

9. Accordingly, this Court does not find any justification to entertain this type of petition and to frustrate this type of petition filed by any such person in future only with the intention to defame the image of a girl or her family members, who are living in a society and if the Court entertains this type of petition, the image and reputation of family members as well as of the girl will certainly be demolished and it will be very difficult for a family who has been roped in these type of cases to solemnize the wedding of their girl in future to any other family of their choice.

10. Further, this Court is of the view that we are not living in a western country, where this type of relationship is very popular and common among the citizens, We live in country, where people believe in culture and traditions, which is the crown of our country and we are proud of it, therefore, we have to respect the traditions and culture of our country. Coming to the case of the petitioner, namely-Ashish Kumar, which is nothing but a ploy to defame the image of the detenue and her other family members so that the family members of the detenue under pressure and fear of insult may compromise the situation.

11. Thus, in view of the above, the present petition is **dismissed** with a cost of Rs.25,000/- (Rupees Twenty Five Thousand Only). The said amount of cost shall be paid by the petitioner, namely-Ashish Kumar, son of Sri Prem Praksh, resident of Village-Futha, Police Station-Bheera, District-Lakhimpur Kheri which shall be deposited before the District Magistrate, Lakhimpur Kheri within one month from today, thereafter, the District Magistrate, Lakhimpur Kheri is directed to pay the said amount, so deposited by the petitioner, namely-Ashish Kumar to the corpus, namely-Vaishali Mishra, daughter

of Late Sri Alok Mishra, resident of Mohalla-Ayodhyapuri, City-Lakhimpur, Police Station-Kotwali Sadar, District-Lakhimpur Kheri within one month after the said amount is deposited before it. In case, the said amount is not deposited before the District Magistrate, Lakhimpur Kheri within the stipulated time, the District Magistrate, Lakhimpur Kheri is directed to recover the said amount from the petitioner, namely-Ashish Kumar as an arrear of land revenue and pay the said amount to the detenue, namely-Vaishali Mishra for damaging her image in the society.

12. Let a copy of this order be transmitted to the Senior Registrar of this Court, who shall communicate the same to the District Magistrate, Lakhimpur Kheri for necessary compliance forthwith.

(2024) 1 ILRA 139

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 315 of 2024

Lalta Prasad Dwivedi ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Ram Naresh Yadav, Vineet Kumar Chaurasia

Counsel for the Opposite Parties:
G.A.

Criminal Law - Prevention of Corruption Act, 1988 - Sections 2(b), 2(c) & 7 - Indian Penal Code, 1860 - Sections 408 & 120B - U.P. Co-operative Societies Act, 1965 - Sections 2(o), 35 & 124 - Code of Criminal Procedure, 1973 - Sections 227 & 482 - Applicant challenged rejection of discharge application, arguing he was not a public servant under Section 7 of the Prevention of Corruption Act. Court held: (1) Applicant, as Assistant Commissioner and Assistant Registrar, U.P. Awas Evam Vikas Parishad, and appointed Chairman of the Committee of Administrators of a cooperative society under Section 35 of the U.P. Co-operative Societies Act, was a public servant under Section 2(c) of the Prevention of Corruption Act, as he was remunerated by the government for public duties. (2) Section 2(o) and Section 124 of the U.P. Co-operative Societies Act deem an administrator of a cooperative society a public servant under Section 21 of the Indian Penal Code, reinforcing applicant's status. (3) Applicant's claim of not being a government servant was false, as his appointment as Chairman stemmed from his public servant role, supported by documents annexed with the application. (4) Trial court's rejection of discharge application was valid, as sufficient material existed for trial under Section 7 of the Prevention of Corruption Act. Application u/s 482 dismissed. (Paras 10-19)

Application Dismissed.

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

1. Heard Sri Ram Naresh Yadav, the learned counsel appearing for the applicant and Sri Anurag Verma, the learned Additional Government Advocate-I and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has challenged validity of the order dated 06.11.2023 passed by the Additional District and Sessions Judge/Special Judge, P. C. Act, Court No.6, Lucknow rejecting the application for discharge filed by the applicant in relation to Crime No.686 of 2018 under Section 7

of the Prevention of Corruption Act and Sections 408, 120B IPC, Police Station Sarojini Nagar, Lucknow.

3. On 12.11.2018, an Inspector of U.P. Vigilance Establishment had filed an FIR against 3 named persons, including the applicant, describing him as 'Lalta Prasad Dwivedi, the then Assistant Commissioner Housing and Assistant Registrar' and some unnamed persons in illegal occupation of land, stating that by means of a Government Order dated 03.08.2015, the Vigilance, Establishment had been directed to conduct an open enquiry against co-accused L.K. Asthana, a former office bearer of Vidya Mandir Sahkari Grih Nirman Samiti Ltd. (hereinafter referred to as 'the Society'), and the report dated 09.05.2017 submitted in furtherance of open enquiry indicates that the accused persons managed illegal possession on 4.5 Bigha land, which had been freed by the orders passed by the Hon'ble Court. The applicant, who was the then Assistant Commissioner and Assistant Registrar, U. P. Awas Evas Vikas Parishad and Administrator/Chairman the Society, was found guilty of commission of the aforesaid offences along with two other co-accused persons, L. K. Asthana and Mahadeo Singh.

4. After investigation, a charge-sheet dated 20.12.2022 was submitted against co-accused persons, L. K. Asthana and Mahadeo Singh for commission of offences under Sections 408 and 120B IPC and another charge-sheet dated 27.02.2023 has been submitted against the applicant, for commission of the offences under Section 7 of the Prevention of Corruption Act. The charge-sheet itself mentions that Principal Secretary, Cooperative, Government of U.P. has granted sanction for prosecution of the applicant.

5. The applicant had previously filed an application under Section 482 Cr.P.C., being Application U/S 482 No.5552 of 2023, seeking quashing of the charge-sheet and the proceedings on the ground that he is not a public servant and this contention was rejected by a coordinate bench of this Court vide order dated 31.05.2023.

6. Although the applicant has challenged the validity of the order dated 06.11.2023 rejecting his application for discharge under Section 227 Cr.P.C., a copy of the discharge application filed by the applicant has not been annexed with the application under Section 482 Cr.P.C. Therefore, the Court cannot examine the pleas taken in the application under Section 227 Cr.P.C. and the Court has to examine the validity of the order dated 06.11.2023 treating the narration made in the order regarding the application filed under Section 227 Cr.P.C. to be correct.

7. The impugned order states that the application under Section 227 Cr.P.C. was filed on the ground that the investigating officer has wrongly described the applicant to be Administrator of the Society whereas the administration was being done by a 3 members committee. It was further stated in the application that the applicant was an office bearer of a private society and was not a public servant and, therefore, he should be discharged for offence under Section 7 of the Prevention of Corruption Act.

8. The trial court rejected the application by holding that there was sufficient material available on record for trial of the applicant for commission of the offence under Section 7 of the Prevention of Corruption Act.

9. In para 18 of the affidavit filed in support of the application under Section 482 Cr.P.C., it has categorically been stated that the applicant was neither a Government servant nor a salary paid employee for this Cooperative Housing Society. The learned counsel for the applicant has submitted that the applicant was merely the Chairman of the Committee of administrators of a private Society and he was not a public servant.

10. *Per contra*, Sri. Anurag Verma, the learned A.G.A.-I has submitted that the applicant was working as Assistant Commissioner and Assistant Registrar, Cooperative Societies, Lucknow and he was a Government employee and a public servant within the meaning of Section 2(c) of the Prevention of Corruption Act. By having been appointed as the Chairperson of the Committee of administrators of a cooperative society, the applicant did not lose his character of being a Government servant and the contention made in para 18 of the affidavit that the applicant was not a Government servant is incorrect, on the basis of material annexed by the applicant himself with the application.

11. Section 2(b) and 2(c) of the Prevention of Corruption Act, 1988 define the terms 'public duty' and 'public servant' as follows: -

"(b) ***"public duty" means a duty in the discharge of which the State, the public or the community at large has an interest;*** *Explanation.—In this clause "State" includes a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in S. 617 of the Companies Act, 1956 (1 of 1956)"*

"(c) "public servant" means—

(i) ***any person in the service or pay of the Government*** *or remunerated by the Government by fees or commission for the performance of any public duty;*

* * *

(viii) ***any person who holds an office by virtue of which he is authorised or required to perform any public duty"***

12. Section 2 (b) of the Prevention of Corruption Act, 1988 provides that *"public duty" means a duty in the discharge of which the State, the public or the community at large has an interest.* Any person remunerated by the Government for the performance of any public duty or who holds an office by virtue of which he is authorised or required to perform any public duty, is a 'public servant' within the meaning of the term given in Section 2 (c) of the Prevention of Corruption Act, 1988.

13. Section 35 of the Uttar Pradesh Co-operative Societies Act, 1965 provides that where, in the opinion of the Registrar, the committee of management of any co-operative society persistently makes default or is negligent in the performance of the duties imposed on it by this Act or the rules or the bye-laws of the society or commits any act which is prejudicial to the interest of the society or its members, or is otherwise not functioning properly, the Registrar may supersede the committee of management and he may appoint in its place an administrator or Committee of administrators who need not necessarily be members of the society.

14. A copy of the letter dated 27.03.2019 sent by the Assistant Housing Commissioner/Assistant Registrar to the Superintendent of Police, U.P. Vigilance (Establishment) has been annexed with the

affidavit wherein it has been stated that the Society was registered in the year 1965. Upon expiry of the term of the Members of the committee of management of the Society, a Committee of administrators was constituted by means of the office order dated 18.07.2009, whereby Sri Suneel Chaudhary, Executive Engineer, U.P. Awas Evam Vikas Parishad, Lucknow was appointed as its Chairman, the applicant, who was Cooperative Officer (Housing), U.P. Awas Evas Vikas Parishad and one Sanjay Sharma, Cooperative Inspector were appointed as members of the Committee of administrators. Subsequently, the Committee of administrators was modified by means of an order dated 14.12.2009 passed by the Joint Housing Commissioner/Joint Registrar, U.P. Awas Evas Vikas Parishad, Cooperative Section, whereby the applicant was appointed as the Chairman of the Committee of administrators of the Society.

15. The applicant was working as an officer in U.P. Awas Evas Vikas Parishad and he was appointed initially as a member and subsequently as the Chairperson of the Committee of administrators of the Society under Section 35 of the U.P. Cooperative Society Act, 1965 as the term of the Managing Committee of the Society had come to an end. The applicant was not holding any position in the Cooperative Society independent of his position as a public servant.

16. Section 2(o) of the U.P. Cooperative Society Act, 1965 provides that an Administrator of a Cooperative Society, whether with or without remuneration, shall be an officer of the cooperative society and Section 124 of the U.P. Cooperative Society Act, 1965 provides that any officer of a cooperative society shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.

17. As the applicant was discharging his duties as the Chairperson of the Committee of administrators of the Society having been assigned the aforesaid duty under Section 35 of the U.P. Cooperative Societies Act for the reason that he was the Assistant Housing Commissioner/ Assistant Registrar U.P. Awas Evas Vikas Parishad, the contention made in para 18 of the affidavit filed in support of the application, the applicant is not a Government servant appears to be false on the basis of documents annexed with the application itself. The applicant is a person remunerated for the performance of the public duty by the salary paid by the Government and, therefore, he is a public servant within the meaning of the term given in Section 2 (c) of the Prevention of Corruption Act, 1988.

18. In view of the aforesaid discussion, I am of the considered view that the applicant is a public servant as defined under Section 2(c) of the Prevention of Corruption Act and he can be charged for commission of the offence under Section 7 of the Prevention of Corruption Act, 1988. The ground for seeking the applicant's discharge, that the applicant is not a public servant, is without any force.

19. There is no illegality in the impugned order dated 06.11.2023 passed by the trial court. The applicant lacks merit and is hereby **dismissed.**

(2024) 1 ILRA 142

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 18.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482 No. 412 of 2024

Kamlesh Yadav & Ors. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Shiv Ram Tewari, Mukesh Kumar Tiwari

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 216 & 482 - Indian Penal Code, 1860 - Sections 147, 148, 149, 152, 307, 323, 332, 337, 353, 393, 504 & 506 - Prevention of Damage to Public Property Act, 1984 - Sections 3 & 4 - Criminal Law (Amendment) Act, 1932 - Section 7 - Application u/s 482 – for quashing the impugned criminal proceedings, as well as cognizance order, charge-sheet and order by which application for deletion of charges was rejected - incident – alleged that offence of pelting of bricks/stones, damaging to public property, attempt to murder, robbery – FIR - Investigation - Recovery memo –plea taken by the petitioner that, there was no prima facie evidence for serious allegations like attempt to murder and robbery and investigation was cursory in manner – further, application for deletion of charges was rejected by court mechanically without proper scrutiny – court finds that, during trial all the parties shall be afforded an ample opportunity of hearing to adduce their evidence and to produce the material and while framing charges detailed scrutiny is not required, prima facie evidence suffices – court emphasized that, it is also trite law that during the course of trial the learned trial court shall scrutinize all the charges so framed deeply and unless and until the charge/charges are proved beyond all reasonable doubts the accused persons may not be punished under such charges - held that, there is no infirmity or illegality in the impugned orders and trial court rightly rejected the application of the petitioner – accordingly, Application is dismissed.
(Para – 12, 13, 14)

Application Dismissed. (E-11)

List of Cases cited:

1. P. Kartika Lakshmi Vs Shri Ganesh & anr. – 2017 vol. 3 SCC 347,

2. Jasvinder Saini & ors. Vs St. (Government of NCT of Delhi) – 2013 vol. 7 SCC 256,

3. Sunil Kumar Vs St. of UP & anr.– 2023 Law Suit (SC) 751,

4. Hanuman Prasad Pandey Vs St. of UP & anr. – Application (U/s 482 Cr.P.C.) No. 10659/2023.

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

1. Heard Sri Shiv Ram Tewari, learned counsel for the petitioners and Sri Aniruddha Kumar Singh, learned Additional Government Advocate-I for the State.

2. By means of this petition filed under Section 482 Cr.P.C., the petitioners have prayed for the following reliefs:-

"(i) To set aside the entire criminal proceedings of S.T. No.156 of 2022 (State vs. Kamlesh Kumar and others) pending in the Court of learned Sessions Judge, Shrawasti arising out of Case Crime No.54 of 2021, under Sections 147, 148, 149, 332, 353, 337, 393, 152, 323, 307, 504 & 506 I.P.C. and Section 3/4 of Prevention of Damage to Public Property Act, 1984 and Section 7 of Criminal Law (Amendment) Act, 1932, Police Station-Gilaula, District-Shrawasti along with cognizance order dated 28.07.2021 and the Charge-sheet dated 30.06.2021, so far as it

relates to the present petitioners, as contained in Annexure No.1 to this petition.

(ii) To set aside the impugned order dated 23.05.2023 passed by the learned Sessions Judge, Shrawasti, as contained in Annexure No.5 to this petition.

(iii) To say the further proceedings of S.T. No.156 of 2022 (State vs. Kamlesh Kumar and others) pending in the court of learned Sessions Judge, Shrawasti.

(iv) Any other order or direction as this Hon'ble Court may deem just, fit and proper may also be passed in favour of the petitioners."

3. Attention has been drawn towards the First Information Report (in short F.I.R.) dated 16.04.2021 whereby the false and misconceived allegations have been levelled against the petitioners by one Inspector Incharge, Sri Kamla Kant Tripathi, the informant.

4. Learned counsel for the petitioners has also stated that so far as the allegations relating to Section 307 and 393 I.P.C. are concerned, there is no iota of evidence and material to suggest that those offences have, prima-facie, made out. However, the investigation in question has been conducted in a cursory manner without collecting the relevant material and without recording the statements of the concerning persons filed the impugned charge-sheet under various sections including Sections 307 and 393 I.P.C.

5. Further attention has been drawn towards Annexure No.6 of the petition, which is examination of Inspector Incharge, Sri Kamla Kant Tripathi, the informant wherein he has himself stated that he was not present on the spot when the alleged incident has taken place but the Sub-Inspector Sri Kuldeep Rai and Sri Santosh Kumar were present. The Inspector Incharge has further stated that when he reached at the place, he saw that the public property has been damaged and such damage has been seen by the informant himself along with his other officials. He has further stated that he is not sure as to whether the bricks / stones have been recovered from the place. However, there is no mention of that fact in the recovery memo.

6. Learned counsel for the petitioners has therefore submitted that despite the aforesaid fact when the charge under various sections including Sections 307 & 393 I.P.C. have been framed, which have prima-facie not made out on the basis of material and evidence available, an application for deletion of the charge under Section 307 I.P.C. has been filed before the learned trial court concerned and the learned trial court in a mechanical manner, without appreciating the legal and factual arguments rejected such application vide order dated 23.05.2023 (Annexure No.5). The aforesaid application was rejected mainly on the ground that at the time of framing charges the trial court does not scrutinize all the material and evidences in detail inasmuch as such material/ evidence is scrutinized during the course of trial but only on the basis of material available on record, on the basis of prima-facie opinion the charge/ charges is/ are framed. The learned trial court has further indicated that since the medical examination report of the police personnels is available on the record, therefore, at the time of framing the charges this fact may not be scrutinized that such injury was fatal or not as the aforesaid fact may be scrutinized / tested during the course of trial.

7. Learned counsel for the petitioners has further drawn attention of this Court

towards an judgment of the Apex Court rendered in the case in re: ***Jasvinder Saini and others vs. State (Government of NCT of Delhi)*** reported in ***(2013) 7 SCC 256 and Sunil Kumar vs. State of U.P. & another*** reported in ***2023 LawSuit (SC) 751*** as well as placed reliance of the order of this Court dated 31.10.2023 passed in ***Application (U/S 482 Cr.P.C.) No.10659 of 2023: Hanuman Prasad Pandey vs. State of U.P. and another*** to submit that the application of the petitioners for deletion of charge of Section 307 I.P.C. should be allowed and those charges may be deleted by the court under Section 216 Cr.P.C.

8. Learned counsel for the petitioner has referred para-11 of the judgment of Apex Court rendered in the case in re: ***Jasvinder Saini and others (supra)*** whereby the Apex Court has held that the court invoking powers to add or alter any charge whenever the court finds that the defective charge has been made or finds that new charge is considered necessary after commencement of the trial.

9. Per contra, Sri Aniruddha Kumar Singh, learned Additional Government Advocate-I has stated that there is no infirmity, illegality or apparent error in the order dated 23.05.2023 passed by the learned Sessions Judge, Shrawasti rejecting the application of the petitioners whereby the deletion of the charge framed under Section 307 has been prayed.

10. Sri Singh has further submitted that the learned Sessions Judge in para-6 of the order has categorically indicated that there is allegation against the petitioners and others in respect of various sections including Section 307 I.P.C. and so as to substantiate those allegations the injury report of the police personnels was also available on the record, therefore, the learned trial court has rightly observed that such allegations and material would be sufficient to arrive on prima-facie opinion to the effect that the charge under Section 307 I.P.C. may be framed.

11. Sri Singh has further submitted that the learned trial court has also rightly observed that when so many persons were throwing bricks and stones upon other side as well as the police party and injury report is available on the record, thereofre, it would be examine during the course of trial as to whether such offence is liable to establish or not after appreciating the evidence and material so produced by both the sides i.e. the prosecution and the defence.

12. Sri Aniruddha Kumar Singh has also placed reliance upon the decision of Apex Court in the case in re: ***P. Kartika Lakshmi vs. Sri Ganesh and another*** reported in ***(2017) 3 SCC 347*** referring para-7 wherein the Apex Court has held that the power invocation of Section 216 Cr.P.C. is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment. The Apex Court clarified that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 Cr.P.C.

13. Therefore, Sri Singh has further submitted that on the application of the petitioners/ accused the charge may not be deleted and since the learned trial court has given its finding/ observation to the effect that the charge of Section 307 at this stage

may not be deleted, therefore, there is no infirmity or illegality in the order dated 23.05.2023.

14. Having heard learned counsel for the parties and having perused the material available on record as well as having regard to the case laws so referred by the parties, which have been considered above, I am also of the considered opinion that at the time of framing charges it is incumbent upon the trial court to make scrutiny of the allegations and the material available on the record inasmuch as if, prima-facie, the material is available on record and after perusal of the same the learned trial court is of the opinion that such charge may be framed, the court may very well frame particular charge. Further, at the same time, it is also trite law that during the course of trial the learned trial court shall scrutinize all the charges so framed deeply and unless and until the charge/ charges are proved beyond all reasonable doubts the accused persons may not be punished under such charge/ charges. It is also needless to observe that during the course of trial all the parties shall be afforded an ample opportunity of hearing to adduce their evidence and to produce the material. Further, in the light of the dictum of Apex Court in re: ***P. Kartika Lakshmi (supra)*** the learned trial court has rightly rejected the application of the petitioners vide order dated 23.05.2023.

15. In view of the aforesaid observations, the instant petition is ***dismissed.***

(2024) 1 ILRA 146

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.01.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482 No. 443 of 2024

Shailendra Singh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Madan Gopal Tripathi, Atma Ram Verma, Shivam Kumar Mishra

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 482 - Indian Penal Code, 1860 – Sections 323, 498-A, 504 & 506 - - Dowry Prohibition Act, 1961 - Sections 3 & 4- Application u/s 482 – for quashing the impugned order of cognizance and order of framing charges as well as the Charge-sheet - FIR - Investigation – charge-sheet – cognizance – framing charges – after 9 years present application – court finds that, prima facie case is made out against the applicant and charges have been framed against the applicants in year 2018 itself – therefore, after the delay more than 9 years, this court does not find sufficient ground to interfere in the present case – held that, for quashing the criminal proceeding is applicant u/s 482 is not maintainable after considerably long period in absence of any explanation for delay, specifically when the charges were framed in their presence long back except in exceptional cases – accordingly, present application is dismissed. (Para – 10, 11)

Application Dismissed. (E-11)

List of Cases cited:

1. Rajiv Thaper & ors. Vs Madan Lal Kapoor – 2013 AIR SCW 784,

2. Hasmukhlal D. Vora & anr. Vs St. of T.N.– 2022 SCC online SC 1732,

3. Prabatbhai Aahir @ Parbatbhai & ors. Vs The St. of Gurj. & ors. – 2017 Vol. 9 SCC 641

4. C.B.I. Vs Aryan Singh – 2023 Live Law SC 292.

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

1. Heard learned counsel for the applicants and Sri Arvind Kumar Tripathi, learned AGA for the State and perused the record.

2. Present application under Section 482 CrPC has been filed with the following prayer:-

"To allow this petition by setting aside the cognizance order dated 06/09/2014, the chargesheet dated 25/05/2014 and order dated 23/06/2018 whereby Charges have been framed by Special A.C.J.M Custom Lko, arising out of Case Crime no 13/2014 under section 498-A, 323, 504, 506 I.P.C & 3/4 D.P Act P.S-Banthra District Lucknow pending now before Special Chief Judicial Magistrate Custom Lucknow namely Case No.523 of 2014, State Versus Shailendra Singh and in the interest of Justice."

3. The contention of the learned counsel for the applicants is that from the material collected during investigation no case is made out against the applicants as the allegations made are absolutely vague. He further submitted that though the charges have been framed on 23.06.2018, the applicants are also released on bail in the impugned proceedings. In support of his case, for delayed filing of the present application after almost about more than nine year, he has relied upon judgement of Hon'ble Apex Court in the case of **Rajiv Thapar and others Vs. Madan Lal Kapoor,** reported in 2013 AIR SCW 784, and has relied upon paragraph 22 and 23 of the judgement in which Hon'ble Apex Court observed that Jurisdiction of High Court under Section 482 CrPC can be exercised to quash the proceeding even at the stage of issuance process or at the stage of committal or even at the stage of framing of charges, therefore merely filing an application after the delay of more than nine years will not prevent the Court from exercising its power under Section 482 CrPC. Paragraph 22 and 23 of the judgement are quoted hereunder:-

"22. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., 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 of the Cr.P.C., 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 of the Cr.P.C. 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 leveled against the accused; and the material produced is such, as would clearly reject and overrule

the veracity of the allegations contained in the accusations leveled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations leveled 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 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

23. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C."

It is lastly submitted by the learned counsel for the applicant that in other proceeding under Domestic Violence Act the stand of opposite party no. 2 is contrary to stand taken in the impugned proceeding.

4. Per contra learned AGA contended that there is a delay of more than nine years and charges have already been framed against the applicant on 23.06.2018 and there is no explanation for approaching this Court after the delay of more than nine years. Learned AGA also submitted that, when exercising its power under Section 482 CrPC the court cannot conduct a mini trial and only the material collected by the Investigating agency during investigation is to be considered and defense of the accused cannot be considered at this stage.

5. After hearing the counsel for the parties and on perusal of record, it is clear that FIR was lodged against the applicants in the year 2014 and the Statement under Section 161 CrPC was recorded in the year 2014 itself and from the perusal of the statement recorded under Section 161 CrPC, prima facie case is made out against the applicant as there is specific allegations of harassment and demand of dowry against the applicants and the charges have also been framed against the applicants in the year 2018 itself and after obtaining bail they have been participating in trial and now after almost more than nine years they decided to challenge the proceeding without any plausible reason for approaching this Court after such a long delay.

6. So far as the judgement relied upon by the learned counsel for the applicant is concerned, in that case the Hon'ble Apex Court had observed that power under Section 482 CrPC can be exercised at any stage of the proceeding but in those cases where the material relied upon the accused would rule out the charges leveled against the accused persons and the proceeding of trial will result in abuse of process of Court and would not served the end of justice. Further, from the material on record, prima facie, case is made out against the applicants, therefore aforesaid judgment does not apply in the present case, nor the argument of the counsel of the applicant or the material available on record persuade this court to quash the proceedings of the case in question in exercise of its power under Section 482 CrPC after delay of

more than nine years. The Hon'ble Apex Court in the case of **Hasmukhlal D. Vora & ANR. Vs. State of Tamil Nadu**, reported in **2022 SCC online SC 1732** has observed that while exercising power under Section 482 CrPC the Court is not expected to conduct a full-blown investigation at the stage of a criminal complaint, however, in such cases where the accused has been subjected to the anxiety of a potential initiation of criminal proceedings for such a length of time, it is only reasonable for the court to expect bare-minimum evidence from the Investigating Authorities.

7. Similarly in the case of Neeharika Infrastructure Pvt. Ltd v. State of Maharashtra reported in SCC Online SC 351, Hon'ble Apex Court observed that High Court should not embark upon an enquiry into the merits and demerits of the allegations and quash the proceeding without allowing the investigating agency to complete its task and further observed that the power under Section 482 should be exercised only 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.

8. Similarly, in the case of **Parbatbhai Aahir @ Parbatbhai and others vs The State Of Gujarat and others reported in Vol-9 SCC 641**, it was further observed by the Hon'ble Apex Court that while the Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.:

(i) to secure the ends of justice, or
(ii) to prevent abuse of the process of any court.

9. Similarly in the case of **C.B.I. Vs Aryan Singh, 2023 Live Law (S.C.) 292,** Hon'ble Apex Court observed that High Court cannot conduct "mini trial" while executing powers under Section 482 CrPC.

10. In view of legal position mentioned above this Court holds that application filed under Section 482 CrPC for quashing the criminal proceeding is not maintainable after considerably long period in absence of any explanation for delay, specifically when charges were framed against applicants in his presence long back, except in exceptional cases which may persuade the Court to interfere in the interest of justice.

11. In view of the above discussion, as well as on perusal of record it is clear that *prima facie* case is made out against the applicants and charges have been framed against the applicants in 2018 itself. Therefore, after the delay of more than nine years, this Court does not find sufficient ground to interfere in the present case. Accordingly, the present application under Section 482 is **dismissed.**

12. No order as to costs.

(2024) 1 ILRA 149

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.01.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482 No. 466 of 2024

Shivam Gupta @ Shubham @ Lavi ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Dharm Trivedi

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Section – 482 - Indian Penal Code, 1860 - Sections 392 & 411 - Application u/s 482 – seeking a direction to the trial court to accept a single personal bond and only two sureties for all seven criminal cases against him – 7 criminal cases – in all cases applicant granted Bail order in his favour – However, applicant, because of poor financial condition of the applicant, he is unable to provide separate sureties in all the cases despite being granted bail in all seven cases – court, considering the applicant's situation, allowed sureties in four criminal cases and further sureties and bail bond in other three cases, respectively – accordingly, application is disposed of, with direction to release the applicant upon execution of bonds as directed. (Para – 7, 8, 9)

Application Disposed of. (E-11)

List of Cases cited:

1. Hani Nishad Vs St. of UP – AIR Online 2018 SC 1576.

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

1. Heard learned counsel for the applicant and Sri Arvind Kumar Tripathi, learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to direct the learned court below to take one personal bond and only two sureties from the petitioner in all 7 cases mentioned below:

1. Case Crime No.196 of 2023, u/s 392, 411 IPC, Police Station-Vikas Nagar, District-Lucknow, Bail granted on and surety amount = 23.11.2023, two sureties of Rs.1,00,000/-.

2. Case Crime No.197 of 2023, u/s 392, 411 IPC, Police Station-Vikas Nagar, District-Lucknow, Bail granted on and surety amount = 23.11.2023, two sureties of Rs.1,00,000/-.

3. Case Crime No.198 of 2023, u/s 392, 411 IPC, Police Station-Chowk, District-Lucknow, Bail granted on and surety amount = 03.01.2024, two sureties of Rs.1,00,000/-.

4. Case Crime No.205 of 2023, u/s 392, 411 IPC, Police Station-P.G.I., District-Lucknow, Bail granted on and surety amount = 24.11.2023, two sureties of Rs.1,00,000/-.

5. Case Crime No.31 of 2023, u/s 392, 411 IPC, Police Station-Hasanganj, District-Lucknow, Bail granted on and surety amount = 03.01.2024, two sureties of Rs.1,00,000/-.

6. Case Crime No.253 of 2023, u/s 392, 411 IPC, Police Station-Aliganj, District-Lucknow, Bail granted on and surety amount = 03.01.2024, two sureties of Rs.1,00,000/-.

7. Case Crime No.133 of 2023, u/s 394 IPC, Police Station-Aliganj, District-Lucknow, Bail granted on and surety amount = 03.01.2024, two sureties of Rs.1,00,000/-

in which the petitioner has been granted bail by the learned courts below, which this Hon'ble Court may kindly be pleased to fix in the interest of justice."

3. Contention of learned counsel for the applicant is that the applicant was falsely implicated in seven cases though he was not named in six cases but on his arrest in Case Crime No.197 of 2023, Police Station-Vikas Nagar, District-Lucknow, other cases were also planted on him and further submits that though the bail has

been granted to the applicant in all the seven cases but he could not be released from jail because of his poor financial condition, he is unable to provide separate sureties in all seven cases. Therefore, he may be permitted to furnish sureties in one case which may be deemed to be valid in other six cases in view of the law laid down by the Apex Court in **Hani Nishad Vs. State of U.P.** reported in **AIR OnLine 2018 SC 1576** direction may be issued that sureties in one case be held good in other remaining six cases.

4. Learned AGA has pointed out that in **Hani Nishad's case (supra)**, this court has not laid down any law for universal application of its observations but that was passed on the basis of special circumstances of that case.

5. Considering the facts and circumstances and on perusal of judgement of the Apex Court in Hani Nishad's case (supra), it is clear that the Apex Court did not lay down any law to permit the accused involved in number of cases to provide sureties only in one case to release him in other cases also. Paragraph nos.7 and 8 of the aforesaid judgement are being quoted as below:

"7. Learned counsel for the petitioner submits that even though the court has granted bail to the petitioner, the petitioner is unable to execute the bail bonds because of the onerous conditions of bail imposed particularly the condition of producing 31 sureties.

8. Considering the submissions, the impugned order is modified to the extent that the petitioner shall execute a personal bond for Rs.30,000/- (Rupees Thirty thousand only) and the same bond shall hold good for all 31 cases. There shall be two sureties who shall execute the bond for Rs.30,000/- which bond shall hold good for all the 31 cases. It is clarified that the personal bond so executed by the petitioner and the bond so executed by the two sureties shall hold good for all the 31 cases."

6. Therefore, in absence of any law, it is discretion of court on considering facts and circumstances of case including the nature of cases to permit the accused involved in number of cases to provide sureties in one or more cases which will be held good in remaining cases also.

7. However, in the present case, it is specifically mentioned that because of poor financial condition of the applicant, he is unable to provide separate sureties in all the cases though he has been granted bail in November, 2023 and January, 2024 in all cases.

8. Considering the aforesaid fact and circumstances, this court directs that if the applicant provides sureties in case crime no.197 of 2023, Police Station-Vikas Nagar, District-Lucknow then same shall be held good in case crime no.196 of 2023, Police Station-Vikas Nagar, District-Lucknow, in Case Crime No.198 of 2023, Police Station-Chowk, District-Lucknow, as well as in Case Crime No.205 of 2023, Police Station-P.G.I., District-Lucknow.

9. The applicant will also provide sureties and bail bond in case crime no.31 of 2023, Police Station-Hasanganj, District-Lucknow then this sureties and personal bond in this case will hold good in case crime no.253 of 2023, *Police Station-Aliganj, District-Lucknow, and in Case Crime No.133 of 2023, Police Station-Aliganj, District-Lucknow.*

10. On executing the sureties and personal bond as directed above, the applicant shall be released on bail.

11. With the above observations, the present application is **disposed of.**

(2024) 1 ILRA 152

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 776 of 1987

Suresh Chandra Rastogi ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Daya Shankar Mishra, Karuna Shanker Rastogi, Ram Kishor

Counsel for the Opposite Party:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 195, 195(1)(b)(i), 340 & 482 - Indian Penal Code, 1860 - Sections 193, 193(2), 195, 196, 199, 200, 205, 211, 380 & 411- Constitution of India,1950 – Article 21 - Application u/s 482 – for quashing the charge-sheet as well as summoning order – FIR – Charge-sheet – plea taken that, the impugned charge-sheet was filled on a printed proforma and summoning order was passed without applying judicial mind, as required by law - Court finds that, - merit in this claim, citing precedents including *Lalankumar Singh v. St. of Mah.* and various rulings from coordinate benches, all emphasizing that issuing process must reflect a Magistrate's prima facie satisfaction based on the material on record - Court held that, merely filing up printed proforma and then signing the same will not be a cognizance at all because this is completely non-application of mind on the part of concern Magistrate for taking such mechanical orders which also violate constitutional safeguards under Article 21 – hence, directed to issue well-reasoned cognizance orders afresh, within one month - consequently, applicant is allowed and the impugned orders are quashed.
(Para – 9, 10, 11)

Application Allowed. (E-11)

List of Cases cited:

1. Lalankumar Singh Vs St. of Mah.; 2022 SCC OnLine SC 1383,

2. Surendra Kumar & ors. Vs St. of U.P. & anr.- 2021 (7) ADJ 61,

3. Dhanesh Kumar @ Dhanesh Kumar Mishra Vs St. of U.P. Thru. Prin. Secy. (Home) Lko. & anr. passed in Application u/s 482 No.9892 of 2022 dated 04.01.2023,

4. Amit Kumar Dwivedi & anr. Vs St. of U.P. & anr. - Application u/s 482 No. 35443/2023 - order dated 05.10.2023.

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

1. Heard Sri Karuna Shankar Rastogi Advocate, the learned counsel for the applicant and Sri Shaunak Singh, the learned AGA-I for the State.

2. By means of the instant application filed under Section 482 Cr.P.C. the applicant has sought quashing of the order dated 24.12.1985 passed by the learned Chief Judicial Magistrate, Lakhimpur Kheri in a complaint filed under Section 193/211 IPC, which has been registered as a Criminal Case No.1191 of 1987: State Vs. Suresh Chandra Rastogi as well as the order dated 12.01.1987, passed by the

aforesaid Court whereby charges have been framed against the applicant.

3. Briefly stated, facts of the case are that the applicant had filed an FIR bearing Case No. 86 of 1980 under Sections 380 and 411 IPC, Police Station Muhammadi, District Lakhimpur Kheri on 07.03.1980 stating that Ishtiyaq Ali and Hamid were keeping potatoes for storage in a room of the applicant. There was a wooden almirah in the wall of the room, in which some jewelery was kept. The applicant had gone to his shop in a haste while leaving the almirah unlocked and when he checked the almirah after coming back, the jewelery was not there and Ishtiyaq and Hanif had gone away. The applicant had expressed a suspicion that aforesaid persons had stolen his jewelery. Some jewelery is said to have been recovered from named accused persons, Ishtiyaq and Hanif and another article was recovered from one Imtiyaz, who was also made an accused.

4. After investigation, a charge-sheet was submitted. Trial court took cognizance of the case and registered a Case No.196 of 1983, which was decided by means of a judgment and order dated 23.03.1985 passed by the learned Munsif Magistrate, Mohammadi, Lakhimpur Kheri, acquitting all the three accused persons of the charges. It was observed in the judgment that it appears that the applicant had concocted the story in connivance with the police persons and a case was set up against the accused persons by showing fake recovery, which could not be proved in the trial.

5. On 23.10.1985 the aforesaid three persons filed an application under Section 340/195 Cr.P.C. stating that from the observations made by the trial court while acquitting them, it is manifest that the applicant has committed offences under Sections 193, 195, 211 IPC and he should be punished for the same.

6. The aforesaid application was allowed by means of an order dated 07.11.1985 passed by the Munsif Magistrate, Mohammadi and a complaint was ordered to be filed against the application under Section 193(2) IPC. Accordingly, the Munsif Magistrate, Mohammadi filed a complaint under Section 195/340 Cr.P.C. for prosecution of the applicant under Section 193/211 IPC. The complaint has been registered as Criminal Case No.1191 of 1987

7. The applicant filed his objection dated 15.05.1986 against the complaint. However, the learned Judicial Magistrate Mohammadi, Kheri passed an order dated 19.12.1987 framing charges against the applicant and ordered him to face trial.

8. The applicant has filed the application under Section 482 Cr.P.C. on 27.11.1987 and on the same day, this Court had passed an interim order staying the proceedings of Criminal Case No.1191 of 1987 pending in the Court of Chief Judicial Magistrate, Lahimpur Kheri.

9. Although the application remained pending for more than 36 years, and the proceedings of the complaint are lying stayed since then, a counter affidavit was filed by the State only on 14.03.2023, which is formal in nature. The applicant has filed a rejoinder affidavit.

10. The learned counsel for the applicant Sri. Karuna Shankar Rastogi has submitted that the FIR in question was lodged in the year 1980, judgment of acquittal was passed on 23.03.1985 while

the applicant was merely 28 years of age. The order to file a complaint was passed on 07.11.1985 and the charges were framed on 12.01.1987. Proceedings of the complaint are lying stayed since 27.11.1987 and presently the applicant has attained 72 years of age. Relying upon the judgments in the cases of **Vakil Prasad Singh v. State of Bihar,** (2009) 3 SCC 355, the learned Counsel for the applicant has submitted that the delay in disposal of the proceedings violates the applicant's fundamental right to life and liberty guaranteed under Article 21 of the Constitution of India.

11. The learned counsel for the applicant has next submitted that the applicant had lodged the FIR merely stating that he suspected that the accused persons had committed a theft in his house and during investigation some stolen articles were recovered from the accused persons. However, trial court disbelieved the prosecution version, acquitted the accused persons and observed that the applicant had concocted the story in connivance with the police persons. The learned Counsel for the applicant has submitted that in the entire judgment of the trial Court, there is no mention of any statement given by the applicant, which may amount of commission of offence by the applicant and that the applicant has been made the sole accused on the ground that he had acted in connivance with the police persons but there is no charge of criminal conspiracy between the applicant and the police persons and witnesses.

12. Per contra, Sri. Shaunak Singh, the learned A.G.A.-I has opposed the application and he has submitted that it is apparent from the findings recorded by the trial Court in the judgment dated 23.03.1985, that the applicant had made false allegations against the persons accused in that case and, therefore, he is liable to be prosecuted for the offences under Section 193/211 IPC.

13. I have perused the record and considered the submissions advanced by the learned Counsel for the parties.

14. The applicant had lodged the FIR in question in the year 1980 when the applicant was merely 28 years of age. The trial Court had acquitted the accused vide judgment passed on 23.03.1985. The trial Court had passed an order for filing a complaint under Section 340 Cr.P.C. on 07.11.1985. Thereafter the complaint was filed and the charges were framed on 12.01.1987. Proceedings of the complaint were stayed by this Court on 27.11.1987, the State filed a counter affidavit only on 14.03.2023 and presently the applicant has attained 72 years of age.

15. In **Vakil Prasad Singh** (2009) 3 SCC 355, after considering the precedents on the point, it was held that: -

"24. It is, therefore, well settled that the right to speedy trial in all criminal persecutions (sic prosecutions) is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to

speedy trial has been denied in a given case.

25. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time-frame for conclusion of trial."

16. Therefore, although the entire facts and circumstances of the case have to be taken into consideration, the factum of delay in conclusion of trial weighs heavily in favour of the applicant.

17. The applicant had lodged the FIR on 07.03.1980 stating that he suspected that the accused persons had committed a theft in his house. During investigation, Sub-Inspector Dwarika Prasad Mishra and Deep Singh had made recovery of stolen articles from Hanif on 08.03.1980 in presence of witnesses Ramdeen and Krishnadeen. A gold chain, a ring and a nose ring are said to have been recovered by the S.O. Gyan Chandra from the accused Imtiyaz on 05.06.1980 in the presence of witnesses, Ramesh Chandra and Chhotey Lal.

18. However, the trial court disbelieved the prosecution version by observing that the applicant had stated in his statement that he had a double storied house, he lived on the upper floor and potatoes were being stored in a room on the ground floor in which some useless household items are kept. It does not appear to be natural that jewelery was kept in such a place. The trial court further held that the applicant or any other witness had not seen the accused Ishtiyaq committing theft and no evidence was adduced against him and he deserved to be acquitted. So far as other accused persons, Hanif and Imtiyaz are concerned, the trial Court held that although Sub-Inspector Dwarika Prasad Mishra and Deep Singh had made recovery of stolen articles from Hanif on 08.03.1980 in presence of witnesses Ramdeen and Krishnadeen and a gold chain, a ring and a nose ring are said to have been recovered by the S.O. Gyan Chandra from the accused Imtiyaz on 05.06.1980 in the presence of witnesses, Ramesh Chandra and Chhotey Lal, as no person had seen the aforesaid accused persons committing the theft they could not be convicted for the offence under Section 380 IPC.

19. The complaint filed by Munsif Magistrate, Mohammadi merely reproduces the contents of the FIR that the applicant had suspected that the accused persons-Ishtiyaq and Hanif had stolen some jewelery from his house and thereafter observed that while acquitting the accused persons, the trial court had held that the applicant had lodged a false report and showed a fake recovery in connivance with the police persons and that the applicant gave a false statement on oath.

20. The offence of giving false evidence is defined in Section 191 I.P.C. as follows: -

"191. Giving false evidence.— *Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he*

either knows or believes to be false or does not believe to be true, is said to give false evidence."

21. Section 195 (1) (b) (i) of Cr.P.C. provides that no Court shall take cognizance of any offence punishable under any of the following sections of the Penal Code, 1860 (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, except on the complaint in writing of that Court, or by such officer of the Court as that Court may authorize in writing in this behalf, or of some other Court to which that Court is subordinate.

22. Section 211 I.P.C. provides as follows: -

"211. False charge of offence made with intent to injure.*—Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;*

and if such criminal proceeding be instituted on a false charge of an offence punishable with death, imprisonment for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

23. The applicant had merely expressed a suspicion that the accused persons had committed theft in his house and the suspicion was fortified by the recovery of stolen articles made by the police officers in presence of independent witnesses. There is nothing on record to establish that the applicant had falsely charged the accused persons with intent to cause injury to the accused persons and that the applicant knew that there was no just or lawful ground for lodging the F.I.R. against the accused persons.

24. Section 340 Cr.P.C. provides that "When upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, make a complaint thereof in writing".

25. Thus from the above, it follows that there are two conditions, on fullfilment of which a complaint can be filed against a person who has given a false affidavit or evidence in a proceeding before a court. The first condition being that a person has given a false affidavit in a proceeding before the court and, secondly, in the opinion of the court it is expedient in the interest of justice to make an inquiry against such a person in relation to the offence committed by him.

26. For initiating proceedings under Section 340 Cr.P.C., the person should have consciously made a deliberate statement, which is found to be false on the basis of

unimpeachable evidence. Further, the court concerned has to consider whether it would be expedient in the interest of justice to sanction such prosecution. The court has to see whether there is evidence in support of the allegation to justify the initiation of proceedings against the applicant. The court should be satisfied that there is reasonable foundation for the charge.

27. In **Iqbal Singh Marwah v. Meenakshi Marwah**, (2005) 4 SCC 370, the Hon'ble Supreme Court had held that: -

"23. In view of the language used in Section 340 CrPC the court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(1)(b). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint."

28. In the F.I.R., the applicant had merely expressed a suspicion that the two named accused persons had committed a theft in his house and he had not made a categorical assertion against the accused persons. The complaint does not refer to any other statement made by the applicant on oath, alleging commission of the offence by the accused persons. Therefore, there is no material to establish that the applicant had given any statement on oath, which has been found to be false.

29. The police claimed to have recovered the stolen articles from the accused persons and the recoveries had been witnesses by some independent persons. The trial Court disbelieved the recovery made by police and witnessed by independent persons, but the police persons who had made the recovery or the persons who had witnessed the recovery, have not been made accused in the complaint. The applicant had been made the sole accused on the ground that he had acted in connivance with the police persons but there is no charge of criminal conspiracy between the applicant and the police persons and witnesses.

30. In the aforesaid circumstances, I am of the considered view that the mere expression of a suspicion of commission of theft by the accused persons does not amount to commit an offence by the applicant. The other evidence, which has been disbelieved by the trial court, was not of the applicant and the persons who had given the evidence have not been made an accused. Therefore, there is no material

warranting prosecution of the applicant for offences under Section 193/211 I.P.C. The learned Chief Judicial Magistrate, Lakhimpur Kheri appears to have committed a patent error in framing charges against the applicant and directing him to face trial for the charges.

31. Accordingly, the present application under Section 482 Cr.P.C. is **allowed.** The impugned order dated 24.12.1985, passed by the learned Chief Judicial Magistrate, Lakhimpur Kheri in Criminal Case No.1191 of 1987 as well as the order dated 12.01.1987, passed in the aforesaid case whereby charges have been framed against the applicant, are hereby quashed.

(2024) 1 ILRA 158

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.01.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482 No. 2413 of 2016

Ram Kewal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Party

Counsel for the Applicant:
Angre Nath Shukla, Deo Prakash Srivastava, Naveen Kumar Pandey

Counsel for the Opposite Party:
Govt. Advocate

Criminal Law – Criminal Procedure Code, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 419 & 420 - Constitution of India,1950 – Article 21 - Application u/s 482 – for quashing the charge-sheet as well as summoning order – FIR – Charge-sheet – plea taken that, the impugned charge-sheet was filled on a printed proforma and summoning order was passed without applying judicial mind, as required by law - Court finds that, - merit in this claim, citing precedents including *Lalankumar Singh v. St. of Mah.* and various rulings from coordinate benches, all emphasizing that issuing process must reflect a Magistrate's prima facie satisfaction based on the material on record - Court held that, merely filing up printed proforma and then signing the same will not be a cognizance at all because this is completely non-application of mind on the part of concern Magistrate for taking such mechanical orders which also violate constitutional safeguards under Article 21 – hence, directed to issue well-reasoned cognizance orders afresh, within one month - consequently, applicant is allowed and the impugned orders are quashed. (Para – 9, 10, 11)

Application Allowed. (E-11)

List of Cases cited:

1. Lalankumar Singh Vs St. of Mah.; 2022 SCC OnLine SC 1383,

2. Surendra Kumar & ors. Vs St. of U.P. & anr.- 2021 (7) ADJ 61,

3. Dhanesh Kumar @ Dhanesh Kumar Mishra Vs St. of U.P. Thru. Prin. Secy. (Home) Lko. & anr. passed in Application u/s 482 No.9892 of 2022 dated 04.01.2023,

4. Amit Kumar Dwivedi & anr. Vs St. of U.P. & anr. - Application u/s 482 No. 35443/2023 - order dated 05.10.2023.

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

1. Learned counsel for the applicant is permitted to correct the prayer clause, during the course of the day.

2. Despite service of notice, no one appears on behalf of opposite party no.2.

3. Heard learned counsel for the applicant and Sri Arvind Kumar Tripathi, learned AGA for the State.

4. The present 482 Cr.P.C. application has been filed to quash the chargesheet no.05/2016 arising out of Case Crime No.373/15, under Sections-419, 420 IPC, Police Station-Kotwali Colonelganj, District-Gonda, as well as summoning order dated 01.03.2016 passed by Chief Judicial Magistrate, Gonda.

5. Contention of learned counsel for the applicant is that the impugned cognizance order on the impugned chargesheet was illegal as same was absolutely passed without application of mind being filled up printed proforma and signing the same. In support of his submission, learned counsel for the applicant has relied upon the judgement of coordinate Bench of this Court dated 04.01.2023 passed in Application u/s 482 No.9892 of 2022.

6. *Per contra,* learned AGA has opposed the prayer but could not dispute the aforesaid fact that the cognizance order is nothing but simply filling up the printed proforma and thereafter, signing by the concerned Magistrate.

7. After hearing the parties and on perusal of record, it is explicit from the perusal of cognizance order dated 01.03.2016 that the same was nothing but simply filling up the printed proforma and signing the same which itself shows that there is complete non-application of mind on the part of Chief Judicial Magistrate, Gonda.

8. The Hon'ble Supreme Court in the case of **Lalankumar Singh vs State of Maharashtra; 2022 SCC OnLine SC 1383** has observed in paragraph no.38 that order of issue of process is not an empty formality. Learned Magistrate is required to apply his mind as to whether the sufficient ground for proceeding exists in the case or not. Paragraph no.38 of the aforesaid judgement is quoted as below:

"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 judgement of this court in the case of ***Sunil Bharti Mittal v. 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 case has been made out, the Magistrate ought to issue process and it

cannot 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."

9. The coordinate Bench of this court again considered the issue in the case of **Surendra Kumar & others Vs. State of U.P. & Another** reported in **2021 (7) ADJ 61** as well as in the case of **Dhanesh Kumar @ Dhanesh Kumar Mishra Vs.State Of U.P. Thru. Prin. Secy. (Home) Lko. And Another** passed in **Application u/s 482 No.9892 of 2022 dated 04.01.2023** in which taking of cognizance on printed proforma was deprecated and held the same as non-application of mind. This issue was again considered by this court in the case of ***Amit Kumar Dwivedi and another vs. State of U.P. and another*** passed in ***Application u/s 482 No. 35443 of 2023;*** vide order dated **05.10.2023**. In that case, the court after relying upon the judgement of the Hon'ble Supreme Court as well as several other coordinate benches of this court clearly observed that merely signing and filling up the date and case crime number in the printed proforma is absolutely non-application of mind and also directed to all the Judicial Magistrates/concerned courts in State of U.P. not to pass cognizance order simply filling up the printed proforma and copy of this order was also circulated by the High Court to all the District Judges in State of U.P. Paragraph nos.9, 12 and 13 of the aforesaid judgement are being quoted as under:

"9. In view of above legal position, this Court is of the view that merely signing and filling up the date and case crime number in printed proforma is absolutely non-application of mind because the cognizance order must reflect the prima facie opinion of the learned Magistrate on the material collected during investigation. Order of issuance of process is not an empty formality, it may affect the personal liberty of a person. Article 21 of Constitution of India guarantees personal liberty of a person and same cannot be deprived of, without due procedure of law. Apart from this, summoning of accused to appear before criminal court after taking cognizance is a serious matter, affecting the dignity, self-respect and image in society. Therefore, proper process by the criminal court must be followed at the time of taking cognizance and summoning the accused."

12. This Court further directs to all the Magistrates/concerned courts, while taking cognizance on the charge sheet, the Magistrate/concerned court must mention the fact that which document he has perused and on perusal of those documents prima facie case for taking cognizance is made out on the basis of above material with short reasoning for making out prima facie case.

13. Registrar (Compliance) is directed to circulate the copy of this order to all District Judges for perusal and further circulation."

10. From the above mentioned legal position, it is clear that merely filling up printed proforma and then signing the same will not be a cognizance at all because this is completely non-application of mind on the part of the concerned Magistrate for taking cognizance. Learned Magistrate has to apply his mind on the material available before him which should be reflected from his cognizance order, itself.

11. In view of the above, impugned cognizance order dated 01.03.2016 passed by the Chief Judicial Magistrate, Gonda is hereby quashed and he is at liberty to pass a fresh cognizance order in light of the observations made above, within a period of one month.

12. With the aforesaid observations, the present application is **allowed.**

(2024) 1 ILRA 161

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application U/S 482 No. 9771 of 2023

Vikas Verma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Rakesh Kumar Agarwal, Saksham Agarwal

Counsel for the Opposite Party:
G.A., Girish Kumar Pande, Prashant Pandey

Criminal Law – Criminal Procedure Code, 1973 - Sections 216, 217 & 482 - Indian Penal Code, 1860 - Sections 302, 304-B & 498-A - Dowry Prohibition Act, 1961 - Sections 3 & 4 - Application u/s 482 – for quashing the charge-sheet and summoning order – FIR – alleged that accused has harassed the deceased for dowry after marriage - accusations included forced purchases of expensive items like a Royal Enfield motorcycle and jewellery - Investigation - Charge-sheet, filed only against accused husband, but names of other co-accused are dropped – whether trial court can be framed charge without having any material or evidence to that effect - court finds that, - no material of any kind is available at to suggest the prosecution to file charge sheet against the present petitioner u/s 302 IPC – held that, the alternative charge may not be framed against the against the petitioner by the trial court – Accordingly, impugned summoning order is set-aside – however, the trial court may be conducted and concluded the trial against the petitioner u/s 498-A, 304-B of IPC and u/s 3/4 DP Act, in accordance with law - consequently, applicant is partly allowed. (Para – 16, 18, 19)

Application Partly allowed. (E-11)

List of Cases cited:

1. Shamnsaheb M. Multtani Vs St. of Karn. (2001) 2 SCC 577.

2. Lakhjit Singh Vs St. of Punj. – (1994) Suppl. 1 SCC 173.

3. Shanti Vs St. of Har. – (1991) 1 SCC 371.

4. Jasvinder Saini & ors. Vs St. (Government of NCT of Delhi) – (2013) 7 SCC 256.

5. Rajbir alias Raju & anr. Vs St. of Har. – (2010) 15 SCC 1156.

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

1. Heard Sri Saksham Agarwal, learned counsel for the petitioner and Sri Aniruddh Kumar Singh, learned AGA-I for the State.

2. Learned counsel for the petitioner has informed that the learned counsels for

the private opposite party have informed the learned counsel for the petitioner in writing that they shall not be appearing in the present case on behalf of the private opposite party.

3. By means of this petition, the petitioner has prayed the following reliefs:-

"The applicant most humbly and respectfully beg to submit that on the basis of facts mentioned in the accompanying affidavit this Hon'ble Court may graciously be pleased to quash the charge-sheet dated 14.02.2021, summoning order dated 04.03.2021 passed by Learned Judicial Magistrate Lucknow and also the order dated 27.04.2023 passed by Learned Additional Sessions Judge/ Special Judge-4 (Prevention of Corruption Act) Lucknow whereby charge had been framed under Section 498(A)/304(B)/302 IPC and 3/4 Dowry Prohibition Act 1961 (the certified copy of the charge-sheet dated 14.02.2021, summoning order dated 04.03.2021 and order dated 27.04.2023 is contained in ANNEXURE-1, 2 & 3 respectively) or to pass any other order in the interest of Equity, Justice and Good Conscience."

4. The question to be adjudicated in this petition is that as to whether the learned trial court can frame charge for Section 302 IPC as an alternative charge without having any clinching material/evidence in respect of Section 302 IPC in a case where charge relating to Sections 498-A, 304-B IPC and Section 3/4 of Dowry Prohibition Act has been framed by this Court on the basis of the FIR and the charge sheet, which has been filed only under those Sections, not under Section 302 IPC.

5. The precise facts of the case are that the FIR bearing FIR No.0949 of 2020, under Sections 498-A, 304-B of IPC and Section 3/4 of Dowry Prohibition Act, 1961, Police Station- P.G.I., District-Lucknow has been filed by the father of the deceased against his son-in-law Vikas Verma and other family members, namely, Chandrabhan (father-in-law of the deceased), Rajani (mother-in-law of the deceased), Pushpendra (Devar) and Rupali (Nanad).

6. Pursuant to the aforesaid FIR, investigation has been conducted and after completion of investigation, charge sheet has been filed only against Vikas Verma (husband of the deceased) under Sections 498-A, 304-B IPC and Section 3/4 of Dowry Prohibition Act and names of other co-accused persons have been dropped. Admittedly, no protest application has been filed on behalf of the complainant/ informant against the charge sheet whereby the names of other co-accused persons have been dropped. Learned trial court took cognizance of the charge sheet on 04.03.2021 and issued summons on the same date i.e. 04.03.2021 against the present petitioner only.

7. Learned trial court i.e. Additional Sessions Judge/ Special Judge, Special Court No.4, (Prevention of Corruption Act) Lucknow has passed an order dated 27.04.2023 (Annexure No.3) framing charges against the petitioner under Sections 498-A, 304-B IPC and Section 3/4 of Dowry Prohibition Act. By means of the aforesaid order, learned trial court has framed alternative charge under Section 302 IPC also against the petitioner.

8. Learned counsel for the petitioner has submitted that undisputedly, this is the

prerogative of the learned trial court to frame any charge on the basis of material/evidence available on record. Even the learned trial court may alter or add any charge at any time before pronouncement of judgment under Section 216 Cr.P.C. However, no alternative charge can be framed without having any material or evidence to that effect. In the present case, no allegation of any kind whatsoever has been levelled against the petitioner in respect of murder, even during the course of investigation, no cogent material or reliable evidence has been found by the prosecution to suggest that the petitioner may be charged under Section 302 IPC, therefore, the charge sheet has been filed under Sections 498-A, 304-B IPC and Section 3/4 of Dowry Prohibition Act, not under Section 302 IPC. Even as per the prosecution story itself, at the time of incident in question, the petitioner was far away from the place of incident and prima facie, it was appearing that it was a case of suicide. He has further submitted that if there is any clinching evidence to suggest that the accused person has committed the offence of murder of his own wife within a period of seven years of the marriage and he along with his entire family was coercing her by demanding dowry, the charge under Section 302 IPC could have been framed and in that case, the alternative charge under Section 304-B of IPC could have also been framed. In these circumstances, the charge under Section 302 IPC may not be treated as an alternative charge, rather it should be the main charge. The facts and circumstances of the present case are entirely different as argued above, therefore, in the present case, framing charge under Section 302 IPC as an alternative charge is nullity in the eyes of law.

9. Learned counsel for the petitioner has submitted that though the Apex Court in re; **Rajbir alias Raju and Another v. State of Haryana, (2010) 15 SCC 116,** directed all the trial courts in India to *ordinarily* add Section 302 IPC to the charge of Section 304-B IPC, so that death sentences can be imposed in such heinous and barbaric crimes against women, but while considering the aforesaid judgment, the Apex Court in re; **Jasvinder Saini and Others v. State (Government of NCT of Delhi), (2013) 7 SCC 256,** has held that mechanical addition of charge under Section 302 IPC, when prima facie evidence did not support the case of murder, would not be appropriate. The Apex Court further clarified that since the learned trial court has got power under Section 216 Cr.P.C. to alter or add the charge before pronouncement of the judgment, therefore, if the learned trial court finds any cogent or reliable material during the course of the trial to the effect that Section 302 IPC should be added with Section 304-B IPC, such exercise may very well be undertaken by the learned trial court.

10. Therefore, learned counsel for the petitioner has submitted that in view of the facts and circumstances of the present case, since charges under Sections 498-A, 304-B IPC and Section 3/4 of Dowry Prohibition Act have been framed and no clinching or cogent material/ evidence is on record to show that the offence under Section 302 IPC has been committed by the petitioner, so the impugned order dated 27.04.2023 passed by the learned trial court may be set aside/ modified to the extent of framing of alternative charge under Section 302 IPC.

11. On the other hand, Sri Aniruddh Kumar Singh, learned AGA-I, has submitted that there is no dispute on the findings and direction of the Apex Court in re; **Jasvinder Saini** (supra) wherein all

relevant judgments on the subject including **Rajbir alias Raju (supra)** has been considered but he has submitted that the Apex Court in re; **Shamnsaheb M. Multtani v. State of Karnataka, (2001) 2 SCC 577,** having coram of three Judges has held that if the trial court finds that the prosecution has failed to make out the offence under Section 302 IPC but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of said offence and after affording ample opportunity to the accused, conviction under Section 304-B IPC may be granted but if such person is convicted under Section 304-B IPC without affording an opportunity of hearing, it would lead to serious miscarriage of justice.

12. On being confronted Sri Aniruddh Kumar Singh, learned AGA-I, on his aforesaid submission to the effect that the facts and circumstances of the present case are such wherein only alternative charge under Section 302 IPC was framed whereas the main charge under Section 304-B IPC has also been framed, on that point, Sri Aniruddh Kumar Singh has stated that he wanted to say that any charge may be framed against the accused persons on the basis of material available on record by affording an opportunity of hearing and this prerogative of the Trial Court may not be questioned. However, so far as the facts and circumstances of the present case are concerned, he has submitted that on the basis of material available on record, it is not clear at this stage as to how an alternative charge under Section 302 IPC has been framed by the learned trial court but during the course of the trial, if any clinching material/ evidence is recovered or emerged, the learned trial court may very well add charge under Section 302 IPC against the petitioner strictly in accordance with law.

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

14. At the very outset, I would like to refer Two Hundred and Second Report on Proposal to Amend Section 304-B of Indian Penal Code of October, 2007 submitted by the Law Commission of India, Government of India wherein vide Item No.2.11, aspect of framing of charge - whether under Section 302 IPC or 304-B IPC has been discussed. Notably, after referring the judgment of the Apex Court in re; **Shamnsaheb M. Multtani (supra), Lakhjit Singh Vs. Sate of Punjab, 1994 Supp. 1 SCC 173, Shanti v. State of Haryana, (1991) 1 SCC 371,** as well as the provisions of Sections 302, 304 & 498-A IPC as well as Sections 221, 222 & 464 Cr.P.C. and Section 113-B of the Evidence Act and throwing some light upon Sections 216 & 217 Cr.P.C., the Law Commission of India while summing up has opined as under:-

"... The Evidence Act too was amended to provide for certain presumptions in this regard. The offence of dowry death as provided in Section 304-B is not the same offence as murder in terms of Section 302. A case may or may not fall under both the sections. Where an accused is charged for one offence, he can be convicted for another offence if the charged offence is failed to be made out but the ingredients of another offence are satisfied on available evidence, provided it does not lead to miscarriage of justice. In spite of such provisions in the law, the incidents of dowry deaths are not showing any significant decline or abatement. Hence the

demand for more stringent punishment of death for the offence of dowry deaths."

15. Now, I shall deal the aspect as to whether the alternative charge under Section 302 IPC has been framed properly or framing of such charge was absolutely unwarranted in view of the facts and circumstances of the present case. Perusal of the FIR clearly reveals that death of the daughter of the complainant/ informant has taken place within seven years of marriage inasmuch as the daughter of the informant/ complainant got married with Vikas Verma, the petitioner, on 28.11.2016 and she died on 12.12.2020. The general allegations of demanding dowry and cruelty have been levelled against Vikas Verma (husband) and other family members. The cause of death is hanging and as per material available on record, except ligature mark, no other injury was found on the body of the victim. During the course of the investigation, it was found that on the date of incident, Vikas Verma was far away from the place of incident. Further, during the course of investigation, involvement of other accused persons, namely, Chandrabhan (father-in-law), Rajani (mother-in-law), Pushpendra (Devar) and Rupali (Nanad) has not been found, therefore, their names have been dropped from the charge sheet and charge sheet under Sections 498-A, 304-B IPC and Section 3/4 of Dowry Prohibition Act has been filed only against the present petitioner. No protest application of any kind whatsoever has been filed by the complainant/ informant against the investigation in respect of deleting the names of other accused persons from the charge sheet.

16. Therefore, *prima facie,* it is clear that no material of any kind is available at this stage to suggest the prosecution to file charge sheet against the present petitioner under Section 302 IPC, therefore, in absence of cogent material against the petitioner regarding charge under Section 302 IPC, the alternative charge may not be framed against him by the learned court below.

17. Hence, following the observation of the Apex Court in re; **Jasvinder Saini** (supra), wherein the Apex Court has held that the mechanical addition of charge under Section 302 IPC, when prima facie evidence available on record did not support the case of murder, framing alternative charge under Section 302 IPC is absolutely unwarranted. Relevant paragraphs no.10, 11, 14 & 15 of the aforesaid judgment are being reproduced herein below:-

"10.Section 216 of the Code of Criminal Procedure deals with alteration or addition of any charge and empowers the court to do so at any time before the judgment is pronounced. The section runs as follows:

"216.Court may alter charge.?(1) Any court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the

trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

11.A plain reading of the above would show that the court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the court decides to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the court after commencement of the trial. There can, in the light of the above, be no doubt about the competence of the court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court.

14.Be that as it may, the common thread running through both the orders is that this Court had inRajbir case[Rajbirv.State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568] directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court.

15.It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section

302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued inRajbir case[Rajbirv.State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568] . The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions inRajbir case[Rajbirv.State of Haryana, (2010) 15 SCC 116 : (2013) 2 SCC (Cri) 149 : AIR 2011 SC 568] , but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court."

18. It is needless to say that during the course of the trial, if the learned trial court finds that there is any clinching or cogent material convincing the learned trial court that the trial of the present petitioner should be conducted under Section 302 IPC also, the same charge may be added by the learned trial court under Sections 216 & 217 Cr.P.C.

19. Accordingly, the order dated 27.04.2023 passed by learned Additional Sessions Judge/ Special Judge, Special Court No.4, (Prevention of Corruption Act) Lucknow is hereby set aside/ modified so far as the alternative charge under Section 302 IPC has been framed against the petitioner. However, the trial against the petitioner may be conducted and concluded under Sections 498-A, 304-B of IPC and Section 3/4 Dowry Prohibition Act strictly in accordance with law.

20. Accordingly, the present petition is **partly allowed.**

21. No order as to costs.

(2024) 1 ILRA 167

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2023

BEFORE

THE HON'BLE SAMEER JAIN, J.

Application U/S 482 No. 19546 of 2019

Prashant Saxena ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Awadhesh Kumar Saxena, Sri Avijit Saxena, Sri Kamal Krishna (Sr. Advocate)

Counsel for the Opposite Parties:
G.A., Sri Rajendra Kumar Dubey, Sri Santosh Kumar Pandey

Criminal Law - Code of Criminal Procedure,1973 - Section Application 195(1)(a)(i) – Indian Penal Code,1860 – Section 498A, 354 & 323 – Criminal Proceedings Quashed – The applicant sought to quash the charge-sheet dated 17.04.2019, cognizance order dated 25.04.2019, and proceedings in Criminal Case No. 0597 of 2018 under Sections 376 and 506 IPC – Held, the proceedings were quashed as the allegations of rape and criminal intimidation appeared false, concocted, and motivated by ulterior motives, constituting an abuse of process. (Paras 5, 44, 46)

B. False and Frivolous Allegations – Ulterior Motive – The informant, the applicant's sister-in-law, alleged rape and threats, but prior cases under Sections 498A, 354, 323 IPC, and the Domestic Violence Act against the applicant and his family indicated personal vendetta – Held, as per *Mahmood Ali Vs St. of U.P.*, the court must examine attending circumstances beyond the FIR to identify vexatious proceedings instituted to harass, warranting quashing. (Paras 20, 21, 36, 40)

C. Inherently Improbable Allegations – The informant claimed the applicant raped her

at her paternal home after inducing her to smell a substance, causing unconsciousness, and recorded a video – Held, as per *St. of Haryana Vs Bhajan Lal*, the allegations were absurd and improbable, and the informant's claim that the video was deleted further undermined her story, justifying quashing. (Paras 14, 16, 22, 41, 43)

D. Delayed FIR and Lack of Evidence – The FIR was lodged on 24.07.2018, over two weeks after the alleged incident on 09.07.2018, with no explanation for the delay, and no video evidence was recovered – Held, the delay and absence of corroborative evidence supported the conclusion that the allegations were baseless and fabricated. (Paras 13, 22, 43)

E. Inherent Powers u/s 482 Cr.P.C. – Preventing Abuse of Process – The court invoked its inherent powers under Section 482 Cr.P.C., as guided by *R.P. Kapur Vs St. of Punjab*, *Bhajan Lal*, *Neeharika Infrastructure Vs St. of Maharashtra*, *Prabhatbhai Aahir Vs St. of Gujarat*, and *Kapil Agarwal Vs Sanjay Sharma*, to quash proceedings that were maliciously instituted to harass the applicant and secure the ends of justice. (Paras 31, 33, 34, 35, 45)

Application Allowed.

List of Cases cited:

1. R.P. Kapur Vs St. of Pun., AIR 1960 SC 866

2. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335

3. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra, AIR 2021 SC 1918

4. Prabhatbhai Aahir Vs St. of Gujarat, (2017) 9 SCC 641

5. Kapil Agarwal Vs Sanjay Sharma, (2021) 5 SCC 524

6. Mahmood Ali Vs St. of U.P., Criminal Appeal No. 2341 of 2023, 2023 INSC 684

(Delivered by Hon'ble Sameer Jain, J.)

1. The instant application under Section 482 Cr.P.C. is connected with Criminal Misc.Bail Application No. 19065 of 2023 vide order dated 22.5.2023 passed by this Court in the above noted Criminal Misc. Bail Application.

2. From the order dated 22.5.2023 passed in Criminal Misc.Bail Application No. 19065 of 2023 it reflects that this Court directed the office to place the above noted Criminal Misc.Bail Application along with the instant application before Hon'ble the Chief Justice for nomination so as both the matters may be heard together.

3. In view of the orders dated 22.5.2023 and 26.7.2023 passed by this Court in Criminal Misc.Bail Application No.19065 of 2023 both the matters including the instant application were placed before Hon'ble the Chief Justice for nomination and vide order dated 2.8.2023 both the matters were nominated to this Bench and, therefore, the instant application and Criminal Misc.Bail Application No. 19065 of 2023 were heard together and separate order has been passed in Criminal Misc.Bail Application No. 19065 of 2023.

4. Heard Sri Kamal Krishna, learned Senior Advocate, assisted by Sri Awadhesh Kumar Saxena, learned counsel for the applicant, Sri Santosh Kumar Pandey, learned counsel for the informant and Dr.S.B.Maurya learned AGA-I, for the State.

5. The instant application under Section 482 Cr.P.C. has been filed with the prayer to quash the entire proceedings pursuant to the charge sheet No 138 of 2019 dated 17.4.2019 as well as cognizance order dated 25.4.2019 passed by Chief

Judicial Magistrate, Farrukhabad arising out of Case Crime No. 0597 of 2018, under Sections 376 and 506 IPC, Police Station Fatehgarh Kotwali, District Fatehgarh.

6. From the record it reflects that pleadings have been exchanged, therefore, instant application is being finally disposed of.

FACTUAL MATRIX:

8. On 24.7.2018 opposite party no.2 lodged FIR of the present case against the applicant, who is her 'Dever' (brother-in-law) under Sections 376 and 506 IPC. According to the FIR, the husband of opposite party no.2 expired on 29.7.2017 and after his death applicant , i.e., brother of her husband tried to develop physical relationship with her and due to the conduct of applicant and his parents, opposite party no.2 returned to her paternal home on 8.7.2018 and on 9.7.2018 at about 4.00 AM in the morning applicant arrived at her paternal home and proposed her and thereafter he induced her to smell some substance and thereafter committed rape with her and when informant gained consciousness then found that after committing rape with her, applicant was sleeping on the same bed and when informant (opposite party no.2) made complaint to him then applicant stated, he has prepared the clip of rape and if you made complaint then he will post the same on social media. It is further mentioned in the FIR that although applicant went next day but on the basis of video clip he again committed rape with her. It is further mentioned in the FIR that applicant committed rape with the informant, i.e., her 'Bhabhi' under the false promise of marriage and refused to perform marriage with her.

9. After registration of the case investigation was started and during investigation Investigating Officer recorded the statement of the prosecutrix, i.e., informant (opposite party no.2) under Section 161 Cr.P.C. in which she reiterated the version of the FIR and after that statement of the informant (opposite party no.2) was recorded by the Magistrate under Section 164 Cr.P.C. The prosecutrix in her statement recorded under Section 164 Cr.P.C. also reiterated the version of the FIR. From the record it further reflects that during investigation Investigating Officer also recorded the second statement of the informant (opposite party no.2) under Section 161 Cr.P.C. and made a query that as per allegation applicant also prepared videographs of the prosecutrix and what was the mobile number. On query, prosecutrix replied to the Investigating Officer that applicant although prepared the videographs of rape but now he has deleted the same. Therefore, it appears that during investigation no alleged videograph of the alleged incident of rape was recovered.

10. After investigation, on the basis of the statement of the informant (opposite party no.2) charge sheet was filed against the applicant on 17.4.2019 and the court concerned took cognizance on 25.4.2019 and thereafter summons were issued to the applicant.

11. Hence, the present application.

SUBMISSIONS ADVANCED ON BEHALF OF THE APPLICANT:

12. Learned counsel for the applicant submits that applicant is brother-in-law (Dever) of the informant (opposite party no.2) and totally on the basis of false and

frivolous allegation of rape he has been made accused in the present matter.

13. He further submits that alleged rape is said to have been committed by the applicant on 9.7.2018 but FIR was lodged on 24.7.2018, i..e, after more than two weeks and this fact itself shows that totally on the basis of false allegation of rape applicant has been roped in the present matter.

14. He further submits that as per the prosecutrix, i.e., informant of the case, applicant committed rape with her in her paternal home which appears to be improbable and this fact further shows that a false story of rape has been cooked up by the informant, i.e., 'Bhabhi' of the applicant.

15. He further submits that even from the entire story narrated by the informant (opposite party no.2) it appears that it is based on false and concocted facts and no reliance can be placed on such hypothetical version.

16. He further submits that as per the prosecutrix, applicant induced her to smell some substance and thereafter she lost her consciousness and applicant committed rape with her and this fact itself shows that entire story is false as no reliance can be placed on such hypothetical version, therefore, story of rape narrated by the informant cannot be believed.

17. He further submits that although from the FIR and both the statements of the informant (opposite party no.2) recorded under Sections 161 and 164 Cr.P.C. it appears that there is allegation of rape against the applicant but this Court should read in between the lines while considering the prayer for quashing the charge sheet or the proceedings along with attending circumstances.

18. He further submits that if proceeding pending against the applicant manifestly appears to be vexatious and frivolous then it is the duty of this Court to quash the same.

19. He placed reliance upon the judgment of the Apex Court in the case of **Mahmood Ali and others Vs. State of U.P. and others** passed in Criminal Appeal No.2341 of 2023 dated 8.8.2023 [2023 INSC (684)].

20. He further submits that actually after the death of her husband informant, i.e., Bhabhi of the applicant wanted to grab the entire property of the applicant and his parents and in this regard the mother of applicant, i.e., mother-in-law of the prosecutrix moved applications against her to the police on 11.12.2017 and on 9.3.2018, i.e., well before lodgement of the FIR of the present case which has been annexed along with the instant application and only due to this reason with ulterior motive informant implicated the applicant in the present case.

21. He further submits that informant of the case also filed cases under Sections 498A, 354 and 323 IPC and Section 3/4 Dowry Prohibition Act and under the provisions of Domestic Violence Act against the applicant and his parents even before the FIR of the present case and therefore it appears that informant was highly inimical with the applicant and his parents and she lodged the FIR of the present case only with ulterior motive and, therefore, in view of the law laid down by the Apex Court in the case **Mahmood Ali**

(Surpra) the impugned proceeding pending against the applicant is liable to be quashed.

22. He further submits that although there is allegation that applicant also prepared the video of the incident of rape but in her second statement recorded under Section 161 Cr.P.C. prosecutrix, i.e., informant of the case herself stated that the alleged video has been deleted by the applicant and this fact again shows that applicant neither committed any rape with her nor he ever prepared any video and, therefore, from this angle too story narrated by informant appears to be totally false.

23. He further submits that as the impugned proceeding pending against the applicant appears to be maliciously instituted with an ulterior motive with an intention to harass the applicant and to grab his property, therefore, it is liable to be quashed.

SUBMISSIONS ADVANCED BY OPPOSITE PARTY NO.2 AND THE STATE:

24. Per contra, learned AGA as well as learned counsel for the informant (opposite party no.2) opposed the prayer for quashing the proceeding and the charge sheet and submitted that there are allegations of rape against the applicant in the FIR and in both the statements of the prosecutrix recorded under Sections 161 and 164 Cr.P.C. and law is settled that at this stage if prima facie case against the applicant is made out then this Court should not quash the proceedings pending against him.

25. Both the learned counsels further submit that from the perusal of the FIR and other available materials on record prima facie offence of rape is clearly made out against the applicant.

26. Learned counsel for the informant (opposite party no.2) further submitted that applicant is brother-in-law (Dever) of the informant and he mis-used his position after the death of his elder brother, i.e., husband of the informant and firstly he harassed her and due to his harassment informant had to start living in her paternal home and thereafter he committed rape with her in her paternal home.

27. He further submits that although FIR of the present case was lodged after two weeks but merely on the basis of delay in lodging the FIR criminal proceedings pending against an accused should not be quashed if otherwise it discloses prima offence against him. He next submits that in the case of rape especially where accused is close relative of the victim delay in lodging the FIR is quite obvious.

28. He next submits that although during investigation alleged video of rape could not be recovered as it had already been deleted by the applicant but merely due to this reason proceeding pending against the applicant should not be quashed as informant, i.e., opposite party no.2 in the FIR as well as in her the statements recorded during investigation categorically stated that applicant committed rape with her and at this stage there is no reason to discard her version.

29. Learned counsel for the informant and the learned AGA further submitted that whether allegation of rape is correct or not, it can only be adjudicated by the trial court during trial and this Court at this stage can only see whether prima facie offence of

rape is made out or not and in the present matter as prima facie offence of rape is clearly made out against the applicant, therefore proceeding pending against the applicant should not be quashed and, therefore, instant applicant is devoid of merit and is liable to be dismissed.

ANALYSIS:

30. I have given my anxious consideration on the rival submissions advanced by learned counsel for both the parties and perused the material available on record.

31. The power of this Court with regard to its inherent jurisdiction has been discussed by Three Judges Bench of the Apex Court in case of **R.P. Kapur Vs. State of Punjab AIR 1960 SC 866** and Three Judges Bench of the Apex Court summarised the categories of cases where inherent power can or should be exercised to quash the proceedings:-

(i) Where it manifestly appears that there is a legal bar against the institution or continuance of proceedings for example want of sanction,

(ii) Where allegation in the first information report or complaint if taken at its face value and accepted in their entirety do not constitute the offence alleged,

(iii) Where the allegations constituted an offence but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charges.

32. The Apex Court in its celebrated judgement of **State of Haryana and others Vs. Bhajan Lal and other 1992 Supp (1) SCC 335** considered in detail the scope of this Court under Section 482 Cr.P.C. and/ or Article 226 of Constitution of India and identified the following categories in which proceedings can be quashed and observed in paragraph 102 as:-

"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."

33. The Three Judges Bench of the Supreme Court in the case of **M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others AIR (2021) SC 1918** also occasioned to discuss the scope of Section 482 Cr.P.C. and Article 226 of Constitution of India and observed that if a case falls under the parameters of **R.P. Kapur case (supra)** and **Bhajan Lal case (supra)** then this Court is having jurisdiction to quash the proceedings by invoking its jurisdiction under Section 482 Cr.P.C.

34. The Three Judges Bench of the Apex Court in case of **Prabhatbhai Aahir alias Parbatbai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another (2017) 9 SCC 641** observed that Section 482 Cr.P.C. is pre-faced with an overriding provision and this Court being a superior Court has the inherent power to make such order as necessary (i) to prevent an abuse of the process of any Court; or (ii) otherwise to secure the ends of justice.

35. Again apex Court in case of **Kapil Agarwal and others Vs. Sanjay Sharma and others (2021) 5 SCC 524** observed with regard to power of this Court under Section 482 Cr.P.C. as:-

"As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed."

36. Recently, the Apex Court in the case of **Mahmood Ali** (supra) on which reliance was also placed by the learned counsel for the applicant observed in paragraph-12 as under:

"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."*

37. Therefore, the law with regard to the power of this Court under Section 482 Cr.P.C. is settled that this Court cannot scuttle a legitimate prosecution at its inception and the inherent power should be used sparingly with abundant caution but at the same time if it appears that even if entire allegations are accepted and even then no offence is made out or proceedings has been initiated with mala-fide intention only to harass the accused persons then in the interest of justice and to secure the ends of justice this Court should invoke its jurisdiction under Section 482 Cr.P.C. and should quash the proceedings.

38. Following the well settled principle of law and contents of the allegation would have to be taken as a whole to deduce as to whether the ingredients of the offences have been duly established. If ingredients of the offences have been duly established then next question arises whether in spite that in view of the law laid down by the Apex Court proceeding or charge-sheet pending against the applicant can be quashed or not.

39. In case at hand, from the perusal of the material available on record, it appears that there is allegation of rape against the applicant, who is 'dever' of the informant and victim (informant) i.e. prosecutrix of the case in the FIR as well as in her both the statements recorded under Sections 161 Cr.P.C. and 164 Cr.P.C. made allegation of rape against the applicant, but as observed by the Apex Court in the case of Mahmood Ali (supra) it is not just enough for the Court to look into the averment made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients constitute the alleged offence are disclosed or not. In frivolous or vexatious or proceedings instituted with the

ulterior motive for wreaking vengeance, this Court owes a duty to look into the FIR and record of the case over and above the averments.

40. In case at hand, applicant is brother-in-law (Devar) of the informant i.e. opposite party no.2 and earlier also opposite party no.2 lodged two cases against him and his parents including the case under Section 498A , 354 IPC and case under the provisions of Domestic Violence Act, therefore, attending circumstances indicate that opposite party no.2 instituted the impugned proceedings against the applicant for wreaking vengeance due to personal grudge as alleged by applicant. Further, on analysing the facts of the case it appears that very casually opposite party no.2 made allegation of rape against the applicant, which prima facie appears to be unconvincing, therefore, this Court is of the view that allegation of rape was made with ulterior motive only to harass the applicant, therefore, the present case falls under the parameter 7 of **Bhajan Lal case (supra)**. Thus, in view of the law laid down by the Apex Court in **Bhajan Lal (supra)** and Mahmood Ali (supra) the proceeding pending against the applicant is liable to be quashed.

41. Further, in case of **Bhajan Lal (supra)** the Apex Court in paragraph 102 (5) observed that where the allegations made in the FIR or the complaint are so absurd and inherently improbable then this Court would be justified to quash the proceeding.

42. In case at hand, prosecutrix stated that applicant came at her paternal home and committed rape with her and before committing rape he induced her to smell some substance, thereafter she lost her consciousness. The story narrated by the informant appears to be absurd and no reliance can be placed on such version. Thus in view of law laid down by the Apex Court in case of Bhajan Lal (supra) the proceeding pending against the applicant from this angle also is liable to be quashed.

43. It is also pertinent to mention here that as per informant, applicant also prepared video clip of the alleged rape and threatened her to post it but the alleged video clip could not be recovered and during investigation on query made by Investigating Officer informant in her second statement recorded under Section 161 Cr.P.C. stated that applicant already deleted it. This fact again shows that entire story narrated by victim i.e. opposite party no.2 is totally false and baseless.

44. Therefore, from the discussion made above, it appears that from the face of it the allegations made against the applicant appears to be false, concocted and fabricated one and no prima facie offence of rape and threatening against the applicant is made out.

45. The law is settled that the judicial process should not be instrumental or oppressive for needless harassment and if this Court finds that proceeding pending against the accused is abuse of the process of law and it has been instituted with mala fide intention or ulterior motive with a view for wrecking vengeance then this Court should exercise the power under Section 482 Cr.P.C. and should quash the proceedings pending against the accused to prevent an abuse of the process of Court and to secure the ends of justice.

46. Therefore, from ongoing discussion, the instant application succeeds

and is hereby allowed. The impugned proceedings pending against applicant as well as charge-sheet dated 17.4.2019 filed against the applicant are hereby quashed.

(2024) 1 ILRA 176

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482 No. 38502 of 2018
With
Application U/S 482 No. 3399 of 2019

Rajeev Agarwal ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Swetashwa Agarwal, Sri Ashish Kumar Singh

Counsel for the Opposite Parties:
G.A., Sri Rakesh Dubey

Criminal Law - The U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 - Sections 2/3 - in Special Case No. 113 of 2018, arising from FIR No. 125 of 2018, along with the charge-sheet dated 03.09.2018 and cognizance order dated 26.09.2018. The court found the FIR, based on a single case (Case Crime No. 1063 of 2015 under Sections 420, 467, 468, 471, 120-B IPC), lacked evidence of violence or public order disturbance, essential for invoking the Gangster Act. (Paras 2, 8-9, 14, 28)

Non-Compliance with Procedural Safeguards The court held that the gang-chart was approved mechanically without adherence to Rules 5, 6, 13, 15, 16, and 17 of the U.P. Gangster and Anti-Social Activities (Prevention) Rules, 2021, violating procedural safeguards. The lack of independent application of mind by the District Magistrate and approving authorities, and absence of recorded reasons, rendered the FIR and proceedings mala fide and arbitrary, breaching Article 21 of the Constitution. (Paras 16-17, 23-24, 26)

Civil Dispute Mischaracterized as Criminal The allegations stemmed from a civil dispute over property, with no evidence linking the applicants to the sale deeds or anti-social activities. The court noted that the primary party (Neeraj Jain) involved in the civil litigation was not prosecuted, indicating arbitrary selection of the applicants. The absence of criminal history and property ownership further undermined the Gangster Act's applicability, making the proceedings an abuse of process. (Paras 4-5, 9, 27)

Constitutional Protection and Judicial Scrutiny The court emphasized the St.'s duty to protect personal liberty under Article 21 and cautioned against misuse of the Gangster Act to harass innocent citizens. Citing Shraddha Gupta Vs St. of U.P. (2022) and Gulam Mustafa Vs St. of Karnataka (2023), it held that civil disputes given a criminal color, without evidence of gangsterism, warrant quashing under Section 482 Cr.P.to prevent abuse of court processes. (Paras 21-22, 24-25, 27)

List of Cases cited:

1. Ashok Kumar Dixit Vs St. of U.P., AIR 1987 All 235 (Paras 12, 21)

2. Vimal Shukla Vs St. of U.P., 2019 (1) ARC 299 (Para 21)

3. Shubhankar Gupta Vs St. of U.P., (2019) 1 A.Cr.R. 2 (Para 21)

4. Shraddha Gupta Vs St. of U.P., (2022) 17 SCR 622 (Para 21)

5. Gulam Mustafa Vs St. of Karn., (2023) 5 SCR 354 (Para 22)

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

1. Heard Shri Swetashwa Agarwal, learned counsel for the applicants and learned A.G.A. for the State in both the connected applications as both the

applications arise out of same FIR, chargesheet and cognizance order.

2. The instant Applications 482 Cr.P.C. have been filed on behalf of the applicants with a request to quash the entire proceedings of Special Case No.113 of 2018 (State Vs. Ranjan Mittal and another) arising out of case crime/FIR No.125 of 2018, under Sections 2/3 of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, Police Station-Kotwali Nagar, District-Muzaffar Nagar, which is pending in the court of Special Judge, Gangster Act/5th Additional District and Sessions Judge, Muzaffar Nagar along with impugned charge-sheet dated 03.09.20218 as well as cognizance order dated 26.09.0218.

3. The facts of the case in brief are as follows:

The impugned FIR dated 30.01.2018 bearing No.125 of 2018 under Section 2/3 of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986 has been lodged against the applicants on the basis of a single criminal case, which was registered in the year 2015 as case crime No.1063 of 2015, under Sections 420, 467, 468, 471, 120-B IPC, Police Station-Kotwali Nagar, District-Muzaffar Nagar. It is further alleged in the FIR that applicants exercise terror in society and they indulge in heinous offences for their personal, pecuniary and material advantage and their moving freely is not in public interest. They are involved in committing the offences relating to Chapter XVII & XVIII IPC.

4. It is submitted by the learned counsel for the applicants that single base case i.e. case crime No.1063 of 2015, under Sections 420, 467, 468, 471, 120-B IPC, Police Station-Kotwali Nagar District-Muzaffar Nagar was lodged against seven accused persons including the applicants, wherein the allegations of a civil dispute relating to evacuee and non evacuee properties against all seven accused persons including the applicants have been levelled. It has further been alleged that properties in question mostly belong to Government, which is evident from the records obtained from the Tehsildar and with the intention to damage and destroy the same, two deeds dated 26.02.2003 and 01.05.2003 were executed and forged documents were also prepared by the accused persons including the present applicants.

5. It is further submitted that applicants are neither vendees nor vendors of the alleged property, on the basis of which, instant FIR has been lodged against them, which is evident from the sale deed dated 11.10.2001 executed by Jamshed Ali Khan and others in favour Neeraj Jain, as such, on the basis of the allegations made in the impugned FIR dated 30.01.2018 no offences under Sections 420, 467, 468, 471, 120-B IPC are made out against the applicants.

6. Learned counsel for the applicants submitted that in the present case applicants have been falsely implicated on the basis of arbitrary selection and other co accused persons have been left over. In the instant case, approval has also been appended by the District Magistrate, Muzaffar Nagar and S.S.P, Muzaffar Nagar in an arbitrary and mechanical way without any material available on record. Impugned FIR has been lodged on the basis of vague assumption and presumption against the applicant without there being any incriminating material or evidence available on record. It is further submitted

that in base case i.e. case crime No.1063 of 2015, on the basis of which, impugned FIR has been lodged, arrest of the applicant Ranjan Mittal was stayed till the submission of police report under Section 173(2) Cr.P.C. by a Division Bench of this Court vide order dated 24.07.2015 in Criminal Misc. Writ Petition No.17767 of 2015. However, upon submission of charge-sheet, the entire criminal proceedings along with charge-sheet in question was challenged before this Court by way of filing Application U/S 482 Cr.P.C. No.7731 of 2018, wherein, a co-ordinate Bench of this Court has granted the interim protection in favour of the applicant Ranjan Mittal and stayed the further proceedings of the case vide order dated 09.03.2018. Vide order dated 12.02.2018 Division Bench of this court stayed arrest of the applicant Ranjan Mittal in Criminal Misc. Writ Petition No.3343 of 2018 in FIR No.125 of 2018, under Section 2/3 of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986. Upon submission of Charge Sheet, further proceedings of Special Case No.113 of 2018 State Vs Ranjan Mittal and another in Application U/S 482 Cr.P.C. No.38502 of 2018 of 2018, was stayed by the court. Likewise in the case of the Applicant Rajeev Agarwal similar orders were passed by this court. Even no cogent evidence was found against the applicants by the concerned Investigating Officer, which is evident from the 'Parchas' submitted by him. The Gang-chart of the case reads as follows:-

GANG-CHART

Sr. No	**Name of Accused**	**Age**	**Case No.1063/15 u/s 420/467/468/471/ 120-B Case no. 14/17 Dated 16.12.17**	**Current Situation**		
			P.S.-Kotwali, Muzaffarnagar			
				P	J	L
1.	Rajjan Mittal s/o Manmohan Mittal r/o H.N. 84 Bhopa Road, Muzaffarnagar	50	✓	✓	-	-
2.	Rajiv Agarwal s/o Vinod Agarwal r/o H.N. 646/22. Jawahar Colony PS Nai Mandi Muzaffarnagar	52	✓	✓	-	-

7. It is submitted that I.O. has submitted chargesheet against the applicants under the aforesaid sections. It is apparent that without proper forwarding/ recommending/approval of the gang-chart from the authorities concerned, the charge-sheet under the aforesaid section was submitted.

8. It is submitted by the learned counsel appearing for the applicants, that even if all allegations in the impugned FIR and charge-sheet are taken as true, no case under Sections 2/3 of the Act of 1986 is made out against the applicants. In order to support the aforesaid submission, learned counsel has referred to the provisions of the gangster Act of 1986. He submits that there are two essential ingredients to constitute a gang. The two essential ingredients, according to learned counsel for the applicants, are 'violence' or 'disturbance of public order' indulged in by a group of

persons, acting either singly or collectively, for the purpose of pecuniary gain etc.

9. It is the learned counsel for the applicants' submission that none of the offences charged against the applicant, either involves violence or the disturbance of public order. Therefore, even if there be allegations about pecuniary gain, the consequences under the Act of 1986 would not be attracted. He next submits that there is one base case registered against the applicants, on the footing of which the present prosecution has been launched under Section 2/3 of the Act of 1986. But, in the crime, the applicants were not involved in any manner in committing the offence as has been alleged in the impugned FIR (base case) as the applicants were neither vendees nor vendors of the alleged property. Therefore, in the submission of the learned counsel, the base case is not available to provide foundation to the prosecution to pursue the present case under the Act of 1986. It is further submitted that the reports submitted by the Tehsildar as well as Investigating Officer also does not show that applicants are having too much property except their parental house. Apart from this case, applicants do not have any criminal history. It is in the last submitted by the learned counsel for the applicants that there is violation of Rule Nos. 5, 6, 13, 15,16 and 17 of The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021, vitiating the gang-chart. He has emphasized that non-adherence to these rules has vitiated the basis of registration of the crime and a fortiori the police report and the prosecution. He has emphatically submitted that violation of the aforesaid rule is not mere omission but it shows that the proceedings before registering FIR has been carried out mechanically without giving heed to the provisions of law and rules, which are of fundamental importance as any false and malacious prosecution entails serious consequences resulting into the deprivation of life and personal liberty of the accused person, which cannot be deprived except for the procedure established by law as is enshrined in the Article 21 of the Constitution of India. The forwarding, recommending and approving authorities have not paid any heed or attention to relevant law and rules, while exercising their authority with regard to the preparation and approval of the gang-chart. The whole exercise on their part has been carried out without application of mind.

10. On the other hand, in response to the notice issued to respondents, counter affidavits were filed which are duly sworn by Anil Kapparwan, presently posted as Inspector (In-charge), Police Station-Kairana, District-Shamli and by Chandan singh, presently posted as sub-Inspector, Police station, Kotwali Nagar, District-Muzaffar Nagar, in which all the allegations and averments made in the affidavits filed in support of the applications under section 482 cr.p.c. have been totally denied and it is asserted in paragraph no.4 that accused are hardened criminals and are gang leader and member. They together used to commit crimes for pecuniary and temporal gains.

11. In response to the counter affidavits filed by the opposite parties, rejoinder affidavits were filed in which, the allegations and averments made in the counter affidavits were denied and in paragraph no.6, it is mentioned that applicants have no concern with the base

case as they were neither vendees nor vendors of the alleged property.

12. Upon hearing learned Counsel for the parties, this Court is of opinion that in order to consider the submissions of learned counsel for the applicants as well as learned counsel for the State, it is imperative to refer to the relevant provisions of the Act of 1986, which reads as follows:

As the Act being a special statute- *The Act is a special statute which has been enacted for the prevention of and for coping with gangsterism and anti-social activities. The Object and reasons as well as preamble are quoted hereinbelow:-*

Objects and reasons of the Act:-

Gangsterism and anti-social activities influenced the State Legislature in making introduction of such Act. The objects and reasons of the Act are that gangsterism and anti-social activities were on the increase in the state posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with new menace. With a view to break the gangs by punishing the gangsters and to nip their conspirational designs, it was considered necessary to make special provision for the prevention of and for coping with gangsters and anti-social activities in the State. ***[Ashok Kumar Dixit v. State of U.P., 1987 (34) ACC 164: 1987 ACFR 230 AIR 1987 (All) 235 (All HC, FB)].***

Preamble of Act.-*The Act seeks to punish declared criminals who have deliberately chosen the life of crime. The activities of these professional perpetrators of organised crimes, violence and orgy has a far more baneful effect on the health and morals of the society and its people. If the activities of such recidivist are subjected to same punishment as that other ordinary criminals, the confidence of public in the efficacy and efficiency of State Administration is bound to shake.* ***[Ashok Kumar Dixit v. State of U.P., 1987 (34) ACC 164: 1987 ACTR 230: AIR 1987 (All) 235 (All HC, FB)].***

13. It is important to refer to the relevant provisions of the Act of 1986, which reads as follows:-

"2. Definitions.--*In this Act,--*

(a) x x x

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities (Act no. 2 of 1974), namely--

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act no. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act no. 4 of 1910) or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

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

in himself or any other person, or (Act no. 61 of 1985)

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

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Art, 1956, or

(vi) offences punishable under section 3 of the Public Gambling Act, 1867 (Act no. 104 of 1956), or

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

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

(ix) offences punishable under section 171-E of the Indian Penal Code, or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours

any person who has indulged in such activities;

14. A perusal of the aforesaid provisions shows that violence or disturbance of public order alone are not the sine qua non of a gang as defined under the Act of 1986. It postulates a group of persons, who either acting singly or collectively, employ violence, or threat or show of violence, or intimidation, or coercion, "or otherwise' with the object of (i) disturbing public order; (ii) or of gaining any undue temporal, pecuniary, material; or other advantage for himself or any other person, indulge in anti-social activities, enumerated in clauses (i) to (xxii) of sub-Section (b) of Section 2 of the Act of 1986.

15. It is a well settled cannon of statutory interpretation that a statute should be read and understood according to its plain grammatical meaning, unless that construction leads to an absurd result, or defeats the object and the very purpose of it.

16. Learned counsel for the applicants has also drawn attention towards the mandatory compliance with the provisions of Rule 5, 6, 13, 15, 16 and 17 of the Rules of 2021 framed under the Act of 1986. These Rules have been made by the State Government in exercise of powers under Section 23 of the Act of 1986 to carry out its purposes. Rule Nos.5, 6, 13, 15, 16 and 17 are extracted below:

"5. General Rules.--*(1) To initiate proceedings under this Act, the concerned In-charge of Police Station/Station House Officer/Inspector shall prepare a gang chart mentioning the details of criminal activities of the gang.*

(2) The gang-chart will be presented to the district head of police after clear recommendation of the Additional Superintendent of Police mentioning the detailed activities in relation to all the persons of the said gang.

(3) The following provisions shall be complied with in respect of gang-charts--

(a). The gang-chart will not be approved summarily but after due discussion in a joint meeting of the Commissioner of Police/District Magistrate/Senior Superintendent of Police/Superintendent of Police.

(b). There may be no gang of one person but there may be a gang of known and other unknown persons and in that form the gang-chart may be approved as per these rules.

(c). The gang-chart shall not mention those cases in which acquittal has been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart shall not be approved without the completion of investigation of the base case.

(d). Those cases shall not be mentioned in the gang-chart, on the basis of which action has already been taken once under this Act.

(e). A separate list of criminal history, as given in Form No.--4, shall be attached with the gang-chart detailing all the criminal activities of that gang and mentioning all the criminal cases, even if acquittal has been granted in those cases or even where final report has been submitted in the absence of evidence.

Along with the above, a certified copy of the gang register kept at the police station shall also be attached with the gang-chart. In addition to the above, the information of crime and gang members

mentioned in the gang-chart will also be updated on Interoperable Criminal Justice System (ICJS) portal and Crime and Criminal Tracking Network System (CCTNS).

6. Relevant provision of the Act to be specifically mentioned.-(1) *while preparing the gang-chart, it shall be clearly mentioned if the alleged act of the gang falls within the purview of clause (b) of section 2 of the Act along with the relevant provision.*

(2) If the Investigating Officer makes an endorsement to the effect that the accused is causing panic, alarm or terror in public, then evidence shall be collected in this regard.

To initiate proceedings under this Act, the concerned In-charge of Police Station/Station House Officer/Inspector shall prepare a gang chart mentioning the details of criminal activities of the gang.

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

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

(ii) which disturb the public order; or

(iii) which are a ground for detention under the National Security Act, 1980 (Act No.65 of 1980).

15. Arbitrary selection of gang/member of gang prohibited.-(1) *There should not be a situation of arbitrary selection against any gang under this Act.*

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

(3) The final decision as to whether to include or not to include the name of member of a gang in the gang and gang-chart shall be at the discretion of the commissioner of Police/District Magistrate.

16. Forwarding of Gang-Chart.-

The following manner shall be followed in the forwarding of Gang-Chart:

(1) Forwarding of the gang-chart by the Additional Superintendent of Police:- *The Additional Superintendent of Police will not only take a quick forwarding action in the case but he will duly peruse the gang-chart and all the attached forms; and when it is satisfied that there is a just and satisfactory basis to pursue the case, only then will he forward the letter along with the recommendation given below on the gang-chart to the Superintendent of Police/Senior Superintendent of Police.*

'Throughly studied the gang-chart and attached evidence. The basis of action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 exists. Accordingly, forwarded with recommendation."

(2) Forwarding of the gang-chart by the district police in-charge:- *When the gang-chart along with all the Forms is received by the Senior Superintendent of Police/Superintendent of Police with the clear recommendation of the Additional Superintendent of Police, he will also thoroughly analyse all the facts and when it is confirmed that all the formalities of the Act have been fulfilled and there is a legal basis for taking action in the case, then he should forward the gang-chart to the Commissioner of*

Police/District Magistrate stating that: "I have duly perused the gang-chart and attached forms and I am fully satisfied that all the particulars mentioned in the case are correct and there is a satisfactory basis for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. Accordingly, approved."

(3) Resolution of the Commissioner of Police/District Magistrate:- *When the gang-chart is sent to the Commissioner of Police/District Magistrate along with all the Forms, all the facts will also be thoroughly perused by the Commissioner of Police/District Magistrate and when he is satisfied that the basis of action exists in the case, then he will approve the gang-chart stating therein that: "I duly perused the gang-chart and attached Forms in the light of the evidence attached with the gang-chart satisfactory grounds exist for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The gang-chart is approved accordingly."*

It is noteworthy that the words written above are only illustrative. There is no compulsion to write the same verbatim but it is necessary that the meaning of approval should be the same as the recommendations written above, and it should also be clear from the note of approval marked.

17. Use of independent mind.--

(1) The Competent Authority shall be bound to exercise its own independent mind while forwarding the gang-chart.

(2) A pre-printed rubber seal gang-chart should not be signed by the Competent Authority; otherwise the same shall tantamount to the fact that the Competent Authority has not exercised its free mind."

17. Thus from perusal of the Rules, all that is required by Rules is that the Authorities recommending registration of a case under the Act of 1986 should come to the conclusion with an independent application of mind that a case under the Act of 1986 ought to be registered. Likewise, the Authorities approving the gang-chart should also come to the conclusion on an independent application of mind that a case under the Act of 1986 ought to be registered against the accused on the basis of the activities of the gang. However there is no prescription for the employment of particular words to serve as index of due application of mind.

18. It is pertinent to note here that the above noted rules of 2021 are in the form of procedural safeguards in relation to offences under the Gangsters Act. Even before these Rules of 2021, certain safequards were already, in place, in one way and the another in the form of G.Os. and Notifications/Communications issued by the Government/Executive Authority/Police Authority. These were all ad hoc Procedural Safequards to be observed and complied with by the concerned authorities while dealing with gangster cases, just to make a stop gap arrangement and an effort to plug the void, in place of formal Rules as contemplated by Section 23 of the Act.

डीजी परिपत्र संख्या-27/2003

वी0के0बी0 नायर
आई0पी0एस0

पुलिस महानिदेशक
उत्तर प्रदेश,

1, तिलकमार्ग, लखनऊ।
दिनांक–अक्टूबर, 24, 2003

प्रिय महोदय,

उ0प्र0 में अपराधी, अपराधियों, अराजक तत्वों, समूह बनाकर अपराध करने वाले लोगों,

समाज विरोधी क्रिया कलापों में संलग्न व्यक्तियों पर नियन्त्रण रखने तथा उनकी गतिविधियों पर अंकुश बनाये रखने के उद्देश्य से प्रदेश में उ0प्र0 गुण्डा नियन्त्रण अधिनियम 1970 एवं उ0प्र0 गिरोह बन्द एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम 1986 का प्रावधान है।

इन अधिनियमों का उपयोग केवल पात्र व्यक्तियों के विरूद्ध ही हो एवं इसका दुरूपयोग न हो, इसलिए इस विषय पर समय समय पर विस्तृत निर्देश जारी किये गये है, किन्तु0 मा0 उच्च न्यायालय तथा इस मुख्यालय के संज्ञान में कुछ ऐसे प्रकरण आये हैं, जिससे यह प्रतीत होता है कि इन अधिनियमों का दुरूपयोग रोकने के लिए शासन द्वारा जो दिशा–निर्देश जारी किये गये है उनका उचित

मा0 उच्च न्यायालय ने रिट याचिका संख्या 6249/2003 अमरनाथ दुबे बनाम उ0प्र0 राज्य एवं अन्य में उ0प्र0 समाज विरोधी क्रिया–कलाप और गिरोह बन्द अधिनियम के दुरूपयोग पर अप्रसन्नता व्यक्त किया है तथा यह निर्देश दिया है कि उपरोक्त का दुरूपयोग करने वाले अधिकारियों पर भारी अर्थदण्ड लगाया जा सकता है ।

अतः उपरोक्त दोनों अधिनियमों के क्रियान्वयन के सम्बन्ध में निम्नलिखित दिशा–निर्देश जारी किये जा रहे है । आप अक्षरशः अनुपालन सुनिश्चित करें, आपको यह भी सचेत किया जाता है कि यदि भविष्य में कोई ऐसा प्रकरण संज्ञान में आता है जिससे यह प्रतीत हो कि इन निर्देशों का उल्लंघन किया गया है या प्रकरण के विश्लेषण से ऐसा स्पष्ट हो कि आपकी या आपके किसी अधीनस्थ द्वारा जानबूझकर, लापरवाही या त्रुटिपूर्ण आचरण के कारण किसी निर्देश व्यक्ति के विरूद्ध उपरोक्त अधिनियमों के अन्तर्गत कार्यवाही की गयी है तो दोषी अधीनस्थ पुलिस कर्मियों के अतिरिक्त आपके विरूद्ध कठोर दण्डात्मक कार्यवाही की जायेगी ।

<u>उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम 1986 के अन्तर्गत कार्यवाही–</u>

1– उ0प्र0 गिरोह बन्द अधिनियम एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम 1986 के अन्तर्गत कार्यवाही करने के लिए उ0प्र0 शासन के शासनादेश संख्या–3216/8–9–1986 दिनांक 23 जून, 1986, शासनादेश संख्या 3352/ छ–पु0–9–1997 दिनांक 10 अक्टूबर, 1997 द्वारा विस्तृत दिशा निर्देश जारी किये गये है । किसी भी अपराधिक प्रवृत्ति के व्यक्ति के विरूद्ध कार्यवाही करने से पूर्व यह सुनिश्चित करें कि सम्बन्धित व्यक्ति इस अधिनियम के अन्तर्गत कार्यवाही किये जाने के लिए पात्र है ।

2– किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए उसके विरूद्ध केवल उन्हीं मामलों को आपराधिक सूची में सम्मिलित मानना चाहिए जिन मामलों में पुलिस द्व ारा विवेचना के उपरान्त आरोप–पत्र प्रेषित की जा चुकी है या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है, उसे आपराधिक विवरण में सम्मिलित न किया जाय।

3– जिन मामलों के आधार पर उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम के अन्तर्गत कार्यवाही की गयी है उसी आधार पर पुनः कार्यवाही न की जाये अर्थात किसी गिरोह के विरूद्ध उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम के अन्तर्गत कार्यवाही करने के बाद कोई नया अपराधिक कृत्य प्रकाश में आने पर ही उ0प्र0 समाज विरोधी क्रिया कलाप के अन्तर्गत कार्यवाही की जाये ।

4– किसी गिरोह के विरूद्ध कार्यवाही प्रारम्भ करने के लिए थानाध्यक्ष द्वारा गिरोह के आपराधिक विवरण का उल्लेख करते हुए चार्ट तैयार किया जायेगा तथा चार्ट के अतिरिक्त गिरोह के क्रिया कलापों का विवरण देते हुए तथा गिरोह के किन–किन व्यक्तियों के विरूद्ध कार्यवाही किया जाना प्रस्तावित है, उसका स्पष्ट उल्लेख करते हुए प्रतिवेदन प्रस्तुत किया जायेगा जो क्षेत्राधिकारी तथा अपर पुलिस अधीक्षक की स्पष्ट संस्तुति के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक को प्रस्तुत किया जायेगा ।

5– वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी अपने स्तर पर गिरोह के सदस्यों के आपराधिक विवरण तथा उनके क्रिया कलापों का भली भांति परीक्षण के उपरान्त जिलाधिकारी के साथ विचार–विमर्श करके सूची को अन्तिम रूप प्रदान करेंगे।

6– प्रतिवेदन तथा गैंग चार्ट पर वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक एवं जिलाधिकारी के अनुमोदन के उपरान्त अग्रिम कार्यवाही की जायेगी ।

7– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना अनिवार्यतः थाना प्रभारी द्वारा की जानी चाहिए ।

8– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना के बाद आरोप–पत्र भेजने से पूर्व जिलाधिकारी से सहमति प्राप्त कर ली जायेगी।

9– विवेचना की अवधि में मा0 उच्चतम न्यायालय के आर0 सरला बनाम टी0एस0 वेल एवं अन्य में पारित निर्णय दिनांक 13 अप्रैल, 2002 का भी अनुपालन किया जाये।

19. Here, it is pertinent to mention here that above letters were issued by the D.G. Police and thereafter G.O. Dated 02.01.2004, pursuant to the direction given by this Court while deciding **Writ Petition No. 6249/2003 Inre: Amar Nath Dubey Vs. State of U.P.**

20. Noticing the above letter, and the direction contained in the order of Division Bench of this Court, Principal Secretary (Homes) issued yet another set of procedure/instruction mentioning therein the manner in which gang chart in relation to offences under the Gangsters Act has to be prepared. These were all ad hoc practices adopted by higher bureaucracy just to make a stop gap arrangement and an effort to plug the void, in place of formal Rules as contemplated by Section 23 of the Act. Clause 2 of these instructions would indicate the details of information that has to be contained therein. The said instruction issued by Principal Secretary Homes, in the shape of Government Order is extracted herein below: -

भसंख्या 137
प्र0सं0/6–पु0–11–2003–58(रिट)/2003
प्रेषक,
अनिल कुमार,
प्रमुख सचिव,
उ0प्र0 शासन।
सेवा में,
समस्त जिलाधिकारी,
जनपदीय वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक,
उत्तर प्रदेश।

गृह (पुलिस) अनुभाग–11 लखनउ दिनांक 2 जनवरी 2004

महोदय,

मा0 उच्च न्यायालय, इलाहाबाद के द्वारा रिट याचिका संख्या 6249/2003 अमरनाथ दुबे बनाम उ0प्र0 राज्य एवं अन्य में उ0प्र0 गिरोहबन्द व समाजबिरोधी क्रिया कलाप निवारण अधिनियम के दुरूपयोग पर चिन्ता व्यक्त की है। मा0 उच्च न्यायालय ने उ0प्र0 गिरोहबन्द निवारण अधिनियम उ0प्र0 गुण्डा अधिनियम एवं एन0डी0पी0एस0 अधिनियम के सम्यक उपयोग हेतु आवश्यक दिशा निर्देश जारी करने एवं दुरूपयोग रोकने हेतु यथोचित कदम उठाने के लिए कडे निर्देश दिये है ।

इन अधिनियमों के सम्यक सदुपयोग करने एवं इनके दुरूपयोग के रोकथाम हेतु समय समय पर विस्तृत निर्देश पूर्व में जारी किये गये है। परन्तु ऐसा प्रतीत होता है कि इन अधिनियमों का दुरूपयोग रोकने के लिए शासन/पुलिस महानिदेशक, उ0प्र0 द्वारा जो दिशा निर्देश जारी किये गये है, उनका कडाई से अनुपालन नहीं किया जा रहा है। आप सहमत होगें कि निर्दोष व निरपराध व्यक्तियों के विरूद्ध इन अधिनियमों के अन्तर्गत दिये गये अधिकारों का दुरूपयोग कुछ अधिकारियों द्वारा किये जाने के कारण शासन एवं पुलिस विभाग की छवि पर प्रतिकूल प्रभाव पडता है।

अतः इस सम्बन्ध में पुनः निम्नलिखित दिशा निर्देश दिये जा रहे है, जिनका कड़ाई से अनुपालन सुनिश्चित किया जाये–

1– समस्त थाना प्रभारी, क्षेत्राधिकारी, अपर पुलिस अधीक्षक वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, प्रभारी जनपद एवं जिलाधिकारी इस अधिनियम में दिये गये प्राविधानों का अध्ययन करके इसको भली भंति समझ लें। इस हेतु यह जान लेना रहेगा कि जनपद स्तर पर एक कार्यशाला आयोजित करा ली जाये जिसमें सभी अधिकारियों के अलावा जनपद के जिला शासकीय अधिवक्ता– फौजदारी एवं ज्येष्ठ अभियोजन अधिकारी प्रभारी भी अवश्य उपस्थित रहे। यदि किसी अधिकारी की किसी स्तर पर इन अधिनियमों के किसी प्राविधान के बारे में किसी प्रकार की कोई शंका हो तो इस कार्यशाला में उनका निराकरण करा लिया जाये।

2– इन अधिनियमों के सम्यक प्रयोग करने, दरूपयोग रोकने के सम्बन्ध में इस आदेश के माध्यम से निम्नवत दिशा निर्देश आपको दिये जा रहे है। कृपया इनका कडाई से अनुपालन सुनिश्चित कराये –

उ0प्र0 गिरोहबन्द एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम के सम्यक उपयोग करने/दुरूपयोग रोकने के सम्बन्ध में दिशा निर्देश–

1– इस अधिनियम के अन्तर्गत कार्यवाही केवल उन्हीं अपराधियों के विरूद्ध की जाये, जिनकी

आपराधिक गतिविधि इस अधिनियम में दिये गये प्राविधान की परिधि के अन्तर्गत आती है ।

2– किसी गिरोह के विरूद्ध कार्यवाही प्रारम्भ करने के लिए थाना प्रभारी द्वारा गिरोह के आपराधिक विवरण का उल्लेख करते हुए चार्ट तैयार किया जायेगा तथा ***चार्ट के अतिरिक्त गिरोह के क्रिया कलापों का विवरण देते हुए*** *तथा गिरोह के किन किन व्यक्तियों के विरूद्ध कार्यवाही किया जाना प्रस्तावित है, उसका स्पष्ट उल्लेख करते हुए आख्या प्रस्तुत की जायेगी, जो क्षेत्राधिकारी तथा अपर पुलिस अधीक्षक की स्पष्ट संस्तुति के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को प्रस्तुत की जाये।*

3– वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी अपने स्तर पर गिरोह के सदस्यों के अपराधिक विवरण तथा उनके क्रिया कलापों का भली भांति परीक्षणत के उपरान्त जिलाधिकारी के साथ विचार विमर्श करके इस सूची को अन्तिम रूप प्रदान करेंगे।

4– उक्त आख्या तथा गैंग चार्ट पर वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी एवं जिलाधिकारी के अनुमोदन के उपरान्त अग्रिम कार्यवाही की जायेगी।

5– किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए उसके विरूद्ध केवल उन्हीं मामलों को अपराधिक सूची में सम्मिलित मानना चाहिए, जिन मामलों में पुलिस द्वारा विवेचना के उपरान्त आरोप पत्र प्रेषित किया जा चुका है। जिन मामलों में अन्तिम रिपोर्ट प्रेषित की जा चुकी है या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है उसे आपराधिक विवरण में सम्मिलित न किया जाये।

6– जिन मामलों के आधार पर उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोहबन्द अधिनियम के अन्तर्गत कार्यवाही की गयी है, उसी आधार पर पुनः कार्यवाही न की जाये। अर्थात किसी गिरोह के विरूद्ध उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोहबन्द अधिनियम के अन्तर्गत कार्यवाही करने के बाद कोई नया आपराधिक कृत्य जो इस अधिनियम के प्राविधानों की परिधि में हो, प्रकाश में आने पर ही उ0प्र0 समाज विरोधी क्रिया कलाप के अन्तर्गत कार्यवाही की जाये ।

7– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना अनिवार्यतः दूसरे थाने के प्रभारी द्वारा की जानी चाहिए ।

8– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी से अनुमोदन प्राप्त करने के उपरान्त ही आरोप पत्र न्यायालय प्रेषित किया जाय।

9– गरोहबन्द अधिनियम के अन्तर्गत मुकदमा पंजीकृत करने के उपरान्त विवेचना के पश्चात न्यायालय आरोप पत्र प्रेषित करने हेतु अनुमोदन देने के पूर्व वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को भली भंति संतुष्ट हो लेना चाहिए कि वास्तव में मामला गिरोहगन्द अधिनियम की परिधि में आता है अथवा नहीं।

10– यहां यह भी स्पष्ट किया जाता है कि यदि किसी जनपद में इस अधिनियम में दिये गये प्राविधानों के सम्बन्ध में किसी अधीनस्थ अधिकारी द्वारा अपने कर्तव्य पालन की उपेक्षा करने अथवा अपने अधिकार का दुरूपयोग का कोई मामला प्रकाश में आता है तो सम्बन्धित थाना प्रभारी एवं दोषी पाये गये अधिकारी के अलावा जनपद के वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी भी उत्तरदायी माने जायेंगे।

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सामान्य निर्देश–

1– इन दिशा–निर्देशों के अनुपालन सुनिश्चित कराने की जिम्मेदारी जनपद के वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी की है।

2– यदि किसी जनपद में इन अधिनियमों के दुरूपयोग किये जाने का कोई मामला प्रकाश में आये, तो किसी भी स्तर पर दोषी अधिकारियों/कर्मचारियों को बचाने का प्रयास न किया जाये, वरन दोष निर्धारण करते हुए तत्परता से दोषी के विरूद्ध कार्यवाही की जाये।

3– इन अधिनियमों के अन्तर्गत दिये गये प्राविधानों का दुरूपयोग किये जाने का यदि कोई मामला प्रथम दृष्टया सही पाया जाये तो सम्बन्धित थाने के प्रभारी एवं अन्य दोषी अधीनस्थ पुलिस कर्मियों को थाने से हटा दिया जाये एवं तत्परता से जांच कराकर उनके विरूद्ध दण्डात्मक कार्यवाही की जाये।

4– प्रत्येक माह जिलाधिकारी एवं वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, प्रभारी अपनी मासिक गोष्ठी में इस आदेश के माध्यम से दिये जा रहे दिशा–निर्देशों के अनुपालन के सम्बन्ध में भी अनुश्रवण किया करेंगे।

5– सभी को यह स्पष्ट किया जाता है कि शासन अथवा पुलिस महानिदेशक उ0प्र0 के संज्ञान में यदि कोई ऐसा मामला आता है कि किसी मामले में इन अधिनियमों का दुरूपयोग किये जाने की जानकारी वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को होने के पश्चात भी पीडित पक्ष को न्याय नहीं दिलाया गया अथवा दोषी अधिकारी, कर्मचारी के विरूद्ध यथेष्ठ कार्यवाही नहीं की गयी है, तो ऐसे मामलों में वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी जिम्मेदार माने जायेंगे।

भवदीय,

(अनिल कुमार)

प्रमुख सचिव
संख्या एवं दिनांक तदैव
प्रतिलिपि–निम्नलिखित को आवश्यक कार्यवाही हेतु–
1– पुलिस महानिदेशक, उ0प्र0।
2– पुलिस महानिदेशक, अभियोजन, उ0प्र0।
3– अपर पुलिस महानिदेशक, सी बी सी आई डी, उ0प्र0।
4– अपर पुलिस महानिदेशक, रेलवेज, उ0प्र0

आज्ञा से,

(दीपिका दुग्गल)

विशेष सचिव
संख्या एवं दिनांक तदैव
प्रतिलिपि–निम्नलिखित को अनुपालन सुनिश्चित कराने हेतु–
1– समस्त मण्डल आयुक्त, उ0प्र0।
2– समस्त पुलिस महानिरीक्षक, जोन उ0प्र0।
3– समस्त परिक्षेत्रीय उपमहानिरीक्षक, उ0प्र0।

आज्ञा से,

(दीपिका दुग्गल)

विशेष सचिव

21. It will be apt to take note of what has been held and observed by the Apex Court as well as the High Court with regard to the interpretation and application of the various provisions of the Act.

Status of criminal, not punishable- It is not the status of criminal, but the act which is made punishable. The activities of gangsters are offence under the Act since they pose grave threat to the even tempo of the society and, therefore, call for sterner and more deterrent punishment and speedier trial and early booking. **(Ashok Kumar Dixit Vs. State of U.P.; 1987 (34) ACC 164).**

The person who not liable to be punished- A person is not liable to be punished under the Act merely because he happens to be a member of a group. He comes within the clutches of the Act, when he chooses to join a group which indulges in any anti-social activities defined under the Act with use of force for gaining material and advantage to himself or any other person. **(Ashok Kumar Dixit Vs. State of U.P.; 1987 (34) ACC 164)**.

Duty of the State to protect personal liberty of its citizens- Duty of State to protect personal liberty of its citizens, the State is duty bound to protect personal liberty of its citizens beyond doubt which is fundamentally guaranteed under Article 21 of the Constitution of India **(Vimal Shukla Vs. State of U.P.; 2019 (1) ARC 299).**

Necessity of deeper application of mind- The imposition of Gangsters Act calls for a deeper application of mind and the satisfaction of the authorities must be based on a definite opinion against an accused person.

(Shubhankar Gupta Vs. State of U.P.; (2019) 1 A.Cr.R. 2)

Caution for misuse of the provisions- The provisions of the Act cannot be used as a weapon to wreck vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt. **(Ashok Kumar Dixit Vs. State of U.P.; 2007 (2) ACC 683 Alld.)**

Judicial scrutiny of the subjective satisfaction- In Gangster Act, a subjective satisfaction is open to limited judicial scrutiny, therefore, it would be wrong to contend that there is a complete embargo on the powers of Court to look at the sufficiency of the ground from any perspective. **[Parvez Vs. State of U.P.; 2021 Crl.J. 4034 (All)(LB)].**

There can be prosecution for single offence/FIR/chargesheet- On a fair

reading of the definitions of 'Gang' contained in Section 2(b) and 'Gangster' contained in Section 2(c) of the Gangsters Act, a 'Gangster' means a member or leader or organiser of a gang including any person who abets or assists in the activities of a gang enumerated inclause (b) of Section 2, who either acting singly or collectively commits and indulges in any of the anti-social activities mentioned in Section 2(b) can be said to have committed the offence under the Gangsters Act and can be prosecuted and punished for the offence under the Gangsters Act. There is no specific provision under the Gangsters Act, 1986 like the specific provisions under the Maharashtra Control of Organized Crime Act, 1999 and the Gujarat Control of Terrorism and Organized Crime Act, 2015 that while prosecuting an accused under the Gangsters Act, there shall be more than one offence or the FIR/charge sheet. As per the settled position of law, the provisions of the statute are to be read and considered as it is. Therefore, considering the provisions under the Gangsters Act, 1986 as they are, even in case of a single offence/FIR/charge sheet, if it is found that the accused is a member of a 'Gang' and has indulged in any of the anti-social activities mentioned in Section 2(b) of the Gangsters Act, such as, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person and he/she can be termed as 'Gangster' within the definition of Section 2(c) of the Act, he/ she can be prosecuted for the offences under the Gangsters Act. Therefore, so far as the Gangsters Act, 1986 is concerned, there can be prosecution against a person even in case of a single offence/FIR/chargesheet for any of the anti-social activities mentioned in Section 2(b) of the Act provided such an anti-social activity is by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. **[Shraddha Gupta Vs. State of U.P. and others; (2022) 17 S.C.R. 622 (Para 10)(635-B-G)].**

22. This Court has the occasion to go through the recent judgment of Apex Court in the case of **Sri Gulam Mustafa Vs. The State of Karnataka and another; (2023) 5 S.C.R.** 354. The relevant paragraphs of the aforesaid order reads as under:-

Held: 1.1- *The mere fact that the offence is covered under a 'special statute' would not inhibit this Court or the High Court from exercising their respective powers under Article 142 of the Constitution or Section 482 of the Code.* ***[Para-34] [369-C-D].***

"36. 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 extra-judicial pressure on the party concerned, which, we reiterate, is nothing but abuse of the process of the court. In the present case, there is a huge, and quite frankly, unexplained delay of over 60 years in initiating dispute with regard to the ownership of the land in question, and the criminal case has been lodged only after failure to obtain relief in the civil suits, coupled with denial of relief in the interim therein to the respondent no.2/her family members. It is evident that resort was now

being had to criminal proceedings which, in the considered opinion of this Court, is with ulterior motives, for oblique reasons and is a clear case of vengeance.

1.5.- The High Court fell in error in not invoking its wholesome power under Section 482 of the Code to quash the FIR. Accordingly, the Impugned Judgment, being untenable in law, is set aside. Consequent thereupon, the FIR, as also any proceedings emanating therefrom, insofar as they relate to the appellant, are quashed and set aside. ***[Para 39] [371-C-D]"***

23. Considering the instant case in the light of the provisions of the Act and relevant Rules, it is evident that the gang chart in this case has been approved summarily without adopting due process of law as is apparent from the perusal of the gang chart. Furthermore there is no specific mention of offences which have been committed for pecuniar, materialistic and temporal or similar benefits or which disturb the public order as per Rules. Furthermore, quick forwarding action has been taken in this case without caring for the compliance of the relevant rules. There should be satisfaction recorded to the effect that there is just and legal basis for taking action under the Act and there is satisfactory basis for persuing the case. The satisfaction so recorded should be there by using the mind independently but in the instant case the same is missing.

24. Considering the aforesaid submissions made by the learned counsel for the parties as well as perusal of records, it is evident from the records that at the time of approving the gang-chart, District Magistrate did not apply his mind as no reasons are recorded by him, resultantly, the lodging of FIR under Gangster Act is with *malafide intention,* in violation of the procedural safeguards, which shows that forwarding/ recommending authorities as well as approving authority acted mechanically and the whole exercise lacks application of mind on the parts of the authorities concerned. The applicants have fundamental right to life which include to live with honour and dignity and fundamental right of under Article 21 of the Constitution of India cannot be interferred with lightly. The applicants have been deprived of their liberty by the mechanical excecise/procedure undertaken on the part of the authorities concerned.

25. The procedural compliance in cases of gangster Act is of utmost importance, departure from the due process of law will give chance and provide fodder to the vested interests with singular agenda to spread false narratives. Verily, gangsterism poses an ominious threat to public order. Vile and abhorrent acts of gangsterism do evoke collective societal anger and anguish. While the war against gangsterism must be waged by the State with unwavering resolve but a civil democratic society can ill afford sacrificing the procedural safeguards legislatively provided, and which is an integrated facet of the due process of law, at the altar of perceived peril to public order.

"The Siren Song that the 'end justifies the means', and that the procedural safeguards are subdervient to the overwhelming need to ensure that the accused is prosecuted and punished, must be muzzled by voice of Rule of Law."

26. For all the reasons recorded above, the court is of the view that at the stage of preparing and approving the gang-chart on the basis of materials placed, the competent Authorities should have satisfied

themselves that there is a legal basis and justifiction for taking and persuing action against the accused under the Act of 1986. At the stage of approval of the gang-chart, the approving Authority has to be satisfied that a case for action under the Act of 1986 is made out and that satisfaction should be reflected from the gang chart and other records. But in this case, the competent authorities, unhesitatingly just paid lip service to the legislative mandate and unfortunately had undertaken the whole exercise of preparation and approval of the gang chart as a ritualistic formality without due application of mind.

27. From perusal of records, it is also apparent that Mr. Neeraj Jain purchased the disputed land regarding which the base case was registered and resultantly Gangster Act was imposed on the applicants. Neeraj Jain contested the civil case at the very stages i.e. Board of Revenue, High Court and even upto Supreme Court, from which, it is apparent that he has taken resort to lawful means by way of litigation in the civil and revenue courts. By no stretch of imagination, it can be inferred and said that by indulging in civil litigation, it can be said that applicants have indulged in anti-social activities. Moreover, it is also noteworthy that applicants are not party to the civil litigation. Neeraj Jain who has faught and still fighting civil case has not been made accused which shows that District Magistrate has arbitrarily selected the applicants while imposing Gangster Act against them. No reasons whatsoever have been given with respect of Neeraj Jain who has not been prosecuted if the intention was there to damage and destroy the Government Property. Thus, civil dispute relating to land has been given colour and flavour of criminality and is unnecessarily given shape of act of gangsterism and anti social activities on the part of police and administrative authorities. Report submitted by the Tehsildar called by the Investigating Officer also does not show that applicants are having too much property except their parental houses. Apart from this case, applicants do not have any criminal history. The initiation and continuation of the entire criminal proceedings is persecution and harassment of the accused, amounting to be sheer abuse of process of law as well as abuse of process of court, that is in order to otherwise ensure the ends of justice is liable to be quashed.

28. In such view of the matter, the entire proceedings of Special Case No.113 of 2018 (State Vs. Ranjan Mittal and another) arising out of case crime/FIR No.125 of 2018, under Sections 2/3 of U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986, Police Station-Kotwali Nagar, District-Muzaffar Nagar, which is pending in the court of Special Judge, Gangster Act/5th Additional District and Sessions Judge, Muzaffar Nagar along with impugned charge-sheet dated 03.09.20218 as well as cognizance order dated 26.09.0218 is, hereby, quashed against the applicants namely Rajeev Agarwal and Ranjan Mittal.

29. The Applications are, accordingly, **allowed.**

30. A copy of this order be sent back to the lower court forthwith.

(2024) 1 ILRA 191
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.10.2023

BEFORE

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ B No. 2741 of 2023

Shiv Bachan Yadav & Ors. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Anil Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Pradeep Singh, Sri Virendra Kumar Jaiswal, Manish Dev Singh

A. Revenue Law – Appeal Under U.P. Revenue Code, 2006 – Maintainability – Petitioners challenged the Board of Revenue's order dated 06.07.2023 and the Commissioner's order dated 26.10.2021, admitting an appeal (No. 177 of 2020) without a certified copy of the decree – Held, Section 207 of the U.P. Revenue Code, 2006, read with Rule 182 of the U.P. Revenue Code Rules, 2016, allows an appeal to be filed with a certified copy of either the order or decree, unless dispensed with by the court – The appeal, accompanied by the certified copy of the order dated 14.10.2020, was maintainable despite the delayed filing of the decree on 15.03.2022, as Rule 182 provides flexibility, unlike the mandatory requirement under Order XLI Rule 1, CPC, per *Amarjeet Vs St. of U.P.*. (Paras 13, 18, 24, 25, 34, 36, 38)

B. Statutory Interpretation – Applicability of Code of Civil Procedure, 1908 – Petitioners argued that the appeal was defective for not including the decree, as required under Order XLI Rule 1, CPC, applicable via Section 214 of the U.P. Revenue Code, 2006 – Held, Section 214 and Rule 188 of the U.P. Revenue Code Rules, 2016, with a non-obstante clause, exclude CPC provisions when express provisions exist in the Revenue Code – Section 207 and Rule 182 provide a self-contained procedure for appeals, overriding CPC requirements, as supported by *Maru Ram Vs U.O.I.* and *ICICI Bank Ltd. Vs SIDCO Leathers Ltd.*. (Paras 15, 19, 20, 21, 23, 27, 28, 29, 34, 35)

C. Non-Obstante Clause – Legislative Intent – Petitioners contended that CPC provisions, particularly Order XLI Rule 1, apply to appeals under the Revenue Code due to Section 214 – Held, the non-obstante clause in Rule 188 prioritizes the Revenue Code's provisions over the CPC when express provisions exist – The clear language of Section 207 and Rule 182 indicates legislative intent to allow appeals with either an order or decree, interpreted in their natural sense, per *A.R. Antulay Vs R.S. Nayak* and *Sussex Peerage Claim*. (Paras 27, 28, 30, 31, 32, 34, 36)

D. Judicial Review – Validity of Appellate Proceedings – Petitioners argued that the appeal's prayer to set aside the "Order Decree dated 14.10.2020" was defective, as the decree was dated 19.10.2020 – Held, the Board of Revenue correctly upheld the appeal's maintainability, as the certified copy of the order was filed, and the decree was later submitted with an explanation for delay – The Commissioner's order admitting the appeal was procedural and did not warrant interference under Article 226, as per *M/s Goderej Sara Lee Ltd. Vs Excise and Taxation Officer*. (Paras 11, 12, 13, 16, 38)

E. Revenue Law – Procedural Flexibility in Appeals – Petitioners claimed the appeal was inherently defective for not initially including the decree – Held, Rule 182's provision allowing the court to dispense with the certified copy of the decree provides procedural flexibility – The contesting respondents' subsequent filing of the decree on 15.03.2022, with an affidavit explaining the delay, cured the defect, and the appeal was rightly entertained, consistent with *Jagat Dhish Bhargava Vs Jawahar Bhargava*. (Paras 12, 13, 16, 24, 36)

Writ Petition Dismissed– Appeal Maintainable.

List of Cases cited:

1. Amarjeet Vs St. of U.P., 2021 (151) RD 345

2. Banarsi Vs Ram Phal, (2003) 9 SCC 606

3. Harishankar Vs Jay Deyee, (2000) 39 ALR 120 (All)

4. M/s Goderej Sara Lee Ltd. Vs Excise and Taxation Officer, AIR 2023 SC 781

5. Jagat Dhish Bhargava Vs Jawahar Bhargava, AIR 1961 SC 832

6. Maru Ram Vs U.O.I., (1981) 1 SCC 107

7. ICICI Bank Ltd. Vs SIDCO Leathers Ltd., (2006) 10 SCC 452

8. Iridium India Telecom Ltd. Vs Motorola Inc., (2005) 2 SCC 145

9. A.R. Antulay Vs R.S. Nayak, (1988) 2 SCC 602

10. Emperor Vs Baldeo, AIR 1940 All 263

11. Sussex Peerage Claim, (1844) 11 Cl & Fin 85; 8 ER 1034 (HL)

(Delivered by Hon'ble Syed Qamar Husain Rizvi, J.)

1. Heard Sri Anil Kumar Mishra, learned Counsel for the petitioners, Sri Manish Dev Singh along with Sri V.K. Jaiswal, learned counsels for the respondent nos. 4 to 22, Sri Awadhesh Kumar Patel, learned Standing Counsel for the State-respondents no. 1 to 3 and Sri Pradeep SingSh, learned Counsel for respondent no. 23-Gaon Sabha.

2. The respondents no. 25 to 31 are the proforma respondents. As they are the plaintiffs in the Suit in question along with the petitioners as such, notice is not necessarily required to be issued to them as their claims are conjoined with the petitioners.

3. With the consent of the learned counsel for the parties, this Court proceeds to decide the present Writ Petition at the admission stage itself.

4. By means of the present writ petition, the petitioner has prayed for the following relief:

"(i) issue a writ in the nature of certiorari quashing the impugned order dated 06.07.2023 ***(Annexure No.7)*** *passed by the respondent no. 2 and order dated 26.10.2021* ***(Annexure No. 6)*** *passed by respondent no. 3 together with quash the entire proceeding of Appeal No. 177 of 2020, Computerize No. C202016000000177 (Ram Lakhan Yadav and others versus Ramjatan Yadav and others), pending in the Court of Commissioner, Vindhyachal Division, Mirzapur/respondent no. 3.*

(ii) issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case."

5. The relevant facts leading to the instant Writ Petition, as narrated by the parties are that the petitioners filed a Suit under Section 229-B/176 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 before the Sub Divisional Officer/ Assistant Collector Ist Class, Robertganj, Sonebhadra against the contesting respondents. The said Suit (Ramjatan Yadav and others versus State of U.P. and others) was registered as Case No. RST/07803/2019 (Computerised Case No. T- 201916660107803) and was decided vide judgment and order dated 14.10.2020.

6. Aggrieved by the aforesaid judgment and order dated 14.10.2020, the contesting respondents preferred an Appeal on 21.10.2020, under Section 207 of the U.P. Revenue Code, 2006 before the Commissioner, Vindhyachal Division, Mirzapur (respondent no.3) which was registered as Appeal No. 177 of 2020, Computerised No. C202016000000177 (Ram Lakhan Yadav and others versus Ramjatan Yadav and others).

7. The learned Court of Commissioner, Mirzapur (respondent no.3) vide order

dated 26.10.2021 accepted the aforesaid Appeal, issued notices to the opposite parties and summoned the records from the learned Trial Court.

8. Pending the aforesaid Appeal, the contesting respondents also filed a Revision assailing the aforesaid judgment and order dated 14.10.2020 passed by the Sub Divisional Officer/ Assistant Collector Ist Class, Robertganj, Sonebhadra. The said Revision under Section 333 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 filed before the Board of Revenue at Prayagraj (respondent no.2) was registered as Revision No. 1651 of 2020.

9. The aforesaid Revision was dismissed vide order dated 11.08.2021 passed by the learned Board of Revenue at Prayagraj (respondent no.2), on the ground that since the revisionist / petitioners have already availed the remedy of Appeal before the learned Court of Commissioner and as such has exhausted the option of filing the Revision before the learned Board of Revenue. In view of the same the said Revision is not maintainable.

10. The Petitioner then filed a Revision under Section 210 of the U.P. Revenue Code, 2006 before the learned Board of Revenue (respondent no. 2) assailing the aforesaid order dated 26.10.2021 passed by Court of Commissioner, Mirzapur (respondent no.3), which was registered as Case No. REV/2674/2021/Sonebhadra.

11. By means of the aforesaid Revision, the petitioners challenged the Order dated 26.10.2021 whereby the Commissioner, Vindhyachal Division, Mirzapur (respondent no. 3) accepted the Appeal No. 177 of 2020 for admission, under Section 207 of the U.P. Revenue Code, 2006, filed by the contesting respondents wherein the *"order decree dated 14.10.2020"* is under challenged. The bone of contention as raised by the petitioners in the said Revision is that the memorandum of Appeal does not accompany the certified copy of the decree, as such, the said Appeal is liable to be dismissed being inherently defective.

12. The contesting respondents on 15.03.2022 filed a copy of the decree dated 19.10.2020 prepared in pursuance of the judgement and order dated 14.10.2020 along with an application duly supported by an affidavit, inter alia, explaining the reasons for not filing the said decree earlier and praying for the condonation of delay in filing the aforementioned decree before the learned Court of Commissioner, Mirzapur (respondent no. 3) in Appeal No. 177 of 2020.

13. The above-mentioned Revision having Case No. REV/2674/2021/Sonebhadra was dismissed by the learned Board of Revenue (respondent no. 2) vide order dated 06.07.2023. While dismissing the said revision, the learned Board of Revenue recorded a categorical finding that Rule 182 of the U.P. Revenue Code Rules, 2016 clearly provides that an appeal or revision preferred against any order or decree passed under any provisions of the Code, is maintainable provided a certified copy of such order or decree is accompanied with the memorandum of appeal or revision, unless such copy is dispensed with by the court or officer concerned and therefore, First Appeal under Section 207 of the U.P. Revenue Code, 2006 is very well maintainable against a final order or decree

passed in any suit, application or the proceedings mentioned therein. Since the certified copy of the order dated 14.10.2020 passed by the Sub Divisional Officer has been filed along with the memorandum of appeal although the certified copy of the decree dated 19.10.2020 has not been annexed in the appeal, even then the Appeal is maintainable.

14. Being aggrieved by the aforesaid order dated 06.07.2023 passed by the learned Board of Revenue (respondent no.2) in Revision having Case No. REV/2674/2021/Sonebhadra and order dated 26.10.2021 passed by the Commissioner, Mirzapur (respondent no. 3) in Appeal No. 177 of 2020, the petitioners preferred the instant writ petition.

15. The contentions as raised by Sri Anil Kumar Mishra, learned Counsel for the petitioners are as under:

15.1. He submits that the statutory provisions of appeal under Section 207 of the U.P. Revenue Code, 2006 read with Rule 182 of the U.P. Revenue Code Rules, 2016 provides a bar to entertain an appeal, in absence of the decree and even Section 331(3) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 provides that an appeal shall lie against a decree. Since in the present case, certified copy of the decree dated 19.10.2020 has not been filed along with the memorandum of appeal, the Appeal No. 177 of 2020 is liable to be dismissed as not maintainable.

15.2. It has been contended by the learned counsel for the petitioner that Section 207 of the U.P. Revenue Code, 2006 is a substantive provision and its corresponding Rule 183 of the U.P. Revenue Code Rules, 2016 does not specify the necessary documents that should accompany the memorandum of appeal. Therefore, the said Section is to be read in the light of Section 214 of the U.P. Revenue Code, 2006 whereby the provisions of Code of Civil Procedure, 1908 shall apply in respect of the appeal as provided under Section 207 of the U.P. Revenue Code, 2006. Since, the Order XLI Rule 1 of Code of Civil Procedure, 1908 deals with the procedure of filing an appeal wherein it is mandatory for the appellant to file a certified copy of the decree along with the memorandum of appeal, this mandate is indispensable unless leave for the same is granted by the appellate court as per the proviso to Sub-Rule 2 of Rule 1 in Order XLI Rule 1 of the Code of Civil Procedure, 1908. His contention is that as the procedure for filing an appeal under Section 207 of the U.P. Revenue Code, 2006 is governed by the Code of Civil Procedure, 1908, it was thus, mandatory for the appellant/contesting respondents to file a certified copy of the decree along with the memorandum of appeal.

15.3. Further, he submitted that Section 214 of the U.P. Revenue Code, 2006 read with and Rule 109 of the U.P. Revenue Code Rules, 2016 provide that, unless otherwise expressly provided by or under the U.P. Revenue Code, 2006, the provisions of the Code of Civil Procedure, 1908 shall apply to every suit and plaint for division for holdings, then, an appeal arising out of a suit and plaint of division of several holdings under Section 207 of the U.P. Revenue Code, 2006 will also be governed by the Code of Civil Procedure, 1908 and specifically by Section 96 of Code of Civil Procedure, 1908 read with Order XLI Rule 1.

15.4. He further argued that an Appeal lies only against a decree and not

against a judgment as provided under Section 96 of the Code of Civil Procedure, 1908. In support of his submission, he relied upon the judgment passed by the Hon'ble Supreme Court in the case of **Banarsi versus Ram Phal** reported in **(2003) 9 SCC 606** and Harishankar versus Jay Deyee reported in **(2000) 39 ALR 120 (Alld.).**

15.5. It has been further submitted by the learned counsel for the petitioners that in view of the provisions of Order XLI Rule 1 of the Code of Civil Procedure, 1908 as amended vide Allahabad High Court Amendments; the Court may, for sufficient reasons, accept a memorandum of appeal without a copy of decree appealed from, if the counsel for the appellant certifies that a copy of the same will be filed subsequently within the time granted by the Court. However, it is an admitted fact that no decree was prepared prior to 19.10.2020, while the appellant/contesting respondents in the appeal have prayed for the quashing of the order dated 14.10.2020 and nowhere mentioned in the entire memorandum of appeal, the explanation for not challenging the decree dated 19.10.2020 or have explained the reason for non-filing of the same along with the appeal.

15.6. Further, he argued that throughout the proceeding upto the Board of Revenue, the appellant/contesting respondents did not disclose the fact that they have filed the decree before the Court of learned Commissioner, Mirzapur (respondent no. 3) and for the first time by means of the supplementary affidavit dated 08.08.2023, the appellants/contesting respondents have brought this fact on record before this Court that they have filed the said decree dated 19.10.2020 before the Appellate Court on 15.03.2022; that too after a lapse of about 16 months.

15.7. Further, the prayer made in the Appeal bearing Appeal No. 177 of 2020 is for setting aside the "Order Decree dated 14.10.2020" and since the Decree was prepared on 19.10.2020, as such no decree existed on 14.10.2020. As the basis of the entire proceeding rests upon the prayer for setting aside the "Order Decree", the defective prayer as mentioned in the Memorandum of Appeal in Appeal bearing Appeal No. 177 of 2020 renders the entire proceeding of the said Appeal illegal.

15.8. In support of his contentions, the learned Counsel has placed before this Court, a judgment passed by a co-ordinate bench of this Court in the case of **Amarjeet** versus **State of U.P.** reported in **2021 (151) RD 345** and has prayed that the present writ petition be decided in the light of the said judgment.

16. Per contra, Sri Manish Dev Singh, learned Counsel for the respondent nos. 4 to 22; opposing the instant writ petition made the following submissions:

16.1. His first submission is that the impugned order dated 26.10.2021 passed by the Commissioner, Mirzapur (respondent no. 3) is an innocuous order by means of which the aforesaid Appeal has simply been entertained by issuing notices to the opposite parties. The petitioners have every opportunity to agitate the grounds that have been raised in the present writ petition; before the learned Commissioner, Mirzapur (respondent no. 3) and on this score, the present writ petition is not entertainable in the light of the judgment passed by the Hon'ble Supreme Court in the case of **M/s Goderej Sara Lee Ltd. versus Excise and Taxation Officer,** cum Accessing authority and others, reported in **AIR 2023 SC 781.**

16.2. Further, he has refuted the petitioner's argument regarding the non-filing of the Decree dated 19.10.2020 along with the Memorandum of Appeal. He submits that the Decree dated 19.10.2020 as contained in Annexure 2 to the writ petition is not a decree, as the same is not in consonance with the draft of legislature as provided under Order XX Rule 6 and Rule 7 of the Code of Civil Procedure, 1908 and as such, the very basis of the argument advanced by the learned counsel for the petitioner is devoid of substance.

16.3. Moreover, the learned counsel has contended that the even if it is assumed for the sake of argument that the appeal was defective as it did not contain the Decree, in that event, it was incumbent upon the office of the appellate court to point out the said defect, if any, and as such negligence on part of the office concerned does not prejudice the right of the parties concerned/contesting respondents. In support of his contention, he has relied upon the judgment of the Hon'ble Supreme Court in the case of **Jagat Dhish Bhargava versus Jawahar Bhargava** reported in **AIR 1961 SC 832.**

16.4. The learned Counsel for the contesting respondents also urged that from a bare perusal of Order XLI Rule 1 read with the Allahabad High Court Amendments and the amendment by the Act No. 46 of 1999, came in effect from 01.07.2002, that provides that the Memorandum of Appeal must not necessarily be accompanied by a copy of the decree rather the Memorandum of Appeal must be accompanied by a copy of the judgment and this alone is the mandatory requirement under Order XLI Rule 1 of the Code of Civil Procedure, 1908. It is not in dispute that in the instant case, a copy of the impugned judgment appealed against has been annexed with the Memorandum of Appeal, it must, therefore, necessarily be held that the appeal is competent and has rightly been entertained.

17. I have heard the rival submissions advanced on behalf of the parties and perused the material available on record.

18. It is not disputed that the appeal in question has been filed under section 207 of the U.P. Revenue Code, 2006. Therefore, before entering into the question involved in the instant writ petition, it is necessary to appreciate the provisions of Section 207 of the U.P. Revenue Code, 2006, for ready reference, the same is extracted hereinbelow,

"207. First appeal.— *(1) Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in Column 2 of the Third Schedule, may prefer a first appeal to the Court or officer specified against it in Column 4, where such order or decree was passed by a Court or officer specified against it in Column 3 thereof.*

(2) A first appeal shall also lie against an order of the nature specified —

(a) in Section 47 of the Code of Civil Procedure, 1908; or

(b) in Section 104 of the said Code; or

(c) in Order XLIII Rule 1 of the First Schedule to the said Code.

(3) The period of limitation for filing a first appeal under this section shall be thirty days from the date of the order or decree appealed against."

19. Although, from the perusal of the aforesaid Section 207 (1) of the U.P. Revenue Code, 2006, it is apparent that an Appeal can be filed by any party aggrieved by a final order or decree passed in any

suit, application or proceeding specified therein. But, in order to deal with the question posed by the learned counsel for the petitioner that Section 207 is a substantive provision and its corresponding Rule 183 of the U.P. Revenue Code Rules, 2016 does not specify the documents necessary to accompany the memorandum of appeal, therefore, the provisions of Order XLI Rule 1 of the Code of Civil Procedure, 1908 shall apply to the appeal under section 207 of the U.P. Revenue Code, 2006, in the light of Section 214 of the U.P. Revenue Code, 2006, the following discussion has become necessary.

20. In order to determine this question, it would be apt to go through Section 214 of the U.P. Revenue Code, 2006 that deals with the applicability of the Code of Civil Procedure, 1908 and the Limitation Act, 1963. For a ready reference, the same is reproduced hereinbelow,

"214. Applicability of the Code of Civil Procedure, 1908 and Limitation Act, 1963. *—Unless otherwise expressly provided by or under this Code, the provisions of the Code of Civil Procedure, 1908 and the Limitation Act, 1963 shall apply to every suit, application or* proceedings under this Code."

The corresponding rule to the aforesaid Section 214 relevant for the present case is Rule 188 of the Uttar Pradesh Revenue Code Rules, 2016.

For a ready reference, Sub-Rule (1) of the same is extracted below,

"188. Provisions of the Code to apply (Section 214). *— (1) Where in relation to any suit, application or proceedings under the code, any express provision has been made in the said code or these rules or Regulations made thereunder, the provisions of the Code, these rules or regulations will apply, notwithstanding anything contained in the Code of Civil Procedure, 1908, or the Limitation Act, 1963.*

21. From a conjoint reading of the aforesaid Section 214 of the U.P. Revenue Code, 2006 and Rule 188 of the Uttar Pradesh Revenue Code Rules, 2016, it is apparent that the provisions of Code of Civil Procedure, 1908 shall apply to any suit, application or proceeding under the U.P. Revenue Code, 2006 when no *'express'* provision is provided in the U.P. Revenue Code, 2006 in that regard.

22. The term 'express' has an explicit connotation to it. The Constitutional Bench of the Hon'ble Supreme Court in the case of **Maru Ram and others** versus **Union of India and others,** reported in **(1981) 1 SCC 107** while discussing the phraseology of the terms *'specific'* and *'express'* referred to the Full Court judgment of this Court in the case of **Emperor** versus **Baldeo** reported in **AIR 1940 All 263** wherein it was observed in paragraph 36 that,

"36. ...For a provision of a statute to be an 'express' provision affecting another statute or part of it, it would have, I think, to refer in so many words to the other statute or to the relevant portion of it and also to the effect intended to be produced on it. Failing this, it could hardly be said to be 'express' ...."

23. The antithesis of the aforesaid proposition is that for a specific purpose, a Statute 'A' will not be applicable to another Statute 'B' for that specific purpose when

the provision for that specific purpose is already present in the Statue 'B'. Therefore, had there been no express provision for the procedure of filing an appeal under the U.P. Revenue Code, 2006, then, of course, the provisions of the Code of Civil Procedure, 1908 would have been applied to appeals filed under the U.P. Revenue Code, 2006 in the light of Section 214 of the U.P. Revenue Code, 2006.

24. It would not be out of place to discuss the provisions of Rule 182 of the Uttar Pradesh Revenue Code Rules, 2016. For ready reference, the same is extracted hereinbelow,

"182. Certified copy of the order or decree to be enclosed. *— Where an appeal or revision against any order or decree is preferred under any provision of the Code, a certified copy of such order or decree shall accompany the memorandum of appeal or revision, unless such copy is dispensed with by the Court or officer concerned."*

25. The aforementioned Rule 182 elucidates that the necessary documents which should accompany the memorandum of appeal preferred under the U.P. Revenue Code, 2006, are a *'certified copy of such order or decree'*. From the bare reading of the language of the Section 207 of the U.P. Revenue Code, 2006 read with Rule 183 of the Uttar Pradesh Revenue Code Rules, 2016, it is abundantly clear that the U.P. Revenue Code, 2006 itself contains the express provision in respect of the modalities of filing an appeal and as such, the provisions of section 214 of the U.P. Revenue Code, 2006 is not attracted herein.

26. It is a well settled rule of interpretation that in a situation when there is a conflict between the provisions of statues on the same issue, the provisions of special statute shall prevail over the general statute. A co-ordinate bench of this Court has dealt with the said subject matter in detail, in the case of **Amarjeet (Supra)**, wherein it has been held that the U.P. Revenue Code, 2006 being a special law, covering all land tenures and dealing with land revenue and matters connected therewith and incidental thereto while the Code of Civil Procedure, 1908 is a general law relating to procedures in cases which are of civil nature. For a ready reference, paragraph 50 of the said judgment in reproduced hereinbelow,

"50. ...If we consider the Long Title of UP Revenue Code 2006 which says that it is an act to consolidate and amend the law relating to land tenures and land revenue in the State of U.P., and to provide for matters connected therewith and incidental thereto, it is evident that the Act is a special law covering all land tenures and dealing with land revenue and matters connected therewith and incidental thereto."

27. Now coming to Rule 188 of the U.P. Revenue Code Rules, 2016 that contains a non-obstante clause that *"Where in relation to any suit, application or proceedings under the code, any express provision has been made in the said code or these rules or Regulations made thereunder, the provisions of the Code, these rules or regulations will apply,* ***notwithstanding*** *anything contained in the Code of Civil Procedure, 1908, or the Limitation Act, 1963".*

28. It is to be noted that a non-obstante clause in a particular Section of the statute adjoins two parts of the same

section to confer prevalence of one part upon the other connected part of that section, thereby granting an overriding effect to one part of the section over other part within the same section or any other legislation which has been referenced in the non-obstante clause. Essentially, it signifies that despite the stipulations of the Act mentioned in the non-obstante clause, the provisions mentioned before the non-obstante clause will retain its full legal effect, and the provisions listed in the non-obstante clause will not impede the operation of the enactment or the provision in which the non-obstante clause is situated. Once a non-obstante clause has been appended to a particular part of the section it overrides the effect of the part of the section to which it is appended irrespective that the section or the statute to which it refers enacted something to the contrary. ***(Emphasis Supplied)***

29. The Hon'ble Supreme Court in the case of **ICICI Bank Ltd. versus SIDCO Leathers Ltd and others** reported in **(2006) 10 SCC 452,** while discussing the effect of a non-obstante clause appended to a section of a statute, observed that the non-obstante nature of a provision, although, may be of wide amplitude, the interpretive process thereof must be kept confined to the legislative policy and must be given effect to, to the extent that the Parliament intended and not beyond the same.

30. Further, with the regards to the legislative intention to prevent the application of the Code of Civil Procedure, 1908 in respect of certain proceedings, the Hon'ble Supreme Court in the case of **Iridium India Telecom Ltd.** versus **Motorola Inc.** reported in **(2005) 2 SCC 145** observed that the non-obstante clause in a section is indicative of legislature's intention to prevent the application of the Code of Civil Procedure, 1908 in respect of civil proceedings on the original side of the High Courts, which are to be governed by the Rules made by the High Court. These rules which the High Court makes will prevail over the rules contained in the Code of Civil Procedure, 1908.

31. Therefore, it can be logically concluded that a non-obstante clause is a clear indicator of the intention of the legislature with regards to the impact of the non-obstante clause to the particular section of the statute in which it is placed.

32. While interpreting a statute or a provision of the statute, the intention of the legislature must be borne in mind. If the words of the statute are clear and unambiguous, then such words should be interpreted in their natural and ordinary sense. This, in itself, best declares the intention of the legislature. In this regard, the passage from the judgment passed in the case of **Sussex Peerage Claim [(1844) 11 Ce & Fin 85, 143: 8 ER 1034 (HL)],** as quoted by the Constitutional Bench of the Hon'ble Supreme Court in the case of **A.R. Antulay** versus **R.S. Nayak and another,** reported in **(1988) 2 SCC 602 at Paragraph 70,** still holds the commonly accepted view concerning the relationship between the literal and mischief rules of interpretation of statutes. The said passage from the judgment passed in the case of **Sussex Peerage Claim *(Supra)***, is also quoted hereinbelow,

"The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then

no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer, Stowell v. Lord Zouch [(1569) 1 Plowd 353, 369 : 75 ER 536] , is 'a key to open the minds of the makers of the Act, and the mischiefs which they intend to redress'."

33. Further, in the case of ***A.R. Antulay (Supra)***, it was also categorically held that the creation of rights requires legislative authority. Courts cannot create a right which has not been given by the legislature. In a similar way, Courts cannot take away a right granted by the legislature unless such a right is in contravention to any law for the time being or such a right is *ultra vires* to the basic structure of the Constitution of India.

34. In the present case, Section 207 of the U.P. Revenue Code, 2006 read with Rule 182 of the U.P. Revenue Code Rules, 2016 coupled with Section 214 of the U.P. Revenue Code, 2006 read with Rule 188 of the U.P. Revenue Code Rules, 2016 makes it abundantly clear that there exists an express provision governing the substantive as well as the procedural aspects regarding an appeal in and under the U.P. Revenue Code, 2006 and in the presence of this express provision of appeal, the substantive and procedural law regarding the appeal will be governed by the said provisions mentioned in and under the U.P. Revenue Code, 2006, notwithstanding any procedure regarding the appeal enumerated in the Code of Civil Procedure, 1908.

35. Now, having ruled out the applicability of the Code of Civil Procedure, 1908 in respect of the appeals under the U.P. Revenue Code, 2006, it has come to light that the procedure for filing an appeal under the U.P. Revenue Code, 2006 is self-contained, independent and explicit.

36. Further, Rule 182 of the U.P. Revenue Code Rules, 2016 clearly provides that for filing an appeal or revision against any order or decree, a certified copy of such order or decree shall accompany the memorandum of appeal or revision, unless such copy is dispensed with by the Court or officer concerned. The legislative intend in this regard is abundantly clear from the unambiguous words used in the aforementioned Section 207 and Rule 182 *(Supra)* and as such the words mentioned therein will be interpreted in their natural and ordinary sense.

37. In so far as the contention raised by the learned Counsel for the contesting respondents regarding the correctness of the Decree dated 19.10.2020 is concerned, in the present set of facts and circumstances as mentioned above, this Court does not find it necessary to delve into the said issue. However, it is open for the parties, if they so desire, to raise the said issue before the Appellate Court itself.

38. In view of all that is discussed hereinabove, this Court does not find any illegality in the impugned order dated 06.07.2023 passed by the learned Board of Revenue (respondent no. 1) and the order dated 26.10.2021 passed by the

Commissioner, Mirzapur (respondent no. 3) and as such does not find any cogent reason that warrants interference by this Court in exercise of its powers under Article 226 of the Constitution of India.

39. Accordingly, the writ petition is **dismissed.**

(2024) 1 ILRA 202
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE SURENDRA SINGH-I, J.

Writ C No. 5726 of 2020

Devendra Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Mohd. Farooq

Counsel for the Respondents:
C.S.C.

A. Constitution of India,1950-Article 226-Wild Life (Protection) Act, 1972-Sections 9, 44, 49-B, 50, 51-petitioner filed application for release of the vehicle which was rejected by the Magistrate as well as by the revisional court on the ground that the prima facie vehicle was used in the commission of the offence made under the Act of 1972, therefore under the provisions of section 39(1)(d), the vehicle is the property of the State Government and is not liable to be released during the pendency of the trial-Hence, learned court below rightly rejected the application.(Para 25 to 33)

The writ petition is dismissed. (E-6)

List of cases cited:

1. St. of M.P. & ors. Vs Madhukar Rao (2008) 14 SCC 624

2. St. of U.P & anr. Vs Lalloo Singh (2007) 7 SCC 334

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Mohd. Farooq, learned counsel for the petitioner and learned Standing Counsel representing the State.

2. The prosecution case against the petitioner, Devendra Kumar, and his son, Prashant Vishnoi in brief is that on receiving the information regarding illegal storage of large quantity of hide, trophies made of skulls and horn of prohibited forest animals including their meat kept in 47 packets on 29.04.2017 at 01:30 p.m., a joint team of officers of Directorate of Revenue Intelligence and Forest Department, Meerut Division, Meerut, raided the residence of the petitioner, Devendra Kumar, and his son, Prashant Vishnoi situated at 36/4, Civil Lines, Meerut. From the room situated at second floor of the house, hide of leopard, hide and skull of black deer, horns of sambar and deer in large quantity and a knife with handle made of tusk, was recovered. On the ground floor, meat of prohibited wild animals kept in 47 packets in freeze container (deep freezer) was also recovered. Details of articles recovered is as follows :-

(i) one hide of leopard
(ii) one hide of deer/antelope
(iii) one skull of large antelope
(iv) 3 horns of young large antelope
(v) 9 deer skull with two horns
(vi) One deer skull with neck and horn
(vii) 7 teeth of wild animals

(viii) one knife handle sized 12 cm x 1 cm made of elephant tusk, total length with cutting part 26 cm

(ix) On the ground floor, 47 packets of meat of prohibited forest animal kept in freezer (deep freezer)

3. The petitioner, Devendra Kumar, retired colonel, informed the raiding team that the frozen meat is that of wild boar. From the aforesaid recovery, Range Case No. 6/2017-18 u/s 9, 44, 49-A, 49-B, 50 and 51 of Wild Life (Protection) Act, 1972, Police Station- Civil Lines, District-Meerut, was registered against the petitioner and his son, Prashant Vishnoi.

4. The aforesaid articles recovered from the residence of the petitioner were seized, taken into possession and recovery memo was prepared in the presence of the witnesses. After investigation against the petitioner and his son, challan in complaint case under the aforesaid sections was sent to the court of jurisdictional Magistrate.

5. The raiding party also seized white Fortuner vehicle no. U.K. 06 V 0044 involved in the commission of the offence from the residence of the petitioner and prepared its seizure memo dated 05.09.2017 and sent it to the jurisdictional Magistrate.

6. The petitioner filed application for release of the vehicle which was rejected vide order dated 24.04.2018 by the Magistrate concerned. Thereafter, the petitioner filed Criminal Revision No. 227 of 2018, Devendra Kumar Vs. State of U.P. and another against the impugned order passed by the Magistrate which was rejected vide order dated 17.10.2018 passed by the Additional Sessions Judge, Court No. 7, Meerut. Against the aforesaid order passed by the revisional court, the petitioner instituted Matters under Article 227 No. 8477 of 2018, Devendra Kumar Vs. State of U.P. and Another before this Court. Later on, he not pressed it and the petition vide order dated 29.03.2019 was dismissed as withdrawn with liberty to avail any other remedy available under the law.

7. Later on, the petitioner filed an application for release of aforesaid vehicle before the Prescribed Authority/Divisional Director, Social Forestry Division, Meerut which was rejected by the Divisional Director vide order dated 23.06.2019 on the ground that he has no jurisdiction to release a vehicle detained under Wild Life (Protection) Act, 1972. Against the aforesaid order of Divisional Director, Social Forestry Division, Meerut, the petitioner filed appeal before Principal Secretary of Forest/Appellate Tribunal, Department of Social Forestry, U.P. Government at Lucknow, which has been rejected by the aforesaid Principal Secretary vide order dated 14.10.2020.

8. The respondent no. 2 in his counter affidavit has emphasized the averment made in the challani report filed against the petitioner and his son. It has been stated in the counter affidavit that co-accused, Bablu son on Kartare, in his statement recorded u/s 161 Cr.P.C., has stated that on 06.11.2016 in the afternoon, co-accused Prashant Vishnoi by his mobile number 9410644444 ranged him on his mobile number 7060127190 and asked him to come to his residence situated at 36/4, Civil Lines, Meerut. On reaching there, he told him that meat is kept in the freezer attached to the back side of his white Fortuner car no. U.K. 06 V 0044. He asked him to alight and bring it in his residence. On the

direction of Prashant Vishnoi, co-accused, Bablu opened the aforesaid freezer attached to the car and found that large quantity of meat was kept in it. Prashant Vishnoi told him that the meat is of wild animals like *neelgai and padaa* which he has hunted from the jungle of the east. Co-accused, Bablu carried the meat from the Fortuner car and stored in a freezer which was placed at the ground floor of the house.

9. In the counter affidavit, it is also stated that on the basis of statement of co-accused, Bablu, it was found that the Fortuner car was used in the commission of wildlife crime relating to Range Case No. 6/2017-18, Meerut Range and, therefore, it was seized on 05.09.2017. It has also been stated in the counter affidavit that the petitioner preferred an appeal before the State Government on 17.06.2019 and during the pendency of the aforesaid appeal, the present writ petition has been filed by the petitioner for release of the above-mentioned vehicle. It is also submitted that the appeal filed by the petitioner was rejected by the State Government by a detailed, reasoned and speaking order dated 14.10.2020 on the ground that jurisdiction for release of the vehicle detained under Wild Life (Protection) Act, 1972, lies within the jurisdictional Magistrate and not with the Divisional Director, Social Forestry Division, Meerut or the State Government. It has also been stated in the counter affidavit that on the basis of challan submitted by Forest Department, the trial of the case is pending against the petitioner in the court of Additional Chief Judicial Magistrate, Meerut and the petitioner has not yet been acquitted by the court. In the appeal, it was held that the vehicle seized under the provisions of Section 39(1)(d) of the Wild Life (Protection) Act, 1972, is a government property. The decision regarding the said vehicle lies only with the jurisdictional magistrate.

10. It has been submitted by learned counsel for the petitioner that there is no iota of evidence about the involvement of vehicle in the alleged offence committed under the Wild Life (Protection) Act, 1972, but the jurisdictional Magistrate as well as the revisional court illegally rejected petitioner's application for release of the vehicle. It has also been submitted that the trial of the case is still pending before the Magistrate and the petitioner as well as his son, Prashant Vishnoi have been released on bail by this Court in Criminal Misc. Bail Application Nos. 4681 of 2018 and 5275 of 2018 vide orders dated 07.02.2018 and 02.04.2018 respectively. It has also been submitted that no purpose would be served by detention of the vehicle, therefore, it should be released in favour of the petitioner. It has also been submitted that the State Government/Principal Secretary of Forest/Appellate Tribunal, Department of Social Forestry, U.P. Government at Lucknow, dismissed the appeal on the ground that there is no provision of appellate authority at the government level under the Wild Life (Protection) Act, 1972. Thus, decision/order can be passed by Hon'ble Court in the case.

11. The petitioner has stated in his rejoinder affidavit that the confessional statement of co-accused, Bablu is false and no action can be taken against the petitioner on the basis of statement of co-accused, Bablu.

12. Per contra, learned Standing Counsel representing the State has opposed the writ petition on the ground that huge quantity of body parts and meat of

prohibited wild animals was recovered from the residence of the petitioner. Apart from that, forensic report has been sent by the Wildlife Forensic Lab, Dehradun. After analysis of the blood, it was found that it belongs to *gallus gallus* (red junglefowl) which is prohibited under the Wild Life (Protection) Act, 1972. Thus, there is evidence of involvement of vehicle in the offence committed under the Wild Life (Protection) Act, 1972. There is no ground to release the vehicle. The Divisional Director, Social Forestry Division, Meerut, has no jurisdiction to release the vehicle detained under the Wild Life (Protection) Act, 1972. It has also been submitted that there is no provision for any appellate authority at the government level in the Wild Life (Protection) Act, 1972. Based on the revelation of involvement of the vehicle in the wildlife crime, the vehicle has been lawfully seized. The case is under trial before the Additional Chief Judicial Magistrate, Meerut and the accused have not yet been acquitted. If the accused is convicted after the conclusion of trial, the vehicle is liable to be confiscated. The vehicle has been seized under the Wild Life (Protection) Act, 1972 and not under provisions of Indian Forest Act, 1927. Hence, only the jurisdictional Magistrate has power to release the vehicle.

13. For the disposal of the petition, it is necessary to examine the relevant provisions of law. Chapter VI of the Wild Life (Protection) Act, 1972 (hereinafter referred to as the 'Act of 1972') contains provisions dealing with prevention and detection of offences. Section 50 of the Act of 1972 gives to the specified officers the powers of entry, search, arrest and detention. By the Amendment Act 44 of 1991 (w.e.f 02.10.1991), certain amendments were made in Section 50 of the Act of 1972. Before the amendment made in 1991, Section 50 had sub-section (2) which was as follows :-

"50. (2) Any officer of a rank not inferior to that of an Assistant Director of Wild Life Preservation or Wild Life Warden, who, or whose subordinate has seized any trap, tool ,vehicle, vessel or weapon under clause (c) of sub-section (1), may release the same on the execution by the owner thereof of a bond for the production of the property so released, if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made."

14. The Amendment Act 44 of 1991 deleted sub-section (2) and inserted in its place sub-section (3-A) which is as follows :-

"50. (3-A) Any officer of a rank not inferior to that of an Assistant Director of Wild Life Preservation or as Assistant Conservator of Forests, who, or whose subordinate, has seized any captive animal or wild animal under clause (c) of sub-section (1) may give the same for custody on the execution by any person of a bond for the production of such animal if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made."

15. At the same time, amendments were made in Section 39(1)(d) after which it reads as follows :-

"39. ***Wild animals, etc., to be government property****. - (1) Every*

(a)- (c)

(d) vehicle, vessel, weapon, trap or tool that has been used for committing

an offence and has been seized under the provisions of this Act, shall be the property of the State Government, and, where such animals is hunted in a sanctuary or National Park declared by the Central Government, such animal or any animal article, trophy, uncured trophy or meat derived from such animal, or any vehicle, vessel, weapon, trap or tool used in such hunting shall be the property of the Central Government."

16. Section 50(1)(c) of the Act of 1972 authorises a Director or any other Officer authorized by him in this behalf or the Chief Wild Life Warden or the authorized officer or any Forest Officer or any police officer not below the rank of a Sub-Inspector, having reasonable grounds for believing that any person has committed an offence against this Act to seize any captive animal, Wild Life animal, article, meat, trophy, in respect of which the offence against this Act appears to have been committed in the possession of any person together with trap, tool, vehicle or weapon used for committing any special offence.

17. Before the deletion of Section 50(2) of the Act of 1972, any officer of a rank not inferior to that of an Assistant Director of Wild Life Preservation or Wild Life Warden, who, or whose subordinate has seized any trap, tool, vehicle, vessel or weapon under clause (c) of sub-section (1), could release the same on the execution by the owner thereof of a bond for the production of the property so released, if and when so required, before the Magistrate having jurisdiction to try the offence.

18. After aforesaid amendment made in the Act of 1972 which is effective from 02.10.1991, the aforesaid officers of the Forest Department or Police Department don't have jurisdiction to release the aforesaid seized articles trap, tool, vehicle, vessel or weapon, etc. in favour of its owner.

19. Under the provisions of Section 50 (3-A), any officer of a rank not inferior to that of an Assistant Director of Wild Life Preservation or Assistant Conservator of Forests, is competent to give the custody of any captive or wild animal seized under clause (c) of sub-section (1) of Section 50 of Act of 1972 to any person on execution of a bond for the production of such animal if and when so required, before the Magistrate having jurisdiction to try the offence.

20. Thus, the aforesaid various officers are authorised only to give custody of any captive or wild animal which has been seized under clause (c) of sub-section (1) of Section 50 of Act of 1972. They have not been authorised to release the trap, tool, vehicle, vessel or weapon which has been seized under Section 50(1)(d) of Act of 1972. The State Government or the Central Government is also not authorised to release and handover the custody of trap, tool, vehicle, vessel or weapon in the custody of the owner thereof on execution of a bond for production of the property so released before the Magistrate having jurisdiction to try the offence.

21. Sub-section (4) of Section 50 of Act of 1972 provides that when any of authority or police officer mentioned in paragraph 1(c) of this section seizes any captive animal, wild animal, article, meat, trophy, etc. in respect of which an offence against this Act appears to be have been committed or arrests and detains any

person in this connection shall forthwith take him before the Magistrate ***"to be dealt with according to law."***

22. Sub-section (4) of Section 50 of Act of 1972 reads as follows :-

"(4) Any person detained, or things seized under the foregoing power, shall forthwith be taken before a Magistrate to be dealt with according to law (under intimation to the Chief Wild Life Warden or the officer authorized by him in this regard)."

23. The Hon'ble Apex Court has held in **State of Madhya Pradesh and Others Vs. Madhukar Rao, (2008) 14 SCC 624** which is as hereunder :-

"18. ..... It has to be noted here that the expression used in the sub-section is "according to law" and not "according to the provisions of the Act". The expression "according to law" undoubtedly widens the scope and plainly indicates the application of the provisions of the Code.

19. We find that the Full Bench of the High Court has correctly taken the view that the deletion of sub-section (2) and its replacement by sub-section (3-A) in Section 50 of the Act had no effect on the powers of the Magistrate to release the seized vehicle during the pendency of trial under the provisions of the Code. The effect of deletion of sub-section (2) and its replacement by sub-section (3-A) may be summed up thus: as long as sub-section (2) of Section 50 was on the statute book, the Magistrate would not entertain a prayer for interim release of a seized vehicle, etc. until an application for release was made before the departmental authorities as provided in that sub-section. Further, in case the prayer for interim release was rejected by the departmental authority, the findings or observations made in its order would receive due consideration and would carry a lot of weight before the Magistrate while considering the prayer for interim release of the vehicle. But now that sub-section (2) of Section 50 stands deleted, an aggrieved person has not option but to approach the Magistrate directly for interim release of the seized vehicle.

22. We have, therefore, no doubt that the provisions of Section 50 of the Act of 1972 and the amendments made thereunder do not in any way affect the Magistrate's power to make an order of interim release of the vehicle under Section 451 of the Code."

24. Law relating to release of vehicle, vessel, trap, tool seized by the Forest Officer or police Officer u/s 50(1)(c) of Act of 1972 has been settled by the Apex Court in the case of **State of U.P. and Another Vs. Lalloo Singh, (2007) 7 SCC 334**. In paragraph nos. 13, 14, 15, 16 and 17 of the aforesaid judgement, the Apex Court has held as hereunder :-

"13. For appreciating this contention reference is necessary to Section 39 of the Act. Clause (d) of sub-section (1) of Section 39 deals with a situation when any vehicle, vessel, weapon, trap or tool has been used for committing an offence and has been seized under the provisions of the Act. The twin conditions are that the vehicle, etc. must have been used for committing an offence and has been seized. Mere seizure of the property without any material to show that the same has been used for committing an offence does not make the seized property, the property of the Government. At this juncture, it is also to be noted that under sub-section (1) of Section 50 action can be taken if the

official concerned has reasonable grounds for believing that any person has committed an offence under the Act. In other words, there has to be a reasonable ground for belief that an offence has been committed. When any person is detained, or things seized are taken before the Magistrate, he has the power to deal with the same "in accordance with law".

14. There is a significant addition in sub-section (4) by Act 16 of 2003 i.e. requirement of intimation to the Chief Wildlife Warden or the officer authorised in this regard as to the action to be taken by the Magistrate when the seized property is taken before a Magistrate. A combined reading of the omitted sub-section (2) and the substituted sub-section (3-A) of Section 50 makes the position clear that prior to the omission, the officials under the Act had the power to direct release of the seized article. ***Under sub-section (1), the power for giving temporary custody subject to the condition that the same shall be produced if and when required by the Magistrate is indicative of the fact that the Magistrate can pass appropriate orders in respect of the purported seized property which is taken before him.***

15. While dealing with an application for temporary release of custody, there cannot be a complete adjudication of the issues involved as the same is a matter for trial. ***While dealing with the application the Magistrate has to take into account the statutory mandate that the seized property becomes the property of the State Government when the same has been used for commission of an offence under the Act and has been seized.***

16. It appears that insertion in sub-section (4) relating to the intimation to the Chief Wildlife Officer or the officer authorised by him is intended to give the official concerned an opportunity of placing relevant materials on record before the Magistrate passes any order relating to release or custody. In appropriate cases on consideration of materials placed before him, prayer for such release or custody can be rejected.

17. It is to be noted that under sub-section (1) of Section 50 for the purpose of entry, seizure, arrest and detention the official has to form the belief on reasonable grounds that the person has committed an offence under the Act. The Magistrate is, therefore, required to consider these aspects while dealing with the application as noted above. It cannot be a routine exercise. As noted above, the High Court is not justified in holding that Section 457 of the Code has application.

25. Learned A.G.A. for the State has submitted that Section 39(1)(d) of the Act of 1972 made the articles seized u/s 50(1)(c) of Act of 1972 as government property and, therefore, there was no question of their release by the Magistrate.

26. In view of the above-mentioned pronouncement of the Hon'ble Apex Court, the contention of the learned A.G.A. cannot be accepted.

27. From the analysis of the aforesaid pronouncements of the Apex Court in the cases of **Madhukar Rao (supra)** and **Lalloo Singh (supra)** that while disposing the application given for the release of vehicle detained u/s 50(1)(c) of the Act of 1972 states that the Magistrate should ascertain whether the vehicle was used for committing any such offence.

28. We have to analyse the recovery of vehicle and other articles made from the accused-petitioner to ascertain whether the

Magistrate was justified in rejecting the release application of the vehicle by the impugned order.

29. From the perusal of the recovery memo, it is clear that large quantity of animal articles, parts of animal body, animal meat and a knife having its handle made of elephant tusk was recovered from the house of the accused-petitioner. The details of the articles recovered is mentioned in paragraph no. 2 of this judgement. From the perusal of the aforesaid recovery and the statement u/s 161 Cr.P.C. of co-accused Babloo, it prima facie appears that animal articles, animal parts and meat of such animals were stored after hunting by the petitioner.

30. Thus, prima facie vehicle was used in the commission of the offence made punishable under the Act of 1972.

31. The petitioner has relied on the judgement of the Apex Court in the case of **Sunderbhai Ambalal Desai Vs. State of Gujarat, 2002 LawSuit (SC) 1346** and has argued that during the pendency of trial, the case property/vehicle should be released in favour of the owner after obtaining undertaking and surety and preparing panchnama of the case property/vehicle. In the present case, the vehicle, prima facie being used in the commission of offence under the Act of 1972 has become government property. Therefore, the law laid down by Hon'ble Apex Court in **Sunderbhai Ambalal Desai (supra)** shall not be applicable on the release application of the vehicle.

32. Under these facts and circumstances of the case, the learned Magistrate has not committed any illegality in rejecting the vehicle release application of the petitioner. The learned revisional court has also rightly rejected the revision filed against the impugned order of the learned Magistrate.

33. From the aforesaid discussion, we are of the considered view that vehicle no. U.K. 06 V 0044 seized in Range Case No. 6/2017-18 u/s u/s 9, 44, 49-A, 49-B, 50 and 51 of Wild Life (Protection) Act, 1972, was prima facie used in committing the offence under the aforesaid Act and, therefore, under the provisions of Section 39(1)(d), the vehicle is the property of the State Government and is not liable to be released during the pendency of the trial. There is no ground to interfere in the impugned order passed by the learned Magistrate and the revisional court.

34. The petition is dismissed, accordingly.

(2024) 1 ILRA 209
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 1001366 of 2013

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

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Manish Kumar, Ajay Kumar Sharma, Lalit Kishore Tiwari

A. Writ Petition – Appellate Order Set Aside, Matter Remitted – The St. challenged the order dated 04.04.2012 by the IVth

Additional District Judge, Unnao, which allowed Civil Appeal No. 45 of 2011 and quashed the eviction order dated 30.07.2003 under the U.P. Public Premises (Eviction of Unauthorized Occupants) Act, 1972 – Held, the appellate order was arbitrary as it wrongly applied the principle of res judicata, and the matter was remitted for fresh adjudication on merits. (Paras 2, 25, 26)

B. Res Judicata Not Applicable – No Final Finding in Prior Proceedings – The District Judge held that eviction proceedings were barred by res judicata due to prior dismissal in 1993 – Held, as per *Swamy Atmananda Vs Sri Ramakrishna Tapovanam* and *Arjun Singh Vs Mohindra Kumar*, res judicata requires a final judicial determination on a specific issue, which was absent in the prior proceedings as the dismissal was due to lack of evidence, not a conclusive finding on the land's status. (Paras 12, 15, 19, 23, 24)

C. Public Premises Act – Fresh Evidence Justifies New Proceedings – The St. initiated fresh proceedings under the 1972 Act after obtaining a survey report in 1998 confirming that Plot Nos. 564 and 565 were reserved forest land – Held, the absence of a prior conclusive finding allowed the St. to file new proceedings with fresh evidence, and the Prescribed Authority's eviction order based on this evidence required adjudication on merits. (Paras 9, 11, 24)

D. Misapplication of Res Judicata by Appellate Court – The District Judge's finding that the respondents' house was not on Plot Nos. 564 or 565 was contrary to the Prescribed Authority's 1993 order, which dismissed the case for lack of evidence without determining the land's status – Held, this perverse finding rendered the appellate order arbitrary, warranting interference. (Paras 21, 22)

E. Public Policy and Res Judicata – Protection of Public Land – The principle of res judicata, rooted in public policy to ensure finality, cannot be used to shield unauthorized occupation of public land – Held, as per *Wade and Forsyth on Administrative Law* and *Vaish Aggarwal Panchayat Vs Inder Kumar*, the St.'s fresh evidence justified new proceedings to protect public land, and the Prescribed Authority was not bound by the earlier dismissal. (Paras 14, 20, 24)

Writ Petition Allowed.

List of Cases cited:

1. Swamy Atmananda Vs Sri Ramakrishna Tapovanam, (2005) 10 SCC 51

2. Ishwardas Vs St. of M.P., (1979) 4 SCC 163

3. Arnold Vs National Westminster Bank Plc., (1991) 3 All ER 41 : (1991) 2 AC 93

4. Arjun Singh Vs Mohindra Kumar, AIR 1964 SC 993

5. Satyadhan Ghosal Vs Smt Deorajin Debi, (1960) 3 SCR 590

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

1. Heard Sri L.M. Khare, learned Standing Counsel on behalf of petitioners as well as Sri Lalit Kishore Tiwari, learned counsel appearing for respondent no. 4 and Sri Ravi Prakash Yadav, learned counsel appearing on behalf of respondent nos. 1, 2 and 5.

2. By means of present writ petition the petitioner has assailed the judgment and order dated 04.04.2012, passed by IVth Additional District Judge, Unnao whereby he has allowed the Civil Appeal No. 45 of 2011 and quashing the order dated 30.07.2003, passed by the Prescribed Authority under U.P. Public Premises (Eviction of Unauthorized Occupants) Act, 1972 (*hereinafter referred to as "the Act, 1972").*

3. It has been submitted by learned Standing Counsel that notification was issued on 13.06.1961 in exercise of power under Section 4(1) of the Indian Forest Act, 1977 declaring certain lands as mentioned

in the schedule in district Unnao as reserved forest. According to the petitioner plot no. 564 measuring 0.038 hectares and Plot No. 565 measuring 0.013 hectares, situated at Village – Ajgain, Tehsil – Hasanganj, District – Unnao are recorded in the name of Forest Department as per khatauni for fasli year 1403 – 1408.

4. It has been next submitted that one Rajendra Singh had encroached upon the said land situated at Gata Nos. 564 and 565 and constructed a house there upon which according to the petitioner was illegal and consequently a notice under Section 4(1) of the Act, 1972 was issued on 15.01.1990. Despite notice Rajendra Singh failed to remove encroachment and consequently a suit was filed by the Forest Department before the Sub Divisional Magistrate under Section 4 of the Act, 1972.

5. Later on legal heirs of Rajendra Singh appeared before the Prescribed Authority and submitted that the said land was owned by them and was in their possession since their ancestors and it was further stated that a portion of the said land has been sold to one Aniruddha Singh vide Sale Deed dated 01.05.1988. It was further stated that building was constructed on the said land for which map was duly sanctioned by the Collector and denied that they had encroached upon the forest land of Gata Nos. 564 and 565.

6. Before the Prescribed Authority, the officials of Forest Department had deposed to the extent that alleged respondents had constructed a house on the said land, but neither survey report nor any map or any other material was produced by the petitioner to demonstrate that the said land was reserved as forest land. In absence of any material to show that the said land was "public premises" as defined under Section 2(e) of the Act, 1972, the Prescribed Authority rejected the suit for eviction by means of order dated 16.08.1993.

7. Against the order dated 16.08.1993, passed by the Prescribed Authority, the petitioner preferred an appeal before the District Judge, Unnao, which was also rejected affirming the order of Prescribed Authority and the appellate Court was also of the view that the petitioner had been unable to demonstrate that Gata Nos. 564 and 565 were "public premises" or part of the Reserve Forest land as per notification dated 13.06.1961.

8. Against both the aforesaid orders of Prescribed Authority as well as Appellate Authority, writ petition being Writ Petition No. 176 (M/S) of 1997 was filed before this Court by the State Government which was also dismissed by means of order dated 17.01.1997.

9. It has been further stated by the learned Standing Counsel that previous proceedings have concluded and application of the petitioner has been rejected solely on the ground that State was unable to file any documents including the Survey report or Survey map so as to identify the said land and hence failed to demonstrate that encroachment by the respondents was made on "public premises". Faced with the prospect of losing the State land, the petitioner again had a Survey conducted and report was submitted on 23.09.1998 from which it has became evident that Plot Nos. 564 and 565 were part of reserve forest land.

10. The State armed with fresh evidence and material again proceeded

against the respondents under the Act, 1972 and notices were issued to the private respondents. Proceedings were initiated against three persons out of whom against Rajendra Prasad, previously against whom the proceedings had concluded up to the stage of High Court.

11. The Prescribed Authority relying upon the fresh survey report and also taking on record the statement of the area Lekhpal was of the view that the respondents have encroached upon the "public premises" and accordingly ordered their eviction and directed them to pay Rs.6000/- as compensation by means of order dated 30.07.2003.

12. Against order of Prescribed Authority dated 30.07.2003, the respondents preferred an appeal before the District Judge, where they had submitted that proceedings before the Prescribed Authority were barred by the principle of res-judicata inasmuch as previously also notice was issued under the Act, 1972 and proceedings were concluded in favour of respondents and again on same grounds same proceedings cannot be initiated. The District Judge was impressed by the arguments of the respondents and was of the view that previously also the State has alleged that the respondents have encroached upon the land situated at Gata Nos. 564 and 565, which could not be proved by them and consequently proceedings were dropped and again on the same grounds they cannot be permitted to raise same plea before the Prescribed Authority and allowed the appeal holding that proceedings before the Prescribed Authority were barred by the provisions of Section 11 of CPC. Against the said order the State approached this Court assailing the order of District Judge dated 04.04.2012.

13. It has been submitted by the Ld Standing Counsel that before the Prescribed Authority on the previous occasion no issue was decided but merely on the basis lack of evidence the State could not demonstrate that the respondents have encroached upon "public premises" and consequently the suit was rejected. It has been submitted that firstly provisions of Section 11 of CPC are not applicable to the proceedings under the Act, 1972 and even if it is admitted that principles of *res judicata* would be applicable on quasi judicial proceedings there was no issue decided by the Prescribed Authority between the parties from which it can be established that the proceedings on the second occasion were barred by the principles of res-judicata.

14. I have heard the counsel for the parties and perused the record. The dispute in the present case revolves around the question as to whether proceedings under the Act, 1972 initiated against the respondent for the second time, were barred by the principles of *res judicata* or not. Reference in this regard may be made to Wade and Forsyth on Administrative Law, (9th Edition, page 243) wherein it is stated:

"One special variety of estoppel is res judicata. This results from the rule which prevents the parties to a judicial determination from litigating the same question over again, even though the determination is demonstrably wrong. Except in proceedings by way of appeal, the parties bound by the judgment are estopped from questioning it. As between one another, they may neither pursue the same cause of action again, nor may they again litigate any issue which was an

essential element in the decision. These two aspects are sometimes distinguished as 'cause of action estoppel' and 'issue estoppel'.

Law on res judicata and estoppel is well understood in India and there are ample authoritative pronouncements by various courts on these subjects. As noted above, the plea of res judicata, though technical, is based on public policy in order to put an end to litigation. It is, however, different if an issue which had been decided in an earlier litigation again arises for determination between the same parties in a suit based on a fresh cause of action or where there is continuous cause of action. The parties then may not be bound by the determination made earlier if in the meanwhile, law has changed or has been interpreted differently by a higher forum.

A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete, and certain, and when it is not lawfully subject to subsequent rescission, review, or modification by the tribunal which pronounced it.…"

15. In the case of **Swamy Atmananda v. Sri Ramakrishna Tapovanam [(2005) 10 SCC 51**, the Hon'ble Supreme Court had observed as follows:

"26. The object and purport of the principle of res judicata as contended in Section 11 of the Code of Civil Procedure is to uphold the rule of conclusiveness of judgment, as to the points decided earlier of fact, or of law, or of fact and law, in every subsequent suit between the same parties. Once the matter which was the subject-matter of lis stood determined by a competent court, no party thereafter can be permitted to reopen it in a subsequent litigation. Such a rule was brought into the statute-book with a view to bring the litigation to an end so that the other side may not be put to harassment.

27. The principle of res judicata envisages that a judgment of a court of concurrent jurisdiction directly upon a point would create a bar as regards a plea, between the same parties in some other matter in another court, where the said plea seeks to raise afresh the very point that was determined in the earlier judgment."

16. In **Swamy Atmananda v. Sri Ramakrishna Tapovanam (supra)** the Apex Court further noticed:

"42. In Ishwardas v. State of M.P., 1979) 4 SCC 163

'In order to sustain the plea of res judicata it is not necessary that all the parties to the two litigations must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim."

17. Yet again in **Arnold v. National Westminster Bank Plc. [(1991) 3 All ER 41 : (1991) 2 AC 93 : (1991) 2 WLR 1177]** the House of Lords noticed the distinction between cause of action estoppel and issue estoppel:

"Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been litigated between the same parties or their privies and having involved the same subject-matter. In such a case, the bar is absolute in relation to all points decided

unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened. ... Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."

18. Here also the bar is complete to re-litigation but its operation can be thwarted under certain circumstances. The House then finally observed:

"But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice have greater force in cause of action estoppel, the subject-matter of the two proceedings being identical, than they do in issue estoppel, where the subject-matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success."

19. The Apex Court in the case of ***Arjun Singh v. Mohindra Kumar, AIR 1964 SC 993***, as observed as under :

"11. That the question of fact which arose in the two proceedings was identical would not be in doubt. Of course, they were not in successive suits so as to make the provisions Section 11 of the Civil Procedure Code, applicable in terms. That the scope of the principle of res judicata is not confined to what, is contained in Section 11 but is of more general application is also not in dispute. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits. In this connection we were 'referred to what this Court said in Satyadhan Ghosal v. Smt Deorajin Debi [(1960) 3 SCR 590] where Das Gupta, J. speaking for the Court expressed himself thus:

"The principle of res judicata-is based on the need of giving a finality, to judicial decisions. What it says is that once resjudicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question, of fact or on a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again…. The principle of res judicata applies also as between the two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings."

Mr Pathak — laid great stress on this passage as supporting him in the two submissions that he made : (1) that an issue of fact or law decided even in an interlocutory proceeding could operate as res judicata in a later proceeding, and next (2) that in order to attract the principle of res judicata the order or decision first rendered and which is pleaded as res judicata need not be capable of being appealed against."

20. The Apex Court in the case of **Vaish Aggarwal Panchayat vs Inder Kumar & Ors** has observed as follows :

"11. In this context, we may profitably refer to the decision in V. Rajeshwari v. T.C. Saravanabava. In the said case, a two-Judge Bench while dealing with the concept of resjudicata has held:- "11. The rule of res judicata does not strike at the root of the jurisdiction of the court trying the subsequent suit. It is a rule of estoppel by judgment based on the public policy that there should be a finality to litigation and no one should be vexed twice for the same cause.

12. The plea of res judicata is founded on proof of certain facts and then by applying the law to the facts so found. It is, therefore, necessary that the foundation for the plea must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of the trial, would not be permitted to be raised for the first time at the stage of appeal.

After so stating, the Court further observed that:-

"Not only the plea has to be taken, it has to be substantiated by producing the copies of the pleadings, issues and judgment in the previous case. Maybe, in a given case only copy of judgment in previous suit is filed in proof of plea of res judicata and the judgment contains exhaustive or in requisite details the statement of pleadings and the issues which may be taken as enough proof. But as pointed out in Syed Mohd. Salie Labbai v. Mohd. Hanifa the basic method to decide the question of res judicata is first to determine the case of the parties as put forward in their respective pleadings of their previous suit and then to find out as to what had been decided by the judgment which operates as res judicata."

21. By means of the impugned judgement dated for 04/04/2012 the Learned District Judge noticed that on the previous occasion also a suit was filed by the State against the respondent for eviction from the premises situated at Plot No. 564 measuring 0.038 hectares. situated at Village - Ajgain, District Unnao on the ground that the said land belonging to the U.P. Forest Corporation and the decision to convert it into reserve forest has also been taken by issuance of a notification under Section 4 of the Indian Forest Act. When the proceedings were initiated against the respondent under the Act 1972, before the Prescribed Authority, the officers who appeared on behalf of the petitioner to prove their case could not produce the survey report or the survey map from which it could be established that the disputed house made by the respondents was on plot No. 564 or 565, while on the other hand the respondent had disputed the fact that as house was built on plot No. 564 or 565 which have been declared to be a reserve forest land. The respondent himself never files any documents or disclosed the details and location of his land on which his house had been built, and in the aforesaid circumstances the Prescribed Authority discharged the notice after

recording his satisfaction that the petitioner was not able to establish beyond doubt that the house of the respondent was built on the forest land, and on the other hand the respondent had built the house after obtaining due approval of the authorities.

22. A perusal of the impugned appellate order dated 04/04/2012 would indicate that the District Judge while allowing the appeal of the respondent has recorded a finding that *"the house of Rajendra Prasad has not been constructed on plot No. 564 or 565"*. He was of the view that once a finding has been returned in favour of the respondents then the proceedings cannot be re-initiated again to re-agitate the same issue which has once already been concluded by the Prescribed Authority in his order dated 16/08/1993. To test the aforesaid reasons recorded in the order of the District Judge dated 04/04/2012, we have gone through the order of the Prescribed Authority dated 16/08/1993 and find that no such finding was returned by him in favour of the respondents to the effect that their house was existing on the plot No. 564 or 565. On the contrary the Prescribed Authority has rejected the case filed by the petitioner as they were unable to prove that the respondents have constructed the house on plot No. 564 or 565 as neither the survey report nor the survey map was filed. The findings of the District Judge are clearly contrary to the record and is accordingly perverse and consequently the impugned order is clearly arbitrary and deserves interference on this ground alone.

The principles of *res judicata* is a principle of public policy based on the principle of giving finality to judicial decisions. The principle would have application in quasi judicial matters also subject to the condition that the question of fact or on law should have been decided between the parties, and the plea has to be substantiated by producing the copy of the pleadings, showing judgement in the previous case.

23. For application of the principle of *res judicata* in the present case it is to be ascertained as to whether on a question, of fact or a question of law has been decided between the parties in the proceeding before the Prescribed Authority which can be said to be final and conclusive. As already dealt by us, the Prescribed Authority while deciding the proceedings initiated by the petitioner previously, had dismissed the case as the petitioner as he could not demonstrate that the respondent had constructed the house on plot No. 564 or 565 which was notified as a reserve forest. No finding could be returned in this regard in favour of the petitioner, and even otherwise there was no assertion by the respondents with regard to the plot on which their house was made. The respondents only said that the house was not made on plot No. 564 or 565. Accordingly, the Prescribed Authority could not determine the plot on which the house of the respondents was made and therefore had dismissed the case instituted by the petitioner.

24. In the aforesaid circumstances of the present case, this Court of the considered view that no finding was recorded either in favour of the petitioner of the respondent, and merely in absence of cogent material and evidence, the location of the disputed house could not be ascertained, which led to dismissal of the application preferred by the petitioner. Therefore, no finding of fact was recorded by the Prescribed Authority in the previous

proceedings, with regard to the location of the disputed property and therefore, in our considered opinion the principle of *res judicata* would not be applicable, in as much as there is no previous decision of the Prescribed Authority which has attained finality which can be binding between the parties. In absence of any finality given to any issue between the parties, the subsequent proceedings are not hit by the principles of *res Judicata*. Even otherwise the principle of the *res Judicata* is a principle of public policy that there should be an end to litigation. The principle of public policy cannot be utilised to its detriment and to take possession of public lands. The petitioner was unable to produce relevant records and documents in support of the claim that the respondent was encroacher upon the public lands. The second application was filed along with the survey report and survey map to demonstrate that the respondent was encroaching upon public land, and consequently it was incumbent upon the Prescribed Authority to adjudicate the said case based on merits and consider the evidence filed by the petitioner. In absence of any categorical finding recorded previously, the Prescribed Authority could not be bound by the previous finding order, hence it was open for him to have heard and decide the case on merits.

25. In light of the above discussion this Court is of the considered view that the order of District Judge dated 04/04/2012 is arbitrary and requires interference and is accordingly set aside. The matter is remitted to the District Judge to decide the appeal on merits.

26. The writ petition is **allowed.**

(2024) 1 ILRA 217
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.12.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 3000059 of 1992

Bachchoo ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Shafiz Mirza, Shafiz Mirza, Syed Ahmad Jamal, Vishnu Srivastava

Counsel for the Respondent:
Umesh Kumar Srivastava

A Writ Petition – U.P. Imposition of Ceiling on Land Holdings Act, 1960 - **Section 12 5(6) & 5(7) -A(d)** – The petitioner challenged the order dated 18.08.1992 by the Commissioner, Faizabad Division, which allowed the St.'s appeal and rejected the petitioner's claim to exclude land from surplus under the U.P. Imposition of Ceiling on Land Holdings Act, 1960 – Held, the appellate order was upheld as the petitioner failed to demonstrate eligibility for exclusion under Sections 5(6) and 5(7) of the Act, 1960. (Paras 2, 9, 20)

B. Section 12-A(d) – Limited to Tenure Holder's Choice – The petitioner, claiming adverse possession, sought exclusion of land under Section 12-A(d) of the Act, 1960 – Held, Section 12-A(d) allows only the recorded tenure holder to choose land to retain within the ceiling limit, and the petitioner, not being the recorded tenure holder, could not invoke this provision. (Paras 10, 14, 15)

C. Sections 5(6) and 5(7) – Conditions for Exclusion Not Met – The petitioner relied on a decree dated 22.05.1973 declaring him 'Sirdar' under Section 229-B of the U.P. Z.A. & L.R. Act – Held, exclusion under Section 12-A(d) requires compliance with Sections 5(6) and 5(7), which

protect bona fide transfers before the cut-off date, but the petitioner's decree, post-dating the cut-off, did not satisfy these conditions. (Paras 15, 16, 17)

D. Surplus Land Vested in St. – Decree Ineffective – The land was declared surplus on 31.10.1974, vested in the St., and possession was taken – Held, the petitioner's decree of adverse possession did not automatically exclude the land from ceiling operations, as it was not supported by compliance with statutory requirements under the Act, 1960. (Paras 9, 18, 19)

E. No Infirmity in Appellate Order – The Appellate Authority correctly held that the recorded tenure holders did not object to the surplus declaration, and the petitioner's claim lacked legal basis under the Act, 1960 – Held, the absence of evidence satisfying Sections 5(6) and 5(7) justified the dismissal of the petitioner's claim, rendering the writ petition meritless. (Paras 9, 17, 20)

Writ Petition Dismissed – No Costs.

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

1. Heard Sri Syed Ahmad Jamal, learned counsel for the petitioner as well as learned Standing counsel for the respondent. As per office report dated 04.12.2023, service of notice upon respondent no. 4/1 has been deemed to be sufficient. Despite service of notice no one has put in appearance on behalf of respondent no. 4/1.

2. By means of present writ petition the petitioner has assailed the order dated 18.08.1992, passed by the Commissioner, Faizabad Division, Faizabad whereby he allowed the appeal preferred by the State.

3. Facts in brief of the case are that present dispute pertains to the property of which respondent nos. 4 and 5 Someshwar Prasad Singh and Smt. Shanti Devi respectively were recorded tenure holders and a portion of their land was purchased by the petitioner. Proceedings under the Imposition of Ceiling on Land Holdings Act, 1960 *(hereinafter referred to as "the Act, 1960")* were proceeded against the recorded tenure holders and notice was issued on 06.09.1974, whereby certain lands of the recorded tenure holder were declared surplus.

4. The petitioner claims that he was in possession of part of the said property on the basis of adverse possession and in this regard he had filed a suit under Section 229 of the U.P. Z.A. & L.R. Act. The said suit was decreed on 22.11.1973 and 22.05.1973 and the petitioner was declared *'Sirdar'* of the said property. After being declared as above, petitioner moved an application under Section 11(2) of the Act, 1960 before the Prescribed Authority praying that he may be given benefit of Section 12-A(d) of the Act, 1960 and his land may be excluded from the surplus land, declared surplus at the hands of the original tenure holders. The Prescribed Authority duly considered the prayer made by the petitioner and allowed his application by means of order dated 26.02.1983 and excluded the land of which petitioner was declared "sirdar' and which was declared surplus at the hands of the original tenure holders.

5. The State being aggrieved by the order dated 26.02.1983, preferred an appeal before the Appellate Authority under the Act, 1960. The Appellate Authority considered the entire factual matrix and was of the view that the recorded tenure holders had not been heard while deciding the application of the petitioner under Act, 1960 and was of the view that in case application of the petitioner has to be allowed giving him benefit of Section 12-

A(d) of the Act, 1960, same could be done only after giving opportunity of hearing to the recorded tenure holders and accordingly by means of order dated 04.07.1988, set aside the order of Prescribed Authority and remanded the matter to the Prescribed Authority for deciding the application afresh after giving appropriate opportunity of hearing to the recorded tenure holders.

6. The petitioner being aggrieved by the remand order dated 07.07.1988 where appeal of State was allowed, preferred a writ petition before this Court being Writ Petition No. 58808 of 1988. This Court was persuaded to interfere with the order of Appellate Authority dated 07.07.1988, observing that recorded tenure holders could have been given opportunity of hearing by the Appellate Authority itself and concluded that this reason was not sufficient for remanding the matter back to Prescribed Authority and consequently, directed the Appellate Authority to re-hear the appeal after giving opportunity of hearing to the recorded tenure holders. While allowing the writ petition the order of Appellate Authority was set aside and he was directed to decide the same in the light of directions issued by this Court.

7. The Appellate Authority in remand proceedings has again allowed the appeal of the State by means of order dated 18.08.1992, which has been assailed in the present writ petition.

8. Before the Appellate Authority the petitioner has contended that ceiling proceedings were concluded by order dated 31.10.1974 and land of which the petitioner was declared as *'sirdar'* was part of the plot which was declared surplus by the Prescribed Authority. Only ground taken by the petitioner was that in exercise of power conferred under Section 12-A(d) of the Act, 1960, his land deserves to be excluded from the lands which have been declared surplus.

9. The Appellate Authority by means of impugned order dated 18.08.1992, held that the proceedings under the Act, 1960 were concluded with regard to recorded tenure holder on 31.10.1974 and the State had also taken possession of the said land and actual physical possession of the said property was taken by the State and Form No. 6 was issued in this regard. It was further observed that the recorded tenure holder had never raised any objection before the Prescribed Authority nor do they exercise their objection under Section 12-A of the Act, 1960, for excluding the said land from being declared surplus. In the light of said finding the appellate Court allowed the appeal preferred by the State and rejected the objections preferred by the petitioner. Against the order dated 18.08.1992, present writ petition has been filed.

10. Learned counsel for the petitioner has submitted that once the Court of competent jurisdiction in exercise of power under Section 229-B of the U.P. Z.A. & L.R. Act had declared a land to be surplus the natural consequence of the same would be in exercise of power under Section 12-A(d) under which the Prescribed Authority should have excluded the said land from being declared surplus at the hand of the recorded tenure holder. It is submitted that under Section 12-A(d) clear mandate has been given to the Prescribed Authority to exclude such land which have been subject matter of transfer and which are not included in the land referred under Section 5(6) or 5(7) of the Act, 1960.

11. Per contra, learned Standing Counsel has opposed the writ petition. He

submits that objections which are preferred by the petitioner under Section 11(2) and he did not seek exclusion of the said land as contained under Section 5(6) of the Act, 1960 and once the said land is acquired by the State, there is no provision under which such land can be excluded. It is submitted that in this regard there is no error in the finding recorded by the appellate Authority and consequently prays for dismissal of the writ petition.

12. Heard learned counsel for the parties and perused the record.

13. As narrated above, and undisputed facts are that the said land was subjected to ceiling operations of which respondent nos. 3 and 4 were recorded tenure holders. The recorded tenure holders had not filed any objection before the Prescribed Authority and accordingly proceedings were concluded on 31.10.1974 declaring certain land to be surplus. The petitioner filed a suit under Section 229-B of the U.P. Z.A. & L.R. Act, wherein decree was passed in favour of the petitioner on 22.05.1973. The objections raised by the petitioner before the Prescribed Authority under Section 11(2) of the Act, 1960 were filed on 27.03.1989 with regard to exclusion of said land under Section 12-A(d) of the Act, 1960. For ready reference Section 12-A(d) of the Act, 1960 is quoted herein below :-

*"**12-A**. In determining the surplus land under Section 11 or Section 12, the Prescribed Authority shall, as far as possible, accept the choice indicated by the tenure-holder to the plot or plots which he and other members of his family, if any, would like to retain as part of the ceiling area applicable to him or them under the provisions of this Act, whether indicated by him in his statement under Section 9 or in any subsequent proceedings :*

Provided that -

(a) ---

(b) ---

(c) ---

(d) where any person holds land in excess of the ceiling area including land which is the subject of any transfer or partition referred to in sub-section (6) or sub-section (7) of Section 5, the surplus land determined shall, as far as possible, be land other than land which is the subject of such transfer or partition, and if the surplus land includes any land which is the subject of such transfer or partition, the transfer or partition shall, insofar as it relates to the land included in the surplus land, be deemed to be and always to have been void, and -

(i) it shall be open to the transferee to claim refund of the proportionate amount of consideration, if any, advanced by him to the transferor, and such amount shall be charged on the [amount] payable to the transferor under Section 17 and also on any land retained by the transferor within the ceiling area, which shall be liable to be sold in satisfaction of the charge, notwithstanding any thing contained in Section 153 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950;

(ii) any party to the partition (other than the tenure-holder in respect of whom the surplus land has been determined) whose land is included in surplus land of the said tenure-holder shall be entitled to have the partition re-opened."

14. From the perusal of aforesaid provision it is clear that as per Section 12-A(d) of the Act, 1960, in case the land is more than ceiling limit then the Prescribed Authority is bound to give option to the

recorded tenure holder to choose as to which land has to be declared surplus. The case of the petitioner is that land has been devolved on him by decree of adverse possession on 22.03.1973 and accordingly it is stated that his land deserves to be excluded which has been declared surplus by the Prescribed Authority. The first question which arises for consideration is as to whether person other than the recorded tenure holder can exercise power under Section 12A of the Act or not?

15. Bare perusal of Section 12A of the Act, 1960 would indicate that it is provided that the Prescribed Authority shall accept the choice given by the tenure holder to the plot which he would like to retain as part of the ceiling area in determining the surplus land. A perusal of aforesaid provision would make it clear that choice, if any, can only be given by the recorded tenure holder, as provided under Section 12A of the Act, 1960. With regard to Section 12-A(d) of the Act, 1960 it is noticed that if any land which is in excess of the ceiling limit of the tenure holder, would have to be excluded in the light of Section 5(6) and 5(7) of the Act, 1960. In case any transfer is made after the cut-off date, is found to be bonafide and for adequate consideration, then as per provisions of Section 5(6) the same has to be excluded from the holdings of the tenure holder and similar would be the case where any decree has been passed in the matter on the cut-off date. Sub clause (d) of Section 12-A is explanatory in nature and is confined only to the land which are referred to under Section 5(6) and 5(7) of the Act, 1960, the Prescribed Authority is mandated to exclude such land which have been demonstrated to be excluded from the holdings of recorded tenure holder under Section 5(6) & 5(7) of the Act, 1960.

16. In Section 5, it is further clarified by the provisions contained in sub section (8) of Section 5 of Act, 1960 that any transfer of land executed by the tenure holder during continuance of proceedings for determination of surplus land, ought to have been declared void. It is noticed that in the present case it was not the case of the petitioner that transfer by declaratory decree by the Court of competent jurisdiction was sought to be excluded in terms of Section 5(6) and 5(7) of the Act, 1960. The petitioner merely claims that the land deserves to be excluded merely because he had got decree of adverse possession in his favour.

17. This Court is of the considered view that merely obtaining a decree from a Court of competent jurisdiction in itself would be of no consequence unless provisions of Section 5(6) of the Act, 1960 are fulfilled and if the tenure holder is able to demonstrate that his holdings are below the ceiling limit and all the conditions as prescribed under the Act are met.

18. In the present case decree was passed after the cut-off date and on 31.10.1974 the said land was declared to be surplus and consequently the said land has vested in the State Government and even possession of the same has been taken, the decree of the Court would not in itself exclude the land from the clutches of Act, 1960.

19. It was incumbent upon the petitioner to move appropriate application before the Prescribed Authority and satisfy him as to the conditions laid down in Section 5(6) and 5(7) of the Act, 1960 are

fulfilled, and only then the said land could have been excluded from the ceiling operations. Apart from the above, this Court is of the considered view that there is no power vested in the Prescribed Authority to exclude the land merely on demonstration or production of decree passed by the Court of competent jurisdiction.

20. In the light of above discussion, this Court does not find any infirmity in the impugned appellate order dated 18.08.1992, accordingly, the writ petition being devoid of merit is **dismissed.**

(2024) 1 ILRA 222
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.01.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1985 of 2021

Aditya Kumar ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Suresh Kumar Upadhyay, Kamal Kishor Tiwari, Manoj Kumar Mishra

Counsel for the Respondents:
G.A., Maneesh Kumar Singh, Navita Sharma

Criminal Law - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 14A(1) - Indian Penal Code, 1860 - Section 376 - Code of Criminal Procedure, 1973 - Sections 156(3) & 173(2) - Appellant sought quashing of Sessions Trial No. 369 of 2021, summoning order dated 29.10.2021, and charge-sheet No. A-096 of 2021 for offences under Section 376 I.P.C. and Section 3(2)(v) of SC/ST Act, alleging false implication influenced by victim's husband. Court held: (1) Appeal under Section 14A(1) of SC/ST Act was maintainable, as summoning orders and proceedings were challengeable despite alternative remedies, to prevent abuse of process (*Pepsi Foods Ltd. Vs Special Judicial Magistrate, (1998) 5 SCC 749*). (2) FIR disclosed cognizable offence, with prima facie material (victim's St.ments under Sections 161 and 164 Cr.P.C., medical examination) warranting trial; contradictions (e.g., mobile location, delayed reporting) were factual issues for trial (*M/s. India Carat Pvt. Ltd. Vs St. of Karn., (1989) 2 SCC 132*). (3) Appellant's departmental inquiry exoneration and interim bail did not justify quashing, as they did not disprove prima facie case; victim's trauma explained inconsistencies (*Ramveer Upadhyay Vs St. of U.P., 2022 SCC OnLine SC 484*). (4) No material concealment or abuse of process; allegations of false FIR required evidentiary adjudication during trial (*Central Bureau of Investigation Vs Aryan Singh, 2023 SCC OnLine SC 379*). (5) Summoning order upheld, as it reflected application of mind to FIR and charge-sheet; appellant directed to appear within three weeks, file discharge application, and trial court to decide within three months without undue adjournments. Appeal disposed of; no coercive action till discharge application disposal. (Paras 24-36)

Appeal Disposed of.

List of Cases cited:

1. Pepsi Foods Ltd. Vs Special Judicial Magistrate, (1998) 5 SCC 749 (Para 28)

2. M/s. India Carat Pvt. Ltd. Vs St. of Karn., (1989) 2 SCC 132 (Para 29)

3. Ramveer Upadhyay Vs St. of U.P., 2022 SCC OnLine SC 484 (Para 30)

4. Central Bureau of Investigation Vs Aryan Singh, 2023 SCC OnLine SC 379 (Para 21)

5. Simranjit Singh Mann Vs U.O.I., AIR 1993 SC 280 (Para 22)

6. R.P. Kapoor Vs St. of Punjab, AIR 1960 SC 866 (Para 32)

7. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335 (Para 32)

8. St. of Bihar Vs P.P. Sharma, 1992 SCC (Cri) 192 (Para 32)

9. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq, (2005) 1 SCC 122 (Para 32)

10. S.W. Palankattkar Vs St. of Bihar, 2002 (44) ACC 168 (Para 33)

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

1. Heard Mr. Suresh Kumar Upadhyay, Advocate along with Mr. Manoj Kumar Mishra, learned Counsels for the appellant, Mr. Maneesh Kumar Singh, learned Counsel for opposite party No.2 and Ms. Shikha Sinha, learned A.G.A. for the State-opposite party No.1.

2. The present Criminal Appeal under Section 14A(1) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is being preferred by the appellant, namely-Aditya Kumar for quashing the entire criminal proceedings in Session Trial No.369 of 2021 pending before learned Special Judge, SC/ST Act, Shravasti arising out of Case Crime No.0439 of 2020, under Sections 376 I.P.C. and Section 3(2)(V) of SC/ST Act, Police Station-Sonwan, District-Shrawasti against the appellant as well as summoning order dated 29.10.2021 passed by learned Special Judge, SC/ST Act, Shrawasti and charge-sheet No.A-096 of 2021 dated 09.05.2021 against the appellant.

BRIEFS FACTS OF THE CASE

3. The case, in brief, is that the opposite party No.2/complainant, namely, Manju lodged a First Information Report against the appellant at Police Station Malhipur, District- Shrawasti under Section 376 I.P.C. and section 3(2)(V) S.C. / S.T. Act registered as Case Crime No.0439 of 2020 in pursuance of direction issued by the concerned Magistrate upon the application under Section 156(3) Cr.P.C. made by opposite party No.2

4. The said F.I.R. was lodged stating therein that on 02.07.2020 when the victim was standing at Bus Stand Jamunaha at 10:00 A.M. waiting for Taxi/Bus, the appellant reached there, who insisted the victim to sit on his Motorcycle and he would drop her at her destination, thereafter, the opposite party No.2 sat on the Motorcycle of the appellant and went with him. It is further alleged that the appellant had taken her away to his house Chichadi Chauraha upon questioning by victim, the appellant told her that he will drop her after sometime. It is also alleged that the appellant shut the door of his house and snatched the mobile phone of the victim and committed rape on her, thereafter, at about 7:00 P.M. in the evening, she had been released from the house of the appellant and after reaching her house, she informed her mother-in-law about the whole incident and thereafter, she also informed about the incident to the Superintendent of Police, District-Shrawasti on 17.12.2020 through registered post.

ARGUMENTS OF LEARNED COUNSEL FOR THE APPELLANT

5. Learned Counsel for the appellant further submits that as per the contents of the F.I.R. it has been clearly stated that opposite party No.2 reported the alleged incident to the concerned police station on the next day i.e. on 03.07.2020 but no heed was paid to her complaint, thereafter, the victim after a delay of more than five

months, sent an application through a registered post dated 17.12.2020 to the Superintendent of Police, District-Shrawasti, stating therein all the facts about the alleged incident but no action was taken by the Superintendent of Police, District-Shrawasti. Being aggrieved by the inaction on the part of police authorities, the opposite party No.2 moved an application under Section 156(3) Cr.P.C. before concerned Magistrate and vide order dated 19.12.2020, the Magistrate directed the Police Station- Malhipur, District-Shrawasti to register the complaint made by the opposite party No.2 and proceed for investigation. The Investigating Officer visited the place of incident made a site plan and proceeded for further investigation.

6. Learned Counsel for the appellant further submitted that the victim in her statement recorded under Section 161 Cr.P.C. has re-titrated the same version of the F.I.R. but has slightly changed the version of the F.I.R. and stated that she went with the appellant with her children and the appellant locked her children and committed rape on her.

7. Learned Counsel for the appellant further submitted that after her statement under Section 161 Cr.P.C., she was sent for medical examination, where she denied for her internal or external medical examination.

8. Learned Counsel for the appellant further submitted that there are major contradictions in the statements of the victim recorded under Section 161 and 164 Cr.P.C. The victim in her statement recorded under Section 164 Cr.P.C. stated that when the appellant allowed her to leave his house, she came back home on Motorcycle of son of his uncle but later she stated that she reached home by walking alone.

9. Learned Counsel for the appellant further submitted that as per the statements of victim, the mobile phone used by the victim was snatched by the appellant and was made inoperative, and committed rape on her, but as per the CDR of the mobile phone, bearing Mobile No.8005164186 used by the victim on the date of incident i.e. 02.07.2020, the location and network connection of the said mobile number was found in Arriya (Bihar), where the husband of the victim is posted in Shashtra Seema Bal (S.S.B.).

10. Learned Counsel for the appellant further submitted when the victim was inquired about the contradictory statements made by her regarding use of mobile number on the date of incident, she stated that she was traumatized by the incident and the mobile number to which she was referring in her earlier statements i.e. Mobile No.8005164186 was in possession of her husband, who was posted in Bihar. Thus, it appears that victim is making false statements to prove the prosecution story.

11. It was further submitted that the appellant being aggrieved by the false prosecution initiated against him, intimated this issue to his department and the department after making an enquiry in the matter has held that the victim being influenced by her husband, namely-Jagram, who was also posted in the same department i.e. S.S.B. in which the appellant is posted has lodged a fake F.I.R. against the appellant, namely-Aditya Kumar, thus, after going through the findings, opinion and recommendations, the departmental committee has held that

the Jagram, husband of the complainant is blameworthy for influencing his wife to lodge fake F.I.R. against the appellant.

12. Learned counsel for the appellant further submitted that thereafter, the appellant approached this Court for quashing of the F.I.R. by filing a Petition bearing Misc. Bench No.6179 of 2021 (Aditya Kumar vs. State of U.P. and Others) wherein, a Coordinate Bench of this Court vide order dated 09.03.2021 granted interim protection to the appellant and directed that unless and until sufficient and credible evidence against the appellant for filing a police report under Section 173(2) Cr.P.C. for the offences alleged in the F.I.R. is found, he shall not be arrested in Case Crime No.439 of 2020.

13. Learned Counsel for the appellant further submitted that the Investigating Officer after completing the investigation submitted chargesheet dated 09.05.2021 bearing A-096 of 2021 against the appellant and case was numbered as 439 of 2020 under Section 376 I.P.C. and Section 3(2)(v) of SC/ST Act in a cursory manner and the court of Special Judge, SC/ST Act, Shrawasti vide order dated 29.10.2021 rejected the application A-3 of the appellant and summoned him under Section 376 I.P.C. and Section 3(2)(v) of SC/ST Act, which are impugned herein.

14. Learned Counsel for the appellant has submitted that there is no evidence available on record to show any involvement of the appellant in the alleged offence. He has further submitted that the impugned proceedings against the appellant are nothing but a sheer abuse of process of law and are manifestly unjust and illegal. The investigation has also been closed, and no further investigation is pending in the offence and the continuation of proceedings against the appellant would result only in his further harassment for alleged offences, which are not made out against him inasmuch as there is no evidence indicating his involvement in any manner for commission of alleged offences.

15. Learned counsel for the applicant has vehemently submitted that in the facts and circumstances of the case and after having satisfied that the ingredients of Sections 376 I.P.C. and section 3(2)(V) S.C. / S.T. Act are not made out against the appellant and the case falls within the parameters laid down by this Hon'ble Court in the case of **Ch. Bhajan Lal v. State of Haryana 1992 Supp (1) SCC 335** which are required to be considered while quashing the criminal proceedings. He further argued that from the material available on record it is apparent that the appellant is not involved in the alleged offence, thus, he prays that it is a fit case for quashing of the impugned order dated 29-10-2021 and all the consequential proceedings of the case so far as the present appellant is concerned.

ARGUMENTS OF LEARNED COUNSEL FOR THE RESPONDENTS

16. Per contra, Ms. Shikha Sinha, the learned Additional Government Advocate for the State-opposite party No. 1 has submitted that learned court below has not committed any error or illegality in issuing summoning order dated 29-10-2021 against the appellant and the present appeal is liable to be dismissed as all the Factial aspects has been argued.

17. Sri Maneesh Kumar Singh, learned counsel for the complainant/ opposite no. 2 raised preliminary objection

by stating that the present appeal under Section 14A(1) of Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act 1989 is not maintainable and is liable to be dismissed.

18. Learned Counsel for the complainant/ opposite party No. 2 further stated that there are material concealment of facts on behalf of the appellant and the appellant has not came with clean hands before this Hon'ble Court.

19. Learned counsel for the complainant/ opposite party No. 2 further stated that the present application under section 482 Cr.P.C. has been filed by the applicant but the affidavit in support thereof is made by his attorney which is not maintainable. Learned Counsel for the opp. party No. 2 also repudiated the remaining submissions made by the counsel for the applicant and prays that the present application filed by the applicant be dismissed.

20. It was further argued by learned counsel for the complainant/ opposite party No. 2 that the appellant has indulged in clever drafting by twisting material facts. Beside concealing relevant facts germane to the matters in issue, even vital material facts and documents have not been brought on record with due deliberation.

21. Learned counsel for the complainant / opposite party No. 2 has further placed reliance upon the judgment in the case of **Central Bureau of Investigation Vs Aryan Singh Etc 2023 SCC OnLine SC 379**, and relied on paras-10 and 12, wherein it has been observed as under:

"10. From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Section 482 Cr. P.C., the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. This is not the stage where the prosecution/investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution/investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under Section 482 Cr. P.C., the Court has a very limited jurisdiction and is required to consider "whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not".

12. In view of the above and for the reasons stated above, when the High Court has exceeded in its jurisdiction in quashing the entire criminal proceedings and applying the law laid down by this Court in catena of decisions on exercise of the powers at the stage of discharge and/or quashing the criminal proceedings, the impugned common judgment and order passed by the High Court quashing the criminal proceedings against the accused is

unsustainable and the same deserves to be quashed and set aside."

22. Learned counsel for the complainant / opposite party No. 2 has further placed reliance upon the judgment in the case of **Simranjit Singh Mann Vs Union of India: 2 AIR 1993 SC 280**, the Apex Court, held as under:—

"Ordinarily, the aggrieved party which is affected by any order has the right to seek redress by questioning the legal validity or correctness of the order, unless such party is a minor, an insane person or is suffering from any other disability which in law recognized as sufficient to permit any other person e.g. next friend, to move the Court on his behalf. It was also held that if a guardian or a next friend initiates proceedings for and on behalf of such a disabled aggrieved party, it is, in effect, proceedings initiated by the party aggrieved and not by a total stranger, who has no direct personal stake, in the outcome thereof. In the above mentioned case, a leader of a political party approached the Supreme Court under Article 32 of the Constitution of India, challenging the conviction and sentence of the assassins of Gen. Vaidya. The two convicts were alive but did not file any appeal against the conviction and sentence. The Apex Court held that the petitioner, in that case, had locus standi to invoke the jurisdiction under Article 32 of the Constitution."

(9) The plain reading of ratio of law as laid down in the aforesaid cases, clearly goes to reveal that it is only the accused person, against whom a criminal case has been registered or a criminal complaint, has been filed, can file a petition under Section 482 Cr.P.C. in the High Court, for quashing the complaint, the summoning order and/ or the subsequent proceedings, if any, and no third person can fight a proxy war on his behalf under the garb of public interest litigant. The aggrieved party, which is affected by an order, is required to seek redress of its grievance, by questioning the legal validity or correctness of the same. It is another thing, if the aggrieved party, is suffering from some disability, i.e., unless such party is a minor, or an insane person, or is suffering from any other disability, which, in law, is recognized as sufficient to permit any other person, e.g., next friend, to move the Court, on his behalf. On behalf of minor, or insane person, a guardian or a next friend, initiates proceedings, so as to challenge the legality and validity of the order, passed against him, to seek redressal of the grievance, as under law, such a person having disability, cannot be said to be competent, to file a petition, except through next friend or guardian. In the instant case, there is nothing on the record, that Amit Ahuja, petitioner, is suffering from any disability, recognized by the provisions, of law. He is an accused, in the aforesaid complaint. It is he, who is aggrieved against the complaint and the summoning order. It is he, who can challenge the same, on any ground which may be available to him, under the provisions of law. If, in criminal cases, until and unless a person, is allowed to fight the proxy war, then the very purpose of criminal justice system, shall be defeated. In the event, the Courts, would be mushroomed, by public interest litigants. In this view of the matter, the present petition, under Section 482 Cr.P.C. filed by the petitioner, through his attorney, is not maintainable. On this ground alone, the same is liable to be dismissed."

23. The learned counsel for the complainant/ opposite party No. 2 further submitted that in spite of issuance of

bailable and non bailable warrants appellant is deliberately and consciously evading the summons and is circumventing the process of law. In a catena of decisions the Hon'ble Apex Court has held that criminal proceedings cannot be nipped in the bud.

OBSERVATIONS OF THE COURT

24. I have considered the rival submissions of the learned counsel for the parties and the judgments referred herein above and perused the material available on record and also the prayer made in the present appeal under Section 14A(1) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

25. The powers of the High Court to quash criminal proceedings in exercise of its jurisdiction is well known. The High Court may not enter into determination of the disputed questions of fact at the stage of its exercise of powers however, the Court may examine and take note of the facts and allegations in order to find out whether the impugned proceedings are in abuse of the process of the court and law and their continuance would result in miscarriage of justice or not.

26. In the present case the facts, as noted above, are not in dispute. The FIR and the charge-sheet discloses as to how and in what manner the appellant was responsible for commission of offence.

27. The question which arises for consideration in the present case is that whether the appellant was liable for any offence even if the allegations in the FIR and charge-sheet are taken on their face value to be correct in entirety. The Statute must contain provision fixing such a liability. Even for the said purpose, it would be obligatory on the part of the complainant and the investigating agency to make requisite allegations and collect evidence in support thereof which would attract provisions constituting liability.

28. The Hon'ble Supreme Court in the case of ***Pepsi Foods Ltd. v. Special Judicial Magistrate*, (1998) 5 SCC 749** has held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set in motion as the matter of course for alleged offences and was pleased to observe in para-28 of the aforesaid judgment which reads as under:-

"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."

29. In **M/s. India Carat Pvt. Ltd. v. State of Karnataka** and another : (1989) 2 SCC 132, the Hon'ble Court, after analyzing the provisions of the Code, referred to the decisions in Abhinandan Jha v. Dinesh Mishra: AIR 1968 SC 117 and H.S. Bains v. State (UT of Chandigarh) : (1980) 4 SCC 631 and, eventually was pleased to observe as under:

16. "The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) *a Magistrate is entitled to take cognizance of an offence under* Section 190(1)(b) *of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused.* Section 190(1)(b) *does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under* Section 190(1)(b) *and direct the issue of process to the accused."*

30. In the recent decision rendered by the Hon'ble Supreme Court in the case of ***Ramveer Upadhyay vs State of U.P. 2022 SCC OnlIne SC 484*** and placed reliance on para 39 which read as under:

"39 In our considered opinion criminal proceedings cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr.P.C. only because the complaint has been lodged by a political rival. It is possible that a false complaint may have been lodged at the behest of a political opponent. However, such possibility would not justify interference under Section 482 of the Cr.P.C. to quash the criminal proceedings. As observed above, the possibility of retaliation on the part of the petitioners by the acts alleged, after closure of the earlier criminal case cannot be ruled out. The allegations in the complaint constitute offence under the Attrocities Act. Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. The Complaint Case No. 19/2018 is not such a case which should be quashed at the inception itself without further Trial. The High Court rightly dismissed the application under Section 482 of the Cr.P.C."

31. Thus, this Court is of the view that all the contentions raised by the appellant's counsel relate to disputed questions of fact. The court has also been called upon to adjudge the testimonial worth of prosecution evidence and evaluate the same on the basis of various intricacies of factual details which have been touched upon by learned counsel. The veracity and credibility of material furnished on behalf of the prosecution has been questioned and false implication has been pleaded. In the process of invoking its inherent jurisdiction, this court cannot be persuaded to have a pre trial before the actual trial

begins. The submissions made by the learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case.

32. At this stage of issuing process the court below is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The quashing of charge sheet, summoning order and entire proceedings can also be done only if it does not disclose any offence or if there is any legal bar which prohibits the proceedings on its basis. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases and make the position of law in this regard clear:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (Crl.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192** and **(iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.)283.**

33. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists. Hence the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised:-*(i) to give effect an order under the Code; (ii) to prevent abuse of the process of the court; (iii) to otherwise secure the ends of justice.*

34. In absence of any of the grounds recognized by the Apex Court which might justify the quashing of summoning order dated 29-10-2021 or consequential proceedings, **the prayer for quashing the same is refused,** as I do not see any abuse of the courts process either. The court below has been vested with sufficient powers to discharge the accused even before the stage to frame the charges comes, if for reasons to be recorded it considers the charge to be groundless.

35. In view of the above discussions and observations, this appeal filed by the appellant under Section 14A(1) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 for the relief claimed stands **disposed of.**

However, it is directed that the appellant shall appear before the concerned court below, within a period of three weeks from today and move an application claiming discharge, the concerned court shall after hearing the counsel for the parties decide the aforesaid discharge application, if filed, on merits in accordance with law within a period which shall not exceed a period of three months from today without granting any unnecessary adjournment to either of the parties, unless there is some legal impediment or unless there is any order passed by the higher court staying the proceedings of the case.

36. It is further directed that till the disposal of the aforesaid discharge application, if filed, within the stipulated time given by this Court, no coercive action shall be taken against the appellant.

(2024) 1 ILRA 231
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.01.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Revision No. 1142 of 2019

Ram Lal Verma ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Ganesh Kumar Gupta

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Section 200 - Examination of complainant, Section 202 - Postponement of issue of process, Section 244 - Evidence for prosecution, Section 245 - When accused shall be discharged, Indian Penal Code, 1860 - Section 419, 420, 504 - once a case is instituted upon the private complaint, after recording the evidence, discharge application can be entertained - police case - only one cross examination , private complaint - two cross examinations - Distinctions between warrant cases based on police reports and private complaints under Section 200 Cr.P.C. - if the accused produces any evidence material at the stage of framing of charge which might drastically effect very sustainability of the case it infer that no such material should be considered into by the court at this stage. (Para - 7,9, 12)

Trial court after hearing parties rejected discharge application - ground - application under Section 244 Cr.P.C not recorded - revisionist appeared in court - revisionist joined as Branch Manager in U.P. Co-operative Village Development Bank Limited - relieved - joined branch at Jalalpur - trial court held - this fact is to be proved by evidence - rejected the application - Revisionist's Claim for Discharge - Revisionist joined Tanda Branch on 29.08.1998 - relieved for Jalalpur Branch on 18.08.2003 - Incident occurred during his relievement - not posted at the branch at the time - Revisionist moved for discharge citing lack of posting at the relevant time.**(Para -2,6,13)**

HELD: -Complainant not lead evidence under Section 244 (1) Cr.P.C and discharge application moved at prior stage; hence, case of applicant covered under Section 245 (1) Cr.P.C.. Trial court must determine if the accused revisionist was posted at the Tanda Branch when the incident occurred. Court had the liberty to discharge the applicant under Section 245(1) even prior to the evidence led under Section 244 Cr.P.C., but if not posted, the revisionist cannot face the trial. Court should consider the applicant's objection. **(Para - 11,14)**

Impugned order quashed. Matter remitted to court concerned. (E-7)

List of Cases cited:

1. Adalat Prasad Vs Roop Lal Jindal & ors., 2005 (JIC) SC

2. Attar Singh Vs St. of U.P. , (2010)(2) DNR page 558

3. Vijayan Vs St. of Kerals & anr. , (2010) SCC 398

4. U.O.I. Vs Prafulla Kumar Samal & anr. , AIR 1979 SC 366

5. Ajay Kumar Gosh Vs St. of Jharkhand & ors. , 2009 (14) SCC 115

6. Satish Mehra Vs Dehli Administration & ors., (1996) 9 SCC 766

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

1. The present revision under Section 397/401 of the Code of Criminal Procedure has been filed against the judgment and order dated 27.05.2019 passed by the learned Civil Judge (Senior Division) Fast Track/ Additional Chief Judicial Magistrate, Ambedkar Nagar in Complaint Case No. 1130 of 2018 (Old Complaint No. 15040 of 2008) under Section 419, 420, 504 IPC.

2. It is submitted that the applicant moved an application for discharge in light of the order of High Court dated 25.03.2019 by which the applicant was given an opportunity to file a discharge application through counsel within 30 days form the date of order. Learned trial court rejected the above mentioned application on the basis of irrelevant consideration as well as against the provisions of Section 245(2) Cr.P.C as well as spirit of order dated 25.03.2019 passed by the High Court only on the ground that the evidence under Section 244 Cr.P.C is remained in the proceedings and also that the revisionist had never taken bail. It is also submitted that the revisionist had served as Branch Manager in the U.P. Co-operative Village Development Bank Limited Branch Tanda, Ambedkar Nagar. He joined the said bank on 29.08.1998 and served till 18.08.2003. The revisionist superannuated from is post on 31.07.2004 from the Jalalpur Branch. After superannuation the revisionist left district Ambeadkarnagar and started living at his home in district Basti. The revisionist never served the Bank U.P. co-operative Village Development Bank Limited Branch Tanda District Ambedkar Nagar at the time when the alleged loan transaction took place i.e. 25.05. 1998 and after his relieving he never served at that said bank.

3. It is also submitted that the complainant filed a complaint on 15.12.2007 arraying the revisionist as opposite party No.4. After recording the statement under Sections 200 and 202 Cr.P.C, the trial court summoned the revisionist by order dated 15.06.2009 under Section 419, 420, 504 IPC. It is also submitted that no case is made out against the revisionist under Section 419, 420, 504 IPC as such on the perusal of the statement under Sections 200 and 202 Cr.P.C no ingredients has been found for cheating by impersonation. Thereafter trial court issued warrant against the applicant by order dated 08.09.2018. In the month of March, 2019 revisionist filed Criminal Misc. Case No. 1940 of 2019 (Ram Lal Verma Vs. State of U.P and others) against the summoning order dated 15.06.2009 in which the Hon'ble Court was pleased to pass the order dated 25.03.2019 and directed the learned trial court that the discharge application of the applicant shall be heard and decided expeditiously after hearing the parties in accordance with law. The revisionist filed application under Section 245 Cr.P.C and disclosed true material facts. Learned trial court rejected the application ignoring the fact that the allegation against the revisionist is groundless and the case of the revisionist is fully covered by Section 245 (2) Cr.P.C. It is also submitted that the learned trial court failed to appreciate that the proceedings under Section 245 (2) Cr.P.C is to be followed than the provisions provisions under Section 245(1) Cr.P.C. Section 245(2) Cr.P.C dealt with power of trial court discharging an accused even before evidence under Section 244 Cr.P.C

is lead. Learned trial court failed to exercise its jurisdiction under Section 245 (1) Cr.P.C. It is submitted that the learned trial court has rejected the applicant even the case is fully covered by Section 245(2) Cr.P.C, hence it is prayed to set aside the impugned order. Lastly, learned counsel for the revisionist has relied upon the judgment of this Court in the case of Manoj Kumar and others Vs. State of U.P. and others reported at 2016 (3) JIC 329 (Alld) to contend that Section 245(2) Cr.P.C is a stage before the evidence of the prosecution under Section 244(1) is completed or any stage prior to that; such stages would be under Section 200, Cr.P.C to Section 204 Cr.P.C because the next stage is only the appearance of the accused before the Magistrate in a warrant case under Section 244 Cr.P.C and the Magistrate can take decision under Section 245(2) before the accused is brought before the Court or before the evidence is led under Section 244, Cr.P.C. There is no question of consideration of evidence at that stage.

4. None appeared for the private respondent, learned A.G.A for the State submitted that the order passed by the learned trial court is within the purview of jurisdiction of the Court. The revisionist moved an application for discharge at the premature state before recording of the statement of the complainant under Section 244 Cr.P.C which was duly rejected by the learned trial court.

5. I have heard the rival submissions and perused the record.

6. From the perusal of record, it appears that learned trial court after hearing the parties rejected the application on the ground that the application under Section 244 Cr.P.C is not recorded, the revisionist had not appeared in the court, the contention of the revisionist that he joined as Branch Manager in the U.P. Co-operative Village Development Bank Limited Branch Tanda, Ambedkar Nagar on 29.08.1998 and was relieved from the aforesaid branch on 18.08.2003. Thereafter the revisionist joined branch at Jalalpur. Learned trial court held that this fact is to be proved by evidence and relying on the case of **Adalat Prasad Vs. Roop Lal Jindal and others 2005 (JIC) SC** and also on the order passed by this Court in the case of **Attar Singh Vs. State of U.P. (2010)(2) DNR page 558** rejected the application. Before proceeding further, it will be appropriate to reproduce Section 245(2) Cr.P.C which runs under:

"Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

7. A bare perusal of Section goes to show that once a case is instituted upon the private complaint, after recording the evidence, discharge application can be entertained. In police case there will be only one cross examination however in private complaint case, there will be two cross examinations. The major classification of criminal cases in Code of Criminal Procedure are:

(1) Case instituted on the basis of police report (Section 238 to 243).

(2) Case instituted otherwise than on police report based on complaint Sections (244 to 247)

8. In the case of ***Vijayan Vs. State of Kerals and another (2010) SCC 398*** and in

the case of ***Union of India Vs. Prafulla Kumar Samal and another AIR 1979 SC 366*** wherein the Hon'ble Supreme Court has formulated the following guiding principles:

"1. The judge while considering the question of framing the charges U/Sec. 227 Cr.P.C has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. To determine prima facie case would depend upon the facts of each case.

2. Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

3. The court can not act merely as a post office or a mouth piece of the prosecution but it has to consider the broad probabilities of the case. There cannot be a roving enquiry into the pros and cons of the matter and weight the evidence as if a trial was being conduced.

4. On the basis of material on record if the court could form an opinion that the accused might have committed the offence, it can frame the charge.

5. At the time of framing of the charge, the probative value of the material on record can not be gone into but before framing of charge the Courts must apply it's judicial mind on the material placed on record and must be satisfied that the commission by the accused was possible.

6. At the stage of Sec. 227 and 228 Cr.P.C the court is required to evaluate the material and documents on record with a view to find out the existence of all the ingredients constituting the alleged ofence but the court cannot be expected to presume that the prosecution story is gospel truth.

7. If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial judge will be empowered to discharge the accused irrespective of the result of the trial."

9. There are major distinction as regards discharge of accused from warrant case instituted upon police report and warrant case instituted upon private complaint filed under Section 200 Cr.P.C. In **Ajay Kumar Gosh Vs. State of Jharkhand and other 2009 (14) SCC 115**, Hon'ble Apex Court has held that there is clear difference in Section 245 (1) and 245 (2) Cr.P.C. In Section 245(1) Cr.P.C Magistrate has to consider evidence lead by prosecution before him under Section 244 and he is to consider whether if the evidence remain unrebutted, conviction of accused would be wanted. If there is no discernible incriminating material in evidence, then the Magistrate proceed to discharge the accused under Section 245(1) Cr.P.C.

10. The situation under Section 245(2) Cr.P.C however, is different. Under Section 245 (2) the Magistrate has power to discharge the accused at any previous stage of the case even before such evidence is led. However for discharging an accused under Section 245(2) Cr.P.C the Magistrate has come to a finding that the charge is groundless. There is no question of any consideration of the evidence at this stage because no witness will be examined on behalf of the complainant except the sworn statement under Section 200 Cr.P.C. The Magistrate can take this decision before the accused appears or brought before the Court or the evidence is led under Section

244 Cr.P.C. The word appearing in Section 245 (2) Cr.P.C " At any previous stage of the case" clearly shows different position. Now the question arise as to what the previous stage is. The previous stage would obviously be before evidence of prosecution under Section 244 (1) Cr.P.C is completed or at any stage prior to that. This stage may be under Section 200 Cr.P.C to Section 204 Cr.P.C in the case in hand the court had find the evidence which was lead by complainant under Section 200 and 202 Cr.P.C and conclusion reached to the conclusion that the revisionist may be summoned under Section 203 Cr.P.C. Notice were also sent to the revisionist under Section 204 Cr.P.C. However, revisionist instead of appearing in the court moved the petition under Section 482 Cr.P.C challenging the summoning order. Vide order dated 25.03.2019 a Co-ordinate Bench of this Court did not find any abnormality, in the impugned order of summoning the accused, therefore, the order was upheld, however, the revisionist was given the relief that no coercive action shall be taken against the applicant if he appears before the court in 30 days and move an application for discharge through counsel.

11. It transpires from the impugned order that the complainant had not lead evidence under Section 244 (1) Cr.P.C and the discharge application is moved at the prior stage, hence, the case of the present applicant is covered under Section 245 (1) Cr.P.C. In **Satish Mehra Vs. Dehli Administration and others** reported in **(1996) 9 SCC 766,** Hon'ble Apex Court held that under Section 239 Cr.P.C the Magistrate has to give the prosecution and the accused a fair chance of being heard besides taking cognizance of the police report and document. The Magistrate has to apply its judicial mind while considering the discharge application. If the accused brings any trustworthy material at that stage or it drastically effect even a very fesibility of the case, it would be very improbable to recommend that no such material would be taken into consideration by the court at this stage.

12. Hon'ble Apex Court has held that if the accused produces any evidence material at the stage of framing of charge which might drastically effect very sustainability of the case it infer that no such material should be considered into by the court at this stage.

13. In the given case, the plea of revisionist is that he joined as Branch Manager of Tanda Branch on 29.08.1998 and relieved for Jalalpur Branch on 18.08.2003, however, the incident occurred when he has been relieved for Jalalpur Branch and the revisionist was not posted in the branch when the incident occurred. The incident is not itself challenged by the revisionist he moved an application for discharge on the ground that he was not posted at the branch at the relevant point in time.

14. Trial Court must consider the fact that whether the accused revisionist was posted at the relevant point in time in the Tanda Branch. Nothing has been disclosed in the impugned order whether the revisionist was posted at Tanda Branch when the incident occurred. The Court had liberty to discharge the applicant under Section 245 (1) even prior to the evidence led under Section 244 Cr.P.C. If the revisionist was not posted at the date of incident, the revisionist cannot be forced to face the trial to which he has no concerned. Hence the court should consider the

preliminary objection of the applicant that whether he was posted at the relevant point in time or not at the Tanda Branch.

15. In view of the above discussions, this Court finds that impugned order dated 27.05.2019 passed by learned Civil Judge (Senior Division) suffers with material lacunae which was not considered by the Court.

16. Hence the impugned order dated is quashed

17. The matter is remitted to the court concerned. The trial court shall consider the fact whether the revisionist was posted at the relevant point in time in Branch Tanda or not and if it is found that he was not posted and and he has no complicity, then he consider the application of discharge of the revisionist. The trial court is also directed to give opportunity of hearing to the parties.

(2024) 1 ILRA 236
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1007413 of 2012

Sohrab Ali ...Petitioner
Versus
D.M. Pratapgarh & Anr. ...Respondents

Counsel for the Petitioner:
Manish Jauhari, Ambuj Kumar Bajpai, Dinesh Kumar Ojha, Mohit Jauhari

Counsel for the Respondents:
C.S.C.

A. Criminal Law - Arms Act, 1959-Section 17(3)(c)-cancellation of licence-suppression of information with regard to the pending criminal cases-cancellation of licence of the petitioner on the ground of pendency has wrongly been decided by the Prescribed Authority as well as Appellate authority-Finding being arbitrary are set aside-Prescribed authority has not considered the aspect of the material suppression information at the time of granting arm licence is an issue for which the matter is remitted to the District Magistrate, Pratapgarh for passing afresh orders.

The writ petition is allowed. (E-6)

List of Cases cited:

1. Ram Murti Madhukar Vs D.M. Sitapur (1998) 16 LCD-905

2. Ram Karpal Singh Vs Commr.Devi Patan Mandal Gonda & ors.(2006) 24 LCD 114

3. Ram Prasad Vs Commr. & ors.

4. Ganesh Chandra Bhatt Vs D. M. Almora (1993) AIR All 291

5. Habib Vs St. of U.P.(2022) ACC

6. Masiuddin Vs Commr. Alld. Div. Alld. & anr. (1972) ALJ 573

7. Chhanga Prasad Sahu Vs St. of U.P. & ors.(1984) AWC 145 FB

8. Ilam Singh Vs Commr. Meerut Div. & ors.(1987) ALL LJ 416

9. Habib Vs St. of U.P. & ors.(2002) 44 ACC 783

10. Satish Singh Vs D.M. Sultanpur (2009) 4 ADJ 33 LB

11. Thakur Prasad Vs St. of U.P. & ors.(2013) 31 LCD 1460 LB

12. Ram Murli Madhukar Vs D.M. Sitapur (1998) 16 LCD 905

13. Ghanshyam Gupta Vs St. of U.P & ors.(2016) 34 LCD 3035

14. Surya Narain Mishra Vs St. of U.P. & ors.(2015) 7 ADJ 510

15. Raj Kumar Verma Vs St. of U.P. (2013) 80 ACC 231

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

(1). Heard Shri Dinesh Kumar Ojha, learned counsel for petitioner, learned Standing Counsel for the State.

(2). At the very outset, learned counsel for petitioner submits that due to inadvertent the challenge to the impugned orders could not be incorporated in the prayer clause and consequently, prays that he may be permitted to assail the validity of the impugned orders dated 06.09.2007 passed by the District Magistrate, Pratapgarh under Section 17 (3) (b) of the Arms Act and dated 21.11.2007 passed by learned Commissioner, Allahabad Division, Allahabad.

(3). Learned Standing Counsel for the State did not object the same.

(4). Accordingly, the prayer of the petitioner is allowed and the petitioner is permitted to incorporate necessary amendment in the prayer clause during the course of the day.

(5). By means of the present writ petition, the petitioner has challenged the impugned orders dated 06.09.2007 passed by the District Magistrate, Pratapgarh under Section 17 (3) (b) of the Arms Act and also order dated 21.11.2007 passed by learned Commissioner, Allahabad Division, Allahabad.

(6). It has been submitted by learned counsel for the petitioner that the petitioner moved an application to the District Magistrate, Pratapgarh to grant him SBBL Gun Licence on account of the fact that the father of the petitioner was murdered in the year 1997 on 11.04.1997. It is further submitted that a criminal case was registered against the petitioner before the murder of this father in Case Crime No. 148 of 1996, under Sections 307, 323 and 504 IPC, Police Station Sangipur, District Pratapgarh. Subsequently, it seems that petitioner was involved in another criminal case in Case Crime No. 40 of 2006, under Sections 307, 323, 147, 148 & 149 IPC and Section 7 of the Criminal Law Amendment Act.

(7). In the aforesaid circumstances, notice under Section 17 (3) of the Arms Act was issued to the petitioner on 23.04.2007 asking him to show cause as to why his arm licence should not be cancelled. Apart from noticing that there are two criminal cases lodged against the petitioner, the licencing authority also mentioned that the petitioner had suppressed material information at the time of grant of licence, inasmuch as, he had concealed the fact that a criminal case in Case Crime No. 148 of 1996, under Sections 307, 323 and 504 IPC was pending against him when he applied for grant of arms licence. The petitioner replied to the notice issued by the District Magistrate on 05.02.2007 and after consideration of his response, which was found to be unsatisfactory, his licence was cancelled. While cancelling the said licence, the District Magistrate has invoked the provisions of Section 17 (3) (c)/(b) of the Arms Act. Against the order dated 06.09.2007 passed by the District Magistrate, Pratapgarh, the petitioner

preferred an appeal before the Commissioner, Allahabad Division, Allahabad, who has also rejected his appeal and affirmed the findings recorded by the District Magistrate, Pratapgarh by means of order dated 21.11.2007. Both the said orders have been assailed by the petitioner in the present writ petition.

(8). Learned counsel for petitioner has submitted that in the year 1997 his father was murdered and the petitioner faced with the trauma of murder of his father and the insecurity to his life and the existing threat perception had to make an urgent application for grant of arms licence. Considering the grave urgency and threat to the life, the District Magistrate had immediately granted him the licence. It is stated that it is during those very dates that the First Information Report was also lodged against the petitioner in Case Crime No. 148 of 1996 under Sections 307, 323 and 504 IPC where the petitioner was implicated. He submits that there was no deliberate suppression of material information in his application so as to invoke the provisions of section 17 (3) (c) of the Arms Act. he submits that the District Magistrate has not considered his response adequately. He submits that on murder of his father he was traumatized and under these challenging situation hand made application for grant of arms licence.

(9). With regard to the involvement of the petitioner in another criminal case in Case Crime No. 40 of 2006, under Sections 307, 323, 147, 148 & 149 IPC and Section 7 of the Criminal Law Amendment Act, it is submitted that there is no allegation of use of arms by the petitioner and consequently merely lodging of the FIR against the petitioner cannot be a ground for cancellation of arm licence. He further submits that there are several judgments of this Court and the law in this regard is settled that merely due to pendency of criminal cases, the arm licence cannot be cancelled.

(10). It is further submitted that the petitioner has been acquitted in Case Crime No. 40 of 2006 under Sections 307, 323, 147, 148 & 149 IPC and Section 7 of the Criminal Law Amendment Act by means of judgment dated 11.06.2010 passed by the learned Additional Sessions Judge, Pratapgarh.

(11). In support of his submission, learned counsel for the petitioner has placed reliance on the judgments passed by this Court in the cases of ***Ram Murti Madhukar vs. District Magistrate, Sitapur [1998 (16) LCD-905], Ram Karpal Singh vs. Commissioner, Devi Patan Mandal, Gonda and Ors. [2006 (24) LCD 114]*** and ***Ram Prasad vs. Commissioner and Ors. decided on 07.02.2020 in Writ-C No. 56378 of 2006***, wherein it has been held that mere pendency of criminal case or apprehension of misuse of arms are not sufficient grounds for passing the order of suspension or revocation of licence under Section 17 of the Act.

(12). In ***Ram Murti Madhukar (supra)***, this Court has held in paragraph no. 8, is quoted as under :-

"(8) It is also well settled in law that mere pendency of criminal case or apprehension of abuse of Arms Act, are not sufficient ground for passing of the order of suspension or revocation of licence under Section 17 of the Act. A reference in this regard may be made to the decisions of this

Court in ***Ganesh Chandra Bhatt v. D. M. Almora, AIR 1993 All 291"***

(13). In the case of ***Ram Karpal Singh (supra)***, this Court has held as following in paragraph nos. 6 and 7 which are being reproduced hereunder:-

'6, Learned counsel for the petitioner had relied upon the two judgments of this Court reported in ***2002 ACC; Habib v. State of U.P***

7. Para 3 of the said judgment is reproduced as under:

"Para 3: The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the license under Arrns Act, has been deal with by a Division Bench in this Court reported in Sheo Prasad Misra v. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Mai Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot be in any way affect the public security or public interest and the order canceling or revoking the .licence of fire arm has been set aside. The present impugned order also suffers from the same infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserve to be quashed and are hereby quashed.'

(14). This Court in the case of ***Ram Prasad (supra)*** has held as under. Relevant paragraphs of the said judgments i.e. 16,19,22,23,24,25,28,32 and 36 are being quoted hereunder:-

"16. The matter which requires consideration is, whether on the ground of pendency of the criminal case the petitioner's fire arm licence could be cancelled and his appeal could be dismissed, notwithstanding his acquittal on 17.1.2003. It also requires consideration if the ground in the impugned orders that if the petitioner's fire arm licence remain with the petitioner, it would not be in the public interest and public security, are justified for cancellation and based on substantial material."

19. In ***Masiuddin Vs. Commissioner, Allahabad Division, Allahabad and another reported in 1972 A.L.J. 573*** this Court held in paragraph Nos. 4 and 7 as under:

"4. After a license is granted, the right to hold the license and possess a gun is a valuable individual right in a free country. The security of public peace and public safety is a valuable social interest. Section 17 shows that Parliament had decided that neither of the two valuable interests should unduly impinge on the other Section 17 seeks to establish a fair equilibrium between the two contending interests. It says: Hear the licensee first; and then cancel the license "if necessary for the security of the public peace or for public safety". True, there is no express provision for hearing. But the nature of the right affected, the language of Sec. 17, the grounds for cancellation, the requirement of a reasoned order and the right of appeal plainly implicate a fair hearing procedure. Jai Narain Rai v. District Magistrate, Azamgarh. While cancelling a licence, the District Magistrate acts as a quasi-judicial authority.

7. A license may be cancelled, inter alia on the ground that it is "necessary for the security of the public peace or for public safety" to do so. The District Magistrate has not recorded a finding that it was necessary for the security of the public

peace or for public safety to revoke the license. The mere existence of enmity between a licensee and another person would not establish the "necessary' connection with security of public peace or public safety. There should be something more than mere enmity. There should be some evidence of the provocative utterances of the licensee or of his suspicious movements or of his criminal designs and conspiracy in reinforcement of the evidence of enmity. It is not possible to give an exhaustive list of facts and circumstances from which an inference of threat to public security or public peace may be deduced. The District Magistrate will have to take a decision on the facts of each case. But in the instant case there is nothing in his order to indicate that it was necessary for the security of the public peace or for public safety to cancel the license of the petitioner. Mere enmity is not sufficient."

22. In ***Chhanga Prasad Sahu Vs. State of U.P. and others*** reported in ***1984 AWC 145 (FB)***, after noticing the provisions of Section 17 (3) of the Arms Act the Full Bench in paragraph 5 held as follows:

"A perusal of abovementioned provisions indicates that the licensing authority has been given the power to suspend or revoe an arms licence only if any of the conditions mentioned in sub-clauses (a) to (e) of sub-section (3) of Section 17 of Act exists." sub section (5) of Section 17 makes it obligatory upon the licensing authority to, while passing the order revoking/suspending an arms licence, record in writing the reasons therefore and to, on demand, furnish a brief statement thereof to the holder of the license unless it considers that it will not be in the public interest to do so."

In paragraph-9 it has been emphasised as under:-

"it is true that in order to revoke/suspend an arms licence, the licensing authority has necessarily to come to the conclusion that the facts justifying revocation/suspension of licence mentioned in grounds (a) to (e) of section 17 exist"

23. In ***Ilam Singh v. Commissioner, Meerut Division and others [1987 ALL. L.J. 416]*** this Court held that under Section 17(3) (b) the licencing authority may suspend or revoke a licence if it becomes necessary for the security of public peace or public safety. In this case no report was lodged against the licensee indicating that he had used the gun in the incident which led to the breach of public peace or public safety. It was held that there must be some positive incident in which the petitioner participated and used his gun which led to breach of public peace or public safety and in the absence of the use of the gun by the licencee against the security of public peace or public safety the licence of the gun could not be suspended or revoked. The relevant paragraphs 4 and 5 of the judgment in Ilam Singh (supra) are being reproduced as under:

"4. Having heard the learned counsel for the petitioner I am of the view that the submissions raised by the learned counsel for the petitioner cannot be said to be without substance. Section 17(3) (b) of the Arms Act enacts that licensing authority may by order in writing suspend a licence or revoke the same if it becomes necessary for the security of public peace or the public safety. When once a person has been granted a licence and he acquires a gun, it becomes one of his properties. In the present case no incident of breach of security of the public peace or public sfety at the behest of the petitioner has been pointed out. Even no report was lodged against the petitioner indicating that he used his gun in the incident which led to the breach of public peace or public safety. Even though some reports might have been

lodged but that could not be said to be a sufficient reason to cancel the licence."

5. There must be some positive incident in which the petitioner participated and used his gun which led to the breach of the public peace or public safety. In the absence of the use of the gun by the petitioner against the security of public peace or public safety the licence of the gun of the petitioner was not liable either to be suspended or revoked. The licensing authority as well as the Commissioner committed errors on the face of the record in cancelling the licence of the gun held by the petitioner in utter disregard of the provisions of Section 17 (3) (b) of the Arms Act. In view of these facts the impugned orders cannot be sustained and deserves to be quashed."

24. In ***Habib v. State of U.P. and others [2002 (44) ACC 783]*** this Court held that mere involvement in a criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking licence of fire arm was not justified. Paragraph 3 of this judgment reads as under:

"3. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this court reported in Sheo Prasad Misra Vs. The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision reported in Masi Uddin v. Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside."

25. In ***Satish Singh v. District Magistrate, Sultanpur 2009 (4) ADJ 33 (LB),*** this Court elaborately explained what is detrimental to the security of the public peace or public safety and held that mere involvement in criminal case cannot in any way affect the public security or public interest. Paragraphs 6 and 7 of Satish Singh case (supra) are being reproduced as under:

"6. A plain reading of section 17 indicates that the arms licence can be cancelled or suspended on the ground that the licensing authority deems it necessary for security of the public peace or the public safety. In the present case, while passing the impugned order, neither the District Magistrate nor the appellate authority has recorded the finding as to how and under what circumstance, the possession of arms licence by the petitioner, is detrimental to the public peace or the public security and safety. Merely because criminal case is pending more so, does not seem to attract the provisions of section 17 of the Arms Act. To attract the provisions of section 17 of the Arms Act with regard to public peace, security and safety it shall always be incumbent on the authorities to record a finding that how, under what circumstances and what manner, the possession of arms licence shall be detrimental to public peace, safety and security. In absence of such finding merely on the ground that a criminal case is pending without any mitigating circumstances with regard to endanger of public peace, safety and security, the provisions contained under Section 17 of the Arms Act, shall not satisfy.

7. Needless to say that right to life and liberty are guaranteed under Article 21 of the Constitution of India and the arms licences are granted for personal safety and security after due inquiry by the authorities in accordance with the provisions contained in Arms Act, 1959. The provisions of section 17 of the Arms Act with regard to

suspension or cancellation of arms licence cannot be invoked lightly in an arbitrary manner. The provisions contained under Section 17 of the Arms Act should be construed strictly and not liberally. The conditions provided therein, should be satisfied by the authorities before proceeding ahead to cancel or suspend an arms licence. We may take notice of the fact that any reason whatsoever, the crime rate is raising day by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is fundamental guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilised society, only civilised persons require arms licence for their safety and security and not the criminals. Of course, in case the government feels that arms licence are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of Section 17 of the Arms Act."

28. In ***Thakur Prasad Vs. State of U.P. and others*** reported in ***2013(31) LCD 1460 (LB)*** this Court after referring to the earlier pronouncements in the case of ***Ram Murli Madhukar Vs. District Magistrate, Sitapur [1998 (16) LCD 905]*** and ***Habib Vs. State of U.P., 2002 ACC 783,*** held in paragraphs 10 and 11 as follows:

"10. "Public peace" or "public safety" do not mean ordinary disturbance of law and order public safety means safety of the public at large and not safety of few persons only and before passing of the order of cancellation of arm license as per Section 17 (3) of the Act the Licensing Authority is under an obligation to apply his mind to the question as to whether there was eminent danger to public peace and safety involved in the case in view of the judgment given by this court in the case of Ram Murli Madhukar v. District Magistrate, Sitapur [1998 916) LCD 905], wherein it has been held that license can not be suspended or revoked on the ground of public interest (Jan-hit) merely on the registration of an F.I.R. and pendency of a criminal case."

11. Further, this Court in the case of ***Habib v. State of U.P. 2002 ACC 783*** held as under:

"The question as to whether mere Involvement in a criminal case or pendency of a criminal case can be a ground for revocation of the licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo prasad Misra Vs. District Magistrate, Basti and Others, 1978 AWC 122, wherein the Division Bench relying upon the earlier decision in Masi Uddin Vs. Commissioner, Allahabad, 1972 ALJ 573, found that mere involvement in criminal case cannot, in any way, affect the public security or public interest and the order cancelling or revoking the licence of fire arm has been set aside. The present impugned orders also suffer from the same infirmity as was pointed out by the Division Bench in the above mentioned cases. I am in full agreement with the view taken by the Division Bench that these orders cannot be sustained and deserves to be quashed and are hereby quashed.

There is yet another reason that during the pendency of the present writ petition, the petitioner has been acquitted from the aforesaid criminal case and at present there is neither any case pending,

nor any conviction has been attributed to the petitioner, as is evident from Annexure SA-I and II to the supplementary affidavit filed by the petitioner. In this view of the matter, the petitioner is entitled to have the fire-arm licence."

32. In ***Ghanshyam Gupta v. State of U.P. and others [2016 (34) LCD 3035]*** this Court has again held that the necessary ingredients to invoke jurisdiction of the licencing authority in terms of Section 17 were clearly lacking and no finding had been returned on the basis of materials produced in that regard by the licencing authority, which must justify passing of the order of cancellation. Paragraph 9 of the said judgment is being quoted as under:

"9. In a recent decision of Lucknow Bench of this court in ***Surya Narain Mishra v. Stae of U.P. and others, reported in 2015 (7) ADJ 510,*** similar view has been taken by this Court relying upon subsequent decisions. Para-14 of the judgment is reproduced:

"14. In the case of ***Raj Kumar Verma v. State of U.P., 2013 (80) ACC 231*** this court in paragraph No.3 held as under:-

"The ground for issue of show-cause notice, suspension and ultimately cancellation of the licence is that one and precisely one criminal case was registered against the petitioner. The District Magistrate has also held that the petitioner has been enlarged on bail. He has gone further to observe that if the licence remained intact, the petitioner, may disturb public peace and tranquility. The same findings have been given by the Commissioner, Unmindful of the fact that this Court is repeating the law of the land, but the deaf ears of the administrative officers do not ready to succumb the law of the land. The settled law is that mere involvement in a criminal case without any finding that involvement in such criminal case shall be detrimental to public peace and tranqulity shall not create the ground for the cancellation of Armed Licence. In Ram Suchi v. Commissioner, Devipatan Division reported in 2004 (22) LCD 1643, it was held that this law was relied upon in Balram Singh Vs. Satate of U.P. 2006 (24) LCD 1359. Mere apprehension without substance is simply an opinion which has no legs to stand. Personal whims are not allowed to be reflected while acting as a public servant.

36. In the present case the petitioner's licence was cancelled by the District Magistrate on the ground of pendency of criminal case against him. The petitioner was later on acquitted of the criminal case by order dated 17.1.2003. A perusal of the order of acquittal does not show the use of fire arm. After acquittal the very basis of the order of cancellation vanished. The finding of the District Magistrate as affirmed by the Commissioner, that it was not in the interest of public peace and the public security that the licence remained with the petitioner/licencee, is not based on any evidence/material, except the police reports which in their turn were in view of the pendency of the criminal case against the petitioner. On mere apprehension expressed in the impugned orders that the petitioner would misuse the fire arm and would extend threat to the persons of the weaker section of the society, the arm licence could not be cancelled"

(15). Learned Standing Counsel for the State on the other hand has opposed the writ petition. It is submitted that the arm licence of the petitioner has been cancelled on the ground that at the time of applying for arm licence, the criminal prosecution against the petitioner in Case Crime No.

148 of 1996 under Sections 307, 323 and 504 IPC was pending against the petitioner, which the petitioner did not disclose in the said application.

(16). He submits that there is no infirmity in the finding recorded by the District Magistrate in this regard and accordingly prayed for dismissal of the writ petition.

(17). I have heard learned counsel for the parties and perused the material available on record.

(18). It seems that father of the petitioner was murdered on 11.04.1997 and it was a very traumatic experience for the petitioner and security was provided to him and his family under the conditions that had prevailed. It is in the aforesaid circumstances, the petitioner had to move an application for grant of arm licence and also for security for his person. The arm licence was provided to him within six days i.e. on 17.04.1997 and it is during this period it seems due to oversight he did not disclose about the pendency of the criminal case pending against him.

(19). Undoubtedly, there was suppression information by the petitioner with regard to the pending criminal cases against him but the same has been sought to be justified by the petitioner on account of the peculiar circumstances, which he was faced at the time when the application was moved. Though the power is vested with the District Magistrate to cancel the arm licence, in case licence was obtained by the suppression of material information and on the basis of wrong information provided by the holder of the arm licence and accordingly, it was incumbent upon the District Magistrate to consider whether suppression of fact that an FIR No. 148 of 1996 was lodged against the petitioner amounts to material suppression of fact or not.

(20). The Legislature in its wisdom has provided for material suppression of fact to be a condition for cancellation of arms licence as per Section 17 (3) (c) of the Arms Act. Clearly, the "suppression" would be different from "material suppression of fact". Accordingly, materiel suppression has to be some what more grave than mere material suppression of facts.

(21). This Court is of the considered view that material suppression would be deliberate and intentional suppression of such facts, which if had been disclosed, would have lead to rejection of application for grant of arms licence. Accordingly, whenever, the authority is considering the case for cancellation of arms licence on the ground of suppression of fact it is incumbent to return finding that firstly there was deliberate and intentional suppression of facts and secondly, had the suppressed fact been brought to the knowledge of the licencing authority at the time of grant of arms licence, it would have materially interfered with his discretion regarding grant of the licence.

(22). Though the Prescribed Authority has duly considered the circumstances under which the arm licence was granted but he has failed to consider the relevant aspect of the matter while rejecting the application of the petitioner. The District Magistrate has duly taken into account of the fact that at the time of cancellation of arm licence, the petitioner had already been acquitted by the competent court and consequently at the stage of cancellation

whether the pendency of the said criminal case would be a material consideration of cancellation is an issue which had to be considered by the Prescribed Authority as per the provisions of Section 17 (3) (c) of the Arms Act, 1959.

(23). In light of the aforesaid judgments it is clear that the ground for cancellation of the licence of the petitioner on the ground of pendency of Criminal Case in Case Crime No. 40 of 2006 under Sections 307, 323, 147, 148 & 149 IPC and Section 7 of the Criminal Law Amendment Act is clearly indicate that the said issue has wrongly been decided by the Prescribed Authority as well as appellate authority and the finding in this regard of both the authorities being arbitrary are set aside.

(24). In light of the above, especially considering the fact that the Prescribed Authority has not considered the aspect of the material suppression information at the time of granting arm licence is an issue for which the matter is remitted to the District Magistrate, Pratapgarh for passing afresh orders in light of the directions given hereinabove by this Court.

(25). The petitioner is granted liberty to file a fresh reply before the District Magistrate, Pratapgarh within a period of two weeks from today and the District Magistrate, Pratapgarh is directed to conclude and decide the matter afresh within two months thereafter by a reasoned and speaking order.

(26). In light of the above, the writ petition is allowed.

(2024) 1 ILRA 245
ORIGINAL JURISDICTION

CRIMINAL SIDE
DATED: LUCKNOW 04.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 3 of 2024

Maneesh Kumar ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Alok Kumar Mishra

Counsel for the Opp. Parties:
G.A., Abhishek Singh

Criminal Law - Code of Criminal Procedure,1973 -Section 482 – The Protection of Children from Sexual Offences Act, 2012 - Section 5(ñ)(ii)/6 – Indian Penal Code, 1860 - Sections 376, 323, 504 & 506 -Inherent Powers of High Court – The applicant sought quashing of a charge sheet and summoning order under Sections 376, 323, 504, 506 IPC, Section 5(ñ)(ii)/6 The Protection of Children from Sexual Offences Act, 2012, and Section 3/4 Dowry Prohibition Act, based on a compromise with the victim – Held, the High Court's inherent powers under Section 482 Code of Criminal Procedure,1973 are to prevent abuse of process or secure justice, but quashing proceedings based on compromise depends on the nature and gravity of the offence, as per *Parbatbhai Aheer Vs St. of Guj.*. (Paras 2, 6, 10)

Compromise in Serious Offences – Limitations – The applicant and victim entered a compromise, with the victim marrying the applicant and expressing unwillingness to pursue the case – Held, offences under Section 376 IPC (rape) and Section 5(ñ)(ii)/6 The Protection of Children from Sexual Offences Act,2012(aggravated penetrative sexual assault on a minor) are grave and heinous, impacting society, and cannot be quashed merely on compromise, as they are not private disputes, following *Parbatbhai Aheer Vs St. of Guj.*. (Paras 5, 6, 9, 10)

Dowry Prohibition Act,1961 – Section 3/4 -Public Interest – The applicant was also charged under Section 3/4 Dowry Prohibition Act for demanding dowry and refusing marriage – Held, as per *Arun Singh Vs St. of U.P.*, offences under the Dowry Prohibition Act are against society, and quashing proceedings based on compromise is not in public interest, necessitating continuation of criminal proceedings. (Paras 3, 7, 8)

Intent Behind Compromise – Judicial Scrutiny – The applicant, after being acquitted earlier, married the victim the day after her re-examination in a retrial, where she reaffirmed the allegations – Held, the compromise appeared to be a strategic move to evade criminal liability, as the applicant had previously reneged on a marriage promise after a settlement, reinforcing the need to continue the trial. (Paras 5, 8, 9, 10)

Nature of Offences and Public Policy – The court noted the victim gave birth to a child during the trial and the applicant's history of breaching a prior settlement – Held, the serious nature of the offences (rape, POCSO violations, and dowry demands) and their societal impact preclude quashing based on compromise, as justice demands punishment for such crimes to serve public interest. (Paras 4, 8, 9, 10)

Application Dismissed

List of Cases cited:

1. Parbatbhai Aheer Vs St. of Guj., (2017) 9 SCC 641

2. Arun Singh Vs St. of U.P., (2020) 3 SCC 736

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

1. प्रार्थी के विद्वान अधिवक्ता श्री आलोक कुमार मिश्रा, विद्वान अतिरिक्त शासकीय अधिवक्ता श्री राकेश कुमार सिंह तथा विपक्षी संख्या 2 के विद्वान अधिवक्ता श्री अभिषेक सिंह को सुना तथा पत्रावली का परिशीलन किया।

2. धारा 482 दं०प्र०सं० के अंतर्गत प्रस्तुत इस प्रार्थना-पत्र द्वारा प्रार्थी ने मु०अ०सं० 0271 सन् 2020 अंतर्गत धारा 376, 498 A, 323, 504, 506 भा०द०वि०, धारा 3/4 लैंगिक अपराधों से बच्चों का संरक्षण अधिनियम, 2012 एवं 3/4 दहेज प्रतिषेध अधिनियम, थाना कछौना, जिला हरदोई के अनुक्रम में प्रस्तुत आरोप पत्र संख्या 343/2020 दिनांक 21.07.2020 अंतर्गत धारा 376, 323, 504, 506 भा०द०वि०, धारा 5 (ञ) (ii)/6 लैंगिक अपराधों से बच्चों का संरक्षण अधिनियम, 2012 तथा उक्त आरोप-पत्र के आधार पर संस्थित विशेष सत्र वाद संख्या 1240/2020, में पारित संज्ञान तथा तलबी आदेश दिनांक 07.09.2020 के निरस्तीकरण की प्रार्थना की है।

3. दिनांक 27.05.2020 को विपक्षी संख्या 2 द्वारा प्रार्थी सहित सात व्यक्तियों के विरुद्ध लिखाई गई प्रथम सूचना रिपोर्ट में कहा गया है कि विपक्षी संख्या 2 शादी का झांसा देकर उसके साथ बलात्कार करता रहा तथा जब वह दो माह की गर्भवती हो गई, प्रार्थी ने उससे शादी करने से मना कर दिया। जब शिकायतकत्री अपने पिता के साथ थाने गई तथा पुलिस को पूरी बात बताई, पुलिस ने दिनांक 23.02.2020 को दोनों पक्षों को बुलाकर आपसी सहमति से गवाहों के समक्ष समझौता कराया जिसमें प्रार्थी व उसके माता-पिता प्रार्थी की शादी शिकायतकत्री के साथ दिनांक 25.03.2020 को करने के लिए तैयार

हो गए। शिकायतकत्री के माता-पिता ने शादी का सारा इंतजाम किया तथा खाना बनाने वाले एवं टेंट लगाने वाले को अग्रिम भुगतान कर दिया। शादी के कार्ड छपवाकर रिश्तेदारों को दे दिया। दिनांक 20.03.2020 को प्रार्थी तथा उसके परिवारवालों ने दहेज में एक चार पहिया गाड़ी व रु 3,00,000/- नगद की मांग रख दी और शिकायतकत्री के पिता द्वारा यह मांग पूरी करने में असमर्थता व्यक्त करने पर प्रार्थी ने शादी से इंकार कर दिया।

4. विवेचना के उपरांत दिनांक 21.07.2020 को प्रार्थी के विरुद्ध धारा 376, 323, 504, 506 भा०द०वि० तथा धारा 5 (ञ) (ii)/6 यौन अपराधों से बच्चों का संरक्षण अधिनियम, 2012, के अपराधों के संबंध में आरोप पत्र प्रस्तुत किया। विचारण के उपरांत विद्वान अतिरिक्त सत्र न्यायाधीश पॉक्सो एक्ट, कोर्ट नं० 14, हरदोई ने निर्णय तथा आदेश दिनांक 25.11.2022 द्वारा प्रार्थी को दोषमुक्त कर दिया। उक्त निर्णय में यह अंकित है कि विपक्षी संख्या 2 ने एक पुत्री को जन्म दिया जो बयान लिखे जाने के समय 1.5 वर्ष की थी।

5. उक्त निर्णय दिनांक 25.11.2020 को विपक्षी संख्या 2 के पिता रामचन्द्र ने इस न्यायालय के समक्ष आपराधिक अपील संख्या 6 सन् 2023 द्वारा चुनौती दी, जो दिनांक 21.09.2023 के निर्णय से स्वीकार हुई तथा निर्णय दिनांक 25.11.2022 निरस्त करते हुए मामले को पुनः निर्णीत करने के लिए विचारण न्यायालय के समक्ष प्रतिप्रेषित किया गया है तथा यह भी निर्देश दिया गया कि विचारण न्यायालय पीड़िता का पुनः परीक्षण करेगा। इसके उपरांत पीड़िता का विचारण न्यायालय के समक्ष पुनः परीक्षण हुआ तथा प्रति-परीक्षा के दौरान दिनांक 07.11.2023 को पीड़िता ने कहा कि वह प्रार्थी से शादी करने के लिए तैयार थी तथा आज भी तैयार है और वह यह चाहती है कि प्रार्थी उसको और उसके बच्चे को घर में रखे और उनका ख्याल रखे। इसके उपरांत अगले ही दिन दिनांक 08.11.2023 को प्रार्थी ने विपक्षी संख्या 2 से आर्य समाज मंदिर में विवाह कर लिया। इसके उपरांत दिनांक 15.12.2023 को पक्षों ने एक सुलहनामा निष्पादित कर लिया जिसमें विपक्षी संख्या 2 ने कहा कि वह प्रार्थी के विरुद्ध कोई कार्यवाही नहीं चाहती है।

6. **परबतभाई अहीर बनाम गुजरात राज्य 2017 9 एससीसी 641** में सुलह-समझौते के आधार पर आपराधिक कार्यवाही को निरस्त किए जाने के विषय पर माननीय उच्चतम न्यायालय ने निम्न सिद्धांत प्रतिपादित किए हैं:-

1. धारा 482 दं०प्र०सं० किसी न्यायालय की कार्यवाही का दुरुपयोग निवारित करने के लिए या किसी अन्य प्रकार से न्याय के उद्देश्यों की प्राप्ति सुनिश्चित करने के लिए आवश्यक आदेश पारित करने की उच्च न्यायालय की अंतर्निहित शक्तियों को संरक्षित करती है। यह

प्रावधान कोई नई शक्ति प्रदान नहीं करते हैं। यह सिर्फ उच्च न्यायालय की अंतर्निहित शक्तियों को मान्यता प्रदान करते हैं तथा उन्हें संरक्षित करते हैं।

ii. सुलह-समझौते के आधार पर उच्च न्यायालय से आपराधिक कार्यवाही को निरस्त कराना धारा 320 द०प्र०सं० के अंतर्गत अपराध का शमन करने के समान नहीं है। अपराध का शमन करने की न्यायालय की शक्ति धारा 320 दं०प्र०सं० से सीमित होती है। धारा 482 दं०प्र०सं० की शक्तियां तब प्रयोग की जाती हैं जब अपराध शमन योग्य न हो।

iii. कोई आपराधिक कार्यवाही धारा 482 की शक्ति के अंतर्गत निरस्त की जा सकती हैं या नहीं, यह निर्धारित करने के लिए उच्च न्यायालय को यह तय करना होगा कि क्या न्याय के उद्देश्यों के लिए अपनी अंतर्निहित शक्तियों का प्रयोग करना उचित होगा।

iv. यद्यपि, उच्च न्यायालय की अंतर्निहित शक्तियां काफी विस्तृत प्रभाव की हैं, उनका प्रयोग मात्र न्याय के उद्देश्यों की प्राप्ति सुनिश्चित करने अथवा किसी न्यायालय की कार्यवाही का दुरुपयोग रोकने के लिए किया जाना चाहिए।

V. यह निर्णय कि कोई शिकायत या प्रथम सूचना रिपोर्ट इस आधार पर निरस्त की जा सकती है कि अपराधी और पीड़ित ने अपने विवादों को सुलह से निपटा लिया है, प्रत्येक मामलों के तथ्यों और परिस्थितयों पर निर्भर करता है तथा इस संबंध में कोई विस्तृत सिद्धांत प्रतिपादित नहीं किए जा सकते हैं।

vi. सुलह के आधार पर धारा 482 के अंतर्गत कार्यवाही निरस्त करने के अनुरोध को तय करते समय उच्च न्यायालय को अपराध की प्रकृति और गंभीरता को ध्यान में रखना चाहिए। जघन्य और गंभीर प्रकृति के अपराध, जिनमें मानसिक विकृति सम्मिलित हो अथवा हत्या बलात्कार तथा डकैती जैसे अपराधों से संबंधित मामले पक्षों में सुलह के आधार पर निरस्त नहीं किए जा सकते हैं। वास्तविकता में ऐसे अपराध निजी प्रकृति के नहीं हैं, अपितु यह समाज पर एक गंभीर प्रभाव डालते हैं। ऐसे मामलों के विचारण को जारी रखने का निर्णय जनहित के इस सिद्धांत पर आधारित है कि गंभीर अपराध कारित करने वाले व्यक्तियों को दण्डित करना जनहित में अनिवार्य हैं।

vii. गंभीर अपराधों से भिन्न ऐसे आपराधिक मामले हो सकते हैं जिनमें मुख्यतया दीवानी प्रकृति का विवाद है। ऐसे मामले निरस्तीकरण की अंतर्निहित शक्तियों के संदर्भ में एक भिन्न पायदान पर रखे जा सकते हैं।

viii. ऐसे आपराधिक मामलें जिनमें वाणिज्यिक, आर्थिक, व्यापारिक भागीदारी से संबंधित अथवा इसी प्रकार के अन्य लेन देन सम्मिलित हो,

जो मूलतः दीवानी प्रकृति के हैं, जहां पक्षकारों ने अपने विवाद को सहमति से तय कर लिया हो ऐसे उचित मामलों में न्यायालय कार्यवाही को निरस्त कर सकती है।

ix. उच्च न्यायालय ऐसे मामलों में भी आपराधिक कार्यवाहियों को निरस्त कर सकती है जहां पक्षकारों के मध्य सुलह हो जाने के कारण दोषी किए जाने की संभावना क्षीण हो गई है तथा आपराधिक वाद की कार्यवाही जारी रखना मात्र उत्पीड़नात्मक होगा।

x. ऊपर धारा (viii) तथा (ix) में कहे गए सिद्धांत का एक अपवाद भी है। ऐसे आर्थिक अपराध, जो राज्य के आर्थिक स्वास्थ्य को प्रभावित करते हैं, एक निजी विवाद के क्षेत्र से कहीं बाहर का असर रखते हैं, ऐसे मामलों में उच्च न्यायालय निरस्त करने से इंकार कर सकता है जहां अपराधी किसी आर्थिक धोखाधड़ी में लिप्त है। राज्य की आर्थिक संरचना पर ऐसे कृत्यों के प्रभाव का मूल्यांकन करना आवश्यक होगा।

7. **अरुण सिंह तथा अन्य बनाम उत्तर प्रदेश राज्य, 2020 3 एससीसी 736** में माननीय उच्चतम न्यायालय ने धारा 3/4 दहेज प्रतिषेध अधिनियम के अंतर्गत आपराधिक कार्यवाही को सुलह के आधार पर निरस्त करने की प्रार्थना अस्वीकार करने के इस उच्च न्यायालय के आदेश को उचित ठहराते हुए यह कहते हुए अपील खारिज कर दी थी कि दहेज प्रतिषेध अधिनियम के अंतर्गत अपराध निजी अपराध की श्रेणी में न आ करके पूरे समाज के विरुद्ध अपराध हैं। ऐसे अपराधों के संबंध में

आपराधिक कार्यवाहियों को जारी रखना जनहित में ऐसे अपराधों को दण्डित करने के लिए आवश्यक है।

8. उपरोक्त विधियों के आलोक में प्रस्तुत तथ्यों को देखने से ऐसा प्रतीत होता है कि पुलिस में शिकायत करने पर प्रार्थी तथा उसके माता-पिता शिकायतकत्री से प्रार्थी के विवाह के लिए राजी हुए, किंतु विवाह की तिथि से थोड़ा ही पहले दहेज की मांग करते हुए पुनः विवाह से इंकार कर दिया।

9. प्रार्थी के विरुद्ध धारा 376 दं०प्र०सं० के अंतर्गत बलात्कार का अपराध तथा धारा 5 (ञ) (ii) के अंतर्गत बालिका पर लैंगिक प्रवेशन करके गर्भवती करने का अपराध कारित करने का आरोप है, जो अपराध अत्यंत गंभीर प्रकृति के हैं। प्रार्थी ने पीड़िता द्वारा थाने में शिकायत करने पर पूर्व में एक बार सुलह की और पीड़िता से विवाह करने की सहमति दी, जिसको विवाह की तैयारी के बाद विवाह की तिथि के 5 दिन पहले वापस ले लिया। प्रार्थी एक बार विचारण न्यायालय के सामने सफलतापूर्वक मुकदमा लड़ चुका है तथा विचारण के दौरान पीड़िता ने एक पुत्री को जन्म दिया है। जब उसकी दोषमुक्ति का आदेश इस न्यायालय द्वारा

अपास्त कर दिया गया तथा पुनः विचारण के दौरान इस न्यायालय के आदेश के अनुसार पीड़िता का बयान अंकित किया गया जिसमें उसने प्रार्थी के विरुद्ध आरोपों को पुष्ट किया, इसके तुरंत बाद अगले ही दिन प्रार्थी ने पीड़िता से मुकदमें की कार्यवाही समाप्त करवाने के उद्देश्य से पीड़िता से सुलह करके विवाह कर लिया, जिससे प्रथम दृष्टया प्रतीत होता है कि प्रार्थी द्वारा सुलह मात्र आपराधिक मुकदमें से बचने के उद्देश्य से की गई थी ।

10. मामले के उपरोक्त विशेष प्रकृति के तथ्यों और परिस्थितियों को देखते हुए न्यायालय का मत है कि बलात्कार तथा बालिका के विरुद्ध लैंगिक प्रवेशन करके उसको गर्भवती करने का आरोप अत्यंत गंभीर प्रकृति का होने के कारण प्रार्थी के विरुद्ध आपराधिक वाद की कार्यवाही सुलह के आधार पर समाप्त नहीं की जा सकती है।

11. उपरोक्त विवेचना के आधार पर प्रार्थना-पत्र **निरस्त** किया जाता है।

(2024) 1 ILRA 250
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 8 of 2024

Pooja Singh & Anr. ...Applicants
Versus
State of U.P. ...Opp. Party

Counsel for the Applicants:
Dharmendra Kumar, Santosh Kumar Giri

Counsel for the Opp. Party:
G.A.

Criminal Law - Code of Criminal Procedure,1973 - Section 482 – Indian Penal Code,1860 - Sections 376, 313, 323, 504, 506 & 507 - Quashing of Criminal Proceedings Based on Compromise – The applicants sought to quash the proceedings of Sessions Trial No. 378 of 2021 under Sections 376, 313, 323, 504, 506, 507 IPC based on a compromise deed dated 29.12.2023 – Held, the proceedings were quashed as the complainant (petitioner no. 1) and accused (petitioner no. 2) were married, living happily with a son, and the complainant was unwilling to prosecute, rendering further trial futile. (Paras 3, 7, 10, 11)

B. Private Nature of Dispute – The dispute arose from an FIR lodged by petitioner no. 1 (wife) against petitioner no. 2 (husband) due to a misunderstanding – Held, as the offence was private in nature with no societal impact, and the parties had amicably settled, quashing the proceedings was justified. (Paras 7, 8)

C. Complainant's Reluctance to Prosecute – Petitioner no. 1, the complainant, St.d in court that she was unwilling to prosecute her husband (petitioner no. 2) or others, as they were living peacefully with a child – Held, compelling the complainant to pursue the trial would be a waste of judicial time and prejudicial to the parties. (Paras 5, 7, 8)

D. Judicial Precedent for Quashing Based on Compromise – Relying on *Jatin Agarwal Vs St. of Telangana*, the court noted that criminal proceedings involving private disputes, particularly between spouses who have reconciled, may be quashed – Held, the present case warranted quashing due to the parties' marriage and amicable settlement. (Paras 9, 10)

E. Directive for Marriage Registration – The court directed the petitioners to register their marriage under the Uttar Pradesh Marriages Registration Rules, 2017 within one month – Held, this ensured legal formalization

of their marital status post-compromise. (Para 12)

Application Allowed

List of Cases cited:

1. Jatin Agarwal Vs St. of Telangana, AIRONLINE 2022 SC 1464

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

1. Heard Sri Dharmendra Kumar, learned counsel for the petitioners and Sri Ram Raj Singh, learned AGA for the State.

2. With the consent of parties, the case is being decided finally at the admission stage.

3. By means of this petition filed u/s 482 Cr.P.C. the following relief has been prayed :

"Wherefore, it is most respectfully prayed that this Hon'ble court may kindly be pleased to quash entire criminal proceeding of Session Trial No. 378 of 2021 arising out of charge sheet dated 3.9.2020 filed by investigating officer in Crime No. 117 of 2020 u/s 376, 313, 323, 504, 506, 507 I.P.C. relating to Police Station -Indira Nagar, District Lucknow in re- State Versus Devendra Pratap Singh on the basis of compromise dated 29.12.2023, contained as Annexure No. -1 to the application, in the interest of justice.

Meanwhile, this Hon'ble Court may kindly be pleased to stay the further proceeding of Session Trial No. 378 of 2021 arising out of Crime No.-117 of 2020 under section -376, 313, 323, 504, 506, 507 IPC relating to Police Station-Indira Nagar, District Lucknow pending in the court of Fast Track Court, Lucknow, in re- State Versus Devendra Pratap Singh, in the interest of justice."

4. Though the petitioners were not summoned to appear before the Court but they have appeared to convince the Court that they have settled their dispute amicably through registered compromise deed, the original copy thereof has been enclosed as Annexure no. 1. Learned counsel for the petitioners has stated that having some wrong impression and confusion the petitioner no. 1 has lodged a F.I.R. on 14.3.2020 u/s 376, 313, 323, 504, 506, 507 I.P.C. against the petitioner no. 2 and two others. However, the petitioner no. 1 married with the petitioner no. 2 on 6.12.2021 by adopting Hindu rituals and since then i.e. 6.12.2021 both are living together as husband and wife. On 27.11.2022 both became parents of one son. The parties are present in the Court with their son also.]

5. Learned counsel for the petitioners has further submitted that after lodging the F.I.R. the charge-sheet was filed, court concerned has taken cognizance, matter was committed to sessions, thereafter charges were framed and trial proceeded. The Sessions Trial number is 378 of 2021. The chief-examination of petitioner no. 1 has already taken place but she has not been cross-examined till date. On being asked from Ms. Pooja Bharti @ Pooja Singh as to whether she is willing to prosecute the petitioner no. 2 i.e. Devendra Pratap Singh and others in the sessions trial, she has specifically and categorically stated that the petitioner no. 2 is her husband, they are having one son, they are living peacefully together and she has no grudges or grievance against her husband or others against whom the allegations have been levelled in the F.I.R. At the same time

the petitioner no. 2 i.e. Devendra Pratap Singh has also informed the Court that he is living with his wife Pooja Bharti @ Pooja Singh w.e.f. 6.12.2021, they are happily living, he has no grievance of any kind whatsoever against his wife i.e. Pooja Bharti @ Pooja Singh, therefore, he prayed that the criminal case pending against him may be set aside / quashed on the basis of aforesaid compromise.

6. Sri Ram Raj Singh, learned AGA has stated that though the sessions trial is in process wherein the cross-examination of complainant / petitioner no. 1 is to take place but if the complainant / informant herself is not willing to prosecute her husband i.e. petitioner no. 2 and they have entered into a compromise then any appropriate order to suffice the ends of justice may be passed.

7. Having heard learned counsel for the parties and having perused the material available on record as well as having regard to the statements, so recorded by the petitioners before the Court, more particularly, the statement of the petitioner no. 1 who is informant / complainant to the effect that she is not willing to contest the criminal case before the sessions court and she is not willing to prosecute her husband and others with whom she is living peacefully and she is also having son with the wedlock with the petitioner no. 2 and she has also stated that she has entered into an agreement / compromise with her free-will and without any coercion, so I find that no fruitful purpose would be served to proceed the sessions trial further. In the given facts and circumstances as considered above to permit the sessions trial further would not only be a sheer waste of time of sessions court but also may cause prejudice to the parties who are happily living as husband and wife since 6.12.2021 and are having son since 27.11.2022.

8. The purpose of criminal justice is to prosecute the wrong doer who has committed any offense but it would not be the purpose of the criminal justice to compel any person to face prosecution when the complainant / informant is his wife and has admitted that on account of some wrong advice or under bad impression the case was lodged and she is not willing to contest the case. Besides, the facts and circumstances of the present case do not involve the serious allegations or any allegation relating to any offense against society and the dispute appears to be private in nature wherein the petitioner no. 1 has lodged a F.I.R. against the petitioner no. 2 who are admittedly husband and wife having one son, therefore, if the proceedings of the aforesaid case are set aside or quashed, it will not have any impact upon the society. The law is trite that the serious offences having impact upon the society may not be quashed or set aside on the basis of compromise but the minor offences or criminal offences which are not having any direct impact on the society, rather those offences are private in nature may be set aside / quashed on the basis of agreement. In these minor offences etc. the parties may not be compelled to face the trial proceedings when they are not interested to prosecute each other.

9. The Hon'ble Apex Court in re: ***Jatin Agarwal vs. State of Telangana, AIRONLINE 2022 SC 1464*** has quashed the order of the High Court which was passed u/s 482 Cr.P.C. dismissing the petition of the petitioner wherein it was pleaded before the High Court that the

petitioner, Jatin Agarwal, has married with the lady and living happily with her as husband and wife, therefore, the F.I.R. u/s 417, 420 and 376 IPC may be quashed. However, the High Court rejected the petition, the Apex Court has observed that considering the aforesaid fact and keeping in a view that the lady has herself made a statement before the Apex Court that she has married with the appellant and now living happily, quashed the aforesaid F.I.R.

10. In the aforesaid case, notably both the petitioners are husband and wife and the petitioner no. 1 has herself made a statement before the Court that she has married the petitioner no. 2 and now living happily with him, therefore, I find this a fit case wherein the criminal proceedings of Sessions Trial No. 378 of 2021 arising out of charge sheet dated 3.9.2020 filed by investigating officer in Crime No. 117 of 2020 u/s 376, 313, 323, 504, 506, 507 I.P.C. relating to Police Station -Indira Nagar, District Lucknow in re- State Versus Devendra Pratap Singh is liable to be set-aside and quashed.

11. In view of the above, I hereby ***quash*** the entire proceedings of Sessions Trial No. 378 of 2021 arising out of charge sheet dated 3.9.2020 filed by investigating officer in Crime No. 117 of 2020 u/s 376, 313, 323, 504, 506, 507 I.P.C. relating to Police Station -Indira Nagar, District Lucknow in re- State Versus Devendra Pratap Singh pending in the court of Fast Track Court, Lucknow.

12. The petitioners shall get their marriage registered under the "Uttar Pradesh Marriages Registration Rules, 2017" within one month from today.

13. In view of above, the petition is ***allowed.***

14. Consequences to follow.

15. No order as to costs.

(2024) 1 ILRA 253
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 13 of 2024

Santosh Kumar @ Santosh Kumar Verma ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Shitesh Jha, Dr. Shailendra Sharma

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Sections 154, 156(1), 156(3) & 482 - Indian Penal Code, 1860 - Sections 34, 323, 354, 452, 504, 506 & 386 - Applicant challenged order treating Section 156(3) Cr.P.C. application as a complaint and summoning him for offences under Sections 452, 323, 506, 354 I.P.C., alleging false allegations to pressure him. Court held: (1) Police lacked authority to investigate allegations in Section 156(3) application without Magistrate's direction, as investigation under Section 156(1) requires FIR registration under Section 154 (*Central Bureau of Investigation Vs Aryan Singh, 2023 SCC OnLine 379*). (2) Police report declaring allegations false was beyond jurisdiction, as their role is limited to reporting whether a case was registered, not investigating without court order. (3) Under Section 482, court cannot conduct a mini-trial to assess correctness of allegations; applicant can raise defenses during trial. (4) Application lacked merit, as validity of allegations must be tested in trial, not under Section 482 jurisdiction. Application rejected. (Paras 9-12)

Application Rejected.

List of Cases cited:

1. Central Bureau of Investigation Vs Aryan Singh, 2023 SCC OnLine 379 (Para 11)

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

1. Heard Sri Shitesh Jha, the learned counsel for the applicant and Sri Arun Kumar Verma, the learned A.G.A for the State.

2. By means of an instant application filed under Section 482 Cr.P.C, the applicant has assailed validity of an order dated 20.10.2022 passed by the Additional Chief Judicial Magistrate, Court No. 25, Barabanki in Miscellaneous Application No. 347 of 2022, ordering an application under Section 156(3) Cr.P.C filed by the opposite party no.2 to be registered as an complaint. The applicant has also assailed validity of an order dated 27.07.2023 passed by the aforesaid court summoning the applicant to face the trial court for commission of offences under Sections 452, 323, 506 and 354 I.P.C.

3. The submission of the learned counsel for the applicant is that on the application under section 156(3) filed in the court, a report was called for and the police has submitted a report dated 20.09.2022 stating that the applicant has filed an F.I.R No. 456 of 2022 under Sections 34, 323, 354, 504, 506, 452 I.P.C in P.S Masauli, District Barabanki.

4. After lodging of the aforesaid F.I.R., some persons from the other side again attacked the applicant's house in the night of 14.08.2022 regarding which another F.I.R No. 467 of 2022 under Sections 34, 323, 386, 504, 506 I.P.C. has been lodged. The police reported that the application under Section 156(3) Cr.P.C has been filed to put pressure on the applicant. The report also stated that the incident alleged in the application under Section 156(3) Cr.P.C could not be established in investigation and the allegations were found to be false and baseless. Towards the closure of the report, it was stated that no case has been registered regarding the incident lodged in the complaint.

5. The learned counsel for the applicant has submitted that a co-accused Dr. Chandra Kant Verma has filed an application under Section 482 Cr.P.C No. 10672 of 2023 in which an interim order has been passed on 01.11.2023.

6. The learned A.G.A has opposed the application and he has submitted that while deciding an application under section 482 Cr.P.C., this court cannot hold a mini trial to adjudicate upon the correctness of the allegation.

7. I have considered the aforesaid facts and circumstances of the case and the submissions advanced by the learned counsel for the applicant.

8. In the application under Section 156(3) Cr.P.C, the opposite party no.2 alleged commission of a cognizable offence by six accused persons and it was further stated in the application that the applicant had given an application to the Superintendent of Police, Barabanki, but no action was taken in furtherance thereof.

9. While submitting a report on this application, the police is merely required to intimate where any case has been registered on the basis of the allegations levelled in

the compliant or not. When the application is pending consideration of the court, the police is not expected to carry out the investigation into the allegations levelled in the application filed before the court, without a direction to this effect being issued by the court.

10. The police may investigate a cognizable offence under Section 156(1), after registration of an F.I.R under Section 154 Cr.P.C but without registration of an F.I.R, the police cannot initiate any investigation. When no F.I.R was registered and merely an application under Section 156(3) was filed, investigation can be carried out under Section 156(3) Cr.P.C only under an order passed by a Magistrate. Therefore, the police has acted beyond authority in carrying out an investigation and submitting a report to the Magistrate that the allegations levelled in the complaint could not be established.

11. In the case of **Central Bureau of Investigation vs. Aryan Singh Etc**., 2023 SCC Online 379, the compliant has been registered and the applicant has been summoned to face the trial, he can raise all the pleas available to him and submit evidence in his defense and the correctness of the allegations levelled in the application will be decided by the trial court after the parties have lead their evidence in support of their respective case. While deciding an application under Section 482 Cr.P.C, this court cannot go into correctness of the allegation and the application cannot be allowed on the ground that the allegations are false.

12. In view of the aforesaid discussion, the application lacks merits and the same is accordingly ***rejected.***

(2024) 1 ILRA 255
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 23 of 2024

Kismati & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Aditya Tiwari, Deepranjan Pandey

Counsel for the Opp. Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 156(3), 200, 202 & 482 – Indian Penal Code, 1860 - Section – 323, 504 & 506 - Application u/s 482 - for quashing the entire criminal proceedings – during pendency of a Civil dispute between the parties – an incident u/s 323, 504, 506 was took place – FIR – not registered – complaint was filed – controverted allegations - final report – protest petition – allowed – complaint case registered – Statement recorded – summoned issued – plea taken that proceedings have been instituted maliciously because of a property dispute is between the parties – court observed that – the power of quashing a criminal proceedings should be exercise very sparingly and with circumspection and that too in the rarest of rare cases and this 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 – court held that, there is sufficient evidence for prosecution of the applicants and it cannot be said at this stage that the proceedings are liable to be quashed for the reason that the same have been maliciously instituted and that can only be decided after the parties adduce in support of their respective cases – accordingly, Application is dismissed. (Para –10, 13)

Application Dismissed. (E-11)

List of Cases cited:

1. St. of Har. Vs Bhajan Lal – 1992 Supp. (1) SCC 335,

2. Central Bureau of Investigation Vs Aryan Singh etc. 2023 SCC Online SC 379.no Case referred.

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

1. Heard Sri Aditya Tiwari, the learned counsel for the applicants, Sri Anant Pratap Singh, the learned AGA for the State and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicants have sought quashing of entire proceedings of Criminal Complaint Case No. 20685 of 2022 "Mayaram v. Rajveer Yadav & Others", arising out of the charge sheet Case Crime/FIR No. 179/2021 under Sections 323, 504 & 506 IPC, and final report dated 27.12.2021, Police Station Hanswar, District Ambedkar Nagar, pending in the Court of Civil Judge (Jr. Div.)/FTC/ Additional Chief Judicial Magistrate, Ambedkar Nagar including the impugned summoning order dated 20.10.2023.

3. The FIR lodged on 26.11.2021 in furtherance of an application under Section 156 (3) Cr.P.C. filed on 30.06.2021 against 5 persons, including the applicants, alleged that a property dispute is going on between the informant and the applicant no. 2, due to which reason the accused persons came to the informant's house and started abusing him. When the informant opposed it, on the exhortation of the applicant nos. 1 and 4, the applicant no. 2 pushed the informant to the ground and he and another accused Beenu Yadav had beaten him with kicks and fists. When the informant's daughter-in-law tried to save him, the accused persons beaten her also and snatched away a chain from her neck. The FIR further stated that the informant had called the Police by dialing 112. The police had taken both the parties to the police station but neither the informant's report was registered, nor was he and his daughter-in-law examined medically. On 15.05.2021, the informant got himself and his daughter-in-law medically examined and thereafter he sent an application to the Superintendent f Police through registered post and when no action was taken on it, he filed the application under Section 156 (3) Cr.P.C.

4. The medico-legal examination report of the informant mentions complaint of pain over chest and a contusion over left side of back of scapula. The medico legal examination report of the informant's daughter-in-law Sarita Pal mentions a contusion on right side of her face and complaint of pain.

5. The injured persons had supported the FIR allegations in their statements recorded during investigation. However, some villagers had stated that no such incident had taken place. The investigating officer had submitted a final report on 27.12.2021. The informant filed a protest petition. The same was allowed and was treated as a complaint. Statements were recorded under Sections 200 and 202 Cr.P.C. Besides the injured persons, an independent person has also given statement under Section 202 Cr.P.C. in support of the complaint allegations. Thereafter the applicants have been summoned to face the trial.

6. The learned counsel for the applicant has submitted that the FIR has

been lodged on false allegations because of a property dispute between the parties and the proceedings have been maliciously instituted. He has placed reliance on the judgment of the Hon'ble Supreme Court in **State of Haryana v. Bhajan Lal**, 1992 Supp (1) SCC 335, wherein the Hon'ble Supreme Court has held as follows:-

"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.

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."

7. The learned counsel for the applicants submits that the present case is covered by clauses (3) and (7) of para 102.

8. The FIR in the present case categorically states that the accused persons had abused and beaten up the informant and his daughter-in-law, both of whom had suffered injuries in the incident. The FIR also alleges that the accused persons had snatched away a chain from the neck of the informant's daughter-in-law. The uncontroverted allegations clearly make out commission of cognizable offences by the accused persons. The injured person and an independent witness have supported the allegations in their statements recorded by the trial Court under Sections 200 and 202 Cr.P.C. The allegations are also supported by the medico-legal examination report of the complainant and his daughter-in-law. Therefore, the submission of the learned counsel for the applicants that the present case is covered by clause (3) of para 102 of Bhajan Lal's case, is entirely misconceived and the same is accordingly turned down.

9. The next submission of the learned counsel for the applicant is that the proceedings have been instituted maliciously because of a property dispute between the parties.He has submitted that the reason for false implication is that Saurabh Pal, son of the informant Maya Ram Pal had made an application for claiming a right of way from the land recorded in the name of the applicant no. 1 - Kismati, which claim was rejected by means of an order dated 09.12.2020. Thereafter, he persisted with this claim, which was again rejected on 21.12.2020 and 29.01.2021. Thereafter the applicant no. 1 had filed a suit against the informant and other persons for perpetual injunction which has been registered as Suit No. 571 of 2020 in the Court of Civil Judge (Senior Division), Tanda, Ambedkar Nagar and the FIR has been lodged maliciously due to the aforesaid civil dispute.

10. As has been held in **Bhajan Lal (Supra)**, the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases and this 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.

11. In **Central Bureau of Investigation versus Aryan Singh etc**., 2023 SCC OnLine SC 379, the Hon'ble Supreme Court was dealing with an appeal filed against a judgment and order by which the High Court of Punjab and Haryana, in exercise of the powers under Section482Cr. P.C., had quashed the criminal proceedings. Initially, the accused Aryan Singh was not named in the FIR. However, after conclusion of the investigation, the charge-sheet came to be filed against the said Aryan Singh also and he was included as one of the accused. The High Court had quashed the entire criminal proceedings by observing that the allegations/charges against the accused had not been proved and that the prosecution was malicious. Allowing the appeal, the Hon'ble Supreme Court held that: -

"10.From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial

and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Section482Cr. P.C., the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. This is not the stage where the prosecution/investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution/investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under Section482Cr. P.C., the Court has a very limited jurisdiction and is required to consider "whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not".

12. In **Aryan Singh (Supra)**, the High Court had also recorded that the initiation of the criminal proceedings/proceedings was malicious. The Hon'ble Supreme Court held that: -

"the High Court has erred in observing at this stage that the initiation of the criminal proceedings/proceedings is malicious. Whether the criminal proceedings was/were malicious or not, is not required to be considered at this stage. The same is required to be considered at the conclusion of the trial. In any case, at this stage, what is required to be considered is a prima facie case and the material collected during the course of the investigation, which warranted the accused to be tried."

13. In the present case, when there is prima facie material to establish the allegations and a care is made out for trial of the accused persons, the proceedings cannot be quashed holding the same to have been instituted maliciously. The property dispute between the parties can be a cause for false implication of the applicants but at the same time it can also be a motive for commission of the offence. When the informant and his daughter-in-law have suffered injuries in the incident and they have supported the FIR allegations by their statements, which is also supported by the medico legal examination report and the statement of an independent witness, there is sufficient evidence for prosecution of the applicants and it cannot be said at this stage that the proceedings are liable to be quashed for the reason that the same have been maliciously instituted. Whether the proceedings have been instituted maliciously, is a question that can only be decided after the parties adduce evidence in support of their respective cases.

14. In view of the foregoing discussion, the application lacks merit and the same is ***dismissed***.

(2024) 1 ILRA 259
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 358 of 2024

Ramesh Kumar ...Applicant

Versus

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

Counsel for the Applicant:
Bhola Singh Patel, Beant Singh, Vivek Kumar Verma

Counsel for the Opp. Parties:
G.A.

Criminal Law - U.P.Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Section-3(1) - Upon perusal of record and relevant case law, it is evident that once all criminal cases cited in gang chart stand quashed / set aside on basis of compromise between the parties by Court, thus foundation of proceedings under Gangsters Act fails, and therefore such criminal proceedings cannot survive on the basis of maxim "Sublato fundamento, cadit opus." - Thus, impugned order, quashed. (Para 9, 10)

Application allowed. (E-13)

List of Cases cited:

1. Salim Vs St. of U.P., (Allahabad) : 2019(12) ILR (Allahabad) 133, (Paras 7 to 10, 13)

2. Sartaj Vs St. of U.P. : 2020(111) ACrC 51 : 2020(1) ILR (Allahabad) 1659

3. Jai Prakash & ors. Vs St. of U.P., Criminal Revision No. 3309 of 2008, judgment dated 12.3.2019

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

1. Heard Sri Vivek Kumar Verma, learned counsel for the petitioner and Sri Ram Raj Singh, learned AGA for State.

2. By means of this petition the petitioner has prayed following relief :

"Wherefore, it is most respectfully prayed that this Hon'ble High Court may kindly be pleased to quash the impugned order dated 17.01.2023, passed by the Special Judge, Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, Additional Session Judge, Court No.-08. Barabanki in Gangster Case No. 2009/2021, State Vs Ramesh Kumar & others, arising out case crime no. 215/2020, under section-3(1) Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, Police Station-Satrikh, District- Barabanki, and also quash its consequential criminal proceeding, contained as Annexure No 1 to this petition."

3. This is a case which can be appreciated on the basis of maxim "***Sublato fundamento, cadit opus***" which means if the foundation of anything is vanished, the super structure constructed whereon shall automatically demolish.

4. Learned counsel for the petitioner has drawn attention of this court towards the gang chart (Annexure no. 3) wherein three cases have been imposed against the petitioner bearing Case Crime Nos. 336 of 2019 u/s 406 & 506 IPC, P.S. Kotwali Nagar, District Barabanki, Case Crime No. 96 of 2020 u/s 323, 504, 506, 342 IPC, P.S. Satrikh, District Barabanki, Case Crime No. 121 of 2020 u/s 420, 504 & 506 IPC, P.S. Satrikh, District Barabanki. Learned counsel for the petitioner has stated that the proceedings of all the aforesaid three cases have been quashed by this Court on the basis of compromise between the parties.

5. Attention has been drawn towards the order dated 18.4.2023 passed by this Court in Application U/s 482 No. 1009 of 2023 allowing the petition filed u/s 482 Cr.P.C. quashing the entire proceedings emanating pursuant to the Case Crime no.

7341/2020 arising out of Crime No. 0336 of 2019 (supra).

6. Further, attention has been drawn towards the order dated 31.8.2022 passed in Application U/S 482 No. 5429 of 2022 (Ramesh Kumar Yadav vs. State of U.P. & others) quashing the entire proceedings emanating from F.I.R./ Crime No. 0121/2020 (supra). Further, attention has been drawn towards the order dated 20.3.2023 passed by this Court in Application U/S 482 No. 1001 of 2023 quashing the entire proceedings emanating out of Crime No. 0096 of 2020 (supra). Learned counsel for the petitioner has submitted that there is one more case bearing Case No. 194 of 2020 u/s 307, 325, 427 IPC, P.S. Satrikh, District Barabanki, though that case is not included in the gang chart but the proceedings emanating to aforesaid crime case have been quashed / set aside by this Court on the basis of compromise vide an order dated 11.7.2023.

7. Learned counsel for the petitioner has, therefore, submitted that since the entire proceedings of the crime cases which have been indicated in the gang chart have been set aside / quashed by this Court, therefore, the proceedings of Gangster Act may not continue any longer against the petitioner inasmuch as the proceedings under the Gangster Act are not independent proceedings rather same proceedings depends upon the cases which have been indicated in the gang-chart. In support of the aforesaid arguments learned counsel for the petitioner has cited some case laws i,e. ***Salim vs. State of U.P., (Allahabad) : 2019(12) ILR (Allahabad) 133, Sartaj vs. State of U.P. : 2020(111) ACrC 51 : 2020(1) ILR (Allahabad) 1659 and judgment dated 12.3.2019 in Criminal Revision No. 3309 of 2008 : Jai Prakash and others vs. State of U.P.*** wherein the concurrent view of this Court is that since the proceedings under the Gangster Act are not the independent proceedings, therefore, implication and trial of the accused-applicant u/s 2/3 of Gangster Act was not justified if the criminal cases, so indicated in the gang-chart have either been quashed / set aside or in those cases the accused person has been acquitted.

8. Learned AGA has, however, tried to justify the proceedings of Gangster Act by saying that the criminal proceedings of the Gangster Act are going on and those proceedings may not be quashed / set aside for the reason that the cases, so indicated in the gang-chart have been set aside. However, on being confronted on the point that if all the criminal cases which have been indicated in the gang chart have been set aside / quashed by this Court then how and on what basis the petitioner may be implicated and punished u/s 2/3 of the Gangster Act, he could not give proper reply.

9. Having heard learned counsel for the parties, having perused the material available on record and having regard to aforesaid case laws, I am also of the considered opinion that when all the criminal cases which have been indicated in the gang chart have been set aside / quashed by this Court then the foundation of the Gangster Act goes and if the very foundation of the Gangster Act goes and the proceedings of Gangster Act would not survive on the basis of maxim "***Sublato fundamento, cadit opus"***. Notably, this Court in re: ***Salim vs. State of U.P. (supra)*** while allowing the petition, considered and perused the judgments of the Apex Court in para 7,8,9,10 and 13 which are being reproduced herein below :

"7. In support of his contention learned counsel has further placed reliance on the judgment of the Apex Court in the case of N.R. Ghosh vs. the State of West Bengal, AIR 1960 Supreme Court (SC) 239 and has relied upon in paragraph 22 of the same reads as under:-

"The principle stated in the section is that when a person has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of it, he shall not while the conviction or acquittal remains in force, be tried again for the same offence. In order, therefore, that the appellant may have the benefit of the section he must have been tried by a court of competent jurisdiction. Furthermore, such acquittal must be in force."

8. Reference to the Apex Court judgment in the case of Manipur Administration, Manipur vs. Thokchon Veere Singh, AIR 1965 (SC) 87 has also been made wherein paragraph 6 are as follows:-

Before referring to the decision of this Court in Pritam Singh v. State of Punjab(1) it would be convenient to refer to and put aside one point for clearing the ground. Section 403, Criminal Procedure Code embodies in statutory form the accepted English rule of autre fois acquit. This section is as follows:-

"403 (1) A person who has been once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any offence for which a different charge from the one made against him might have been made under s. 236, or for which he might have been convicted under section 237. (2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1). (3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(1) A.T.R. 1956 S.C. 415.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation-The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section." Section 26 of the General Clauses Act which is referred to in s. 403 enacts:

"26. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

We might also, in this connection, refer to Art. 20(2) of the Constitution since it makes provision for a bar against a

second prosecution in an analogous case. That provision reads:

"20(2). No person shall be prosecuted and punished for the same offence more than once." As has been pointed out by this Court in State of Bombay v. S. L. Apte(1), both in the case of Art. 20(2) of the Constitution as well as s. 26 of the General Clauses Act to operate as a bar the second prosecution and the consequential punishment thereunder, must be for "same offence" i.e., an offence whose ingredients are the same. It has been pointed out in the same decision that the V Amendment of the American Constitution which provides that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb, proceeds on the same principle.

9. Reliace on Apex Court judgment in the case of Lalta and others vs. State of U.P., AIR 1970 (SC) 1381 has been made, wherein case of Pritam Singh's (supra) and Manipur Administration's case (supra) have been accepted as binding authorities on the issue. Reference to Municipal Corporation of Delhi vs. Shiv Singh 1971 (1) SCC 422 has been made where Section 26 of the general clauses Act 1897 were considered regarding the question of double jeopardy in relation to prosecution of an accused for single offence under two enactments and it was held that Section 26 of the general clauses Act prevents accused from double penalty. This judgment has been relied by the counsel to advance the proposition that the prosecution of the revisionist under the general provisions of Indian Penal Code and then under the provisions of Special Act i.e., Gangster Act on the basis of implication in the case under Section I.P.C., wherein he has been acquitted should not be permitted.

10. Counsel for the applicant has referred to the judgment, Bhagat Ram vs. State of Rajasthan (1972) 2 SCC 466, wherein the Apex Court held that even if an order of acquittal is passed by Division Bench of the Court, it is not open for the third Judge of the same Court in a subsequent stage of the same proceedings to convict the person unless the judgment of the Division Bench is set aside by the Supreme Court. In view of the principle embodied in Section 403 I.P.C.

13. Learned counsel for the applicant has relied upon the judgment in the case of Kolla Vira Raghav Rao vs. Gorantla Vlalalalalal Rao, (2011) 2 SCC 703. In this case the Apex Court disapproved the prosecution of the accused under Section 420 I.P.C. After he was convicted under Section 138 N.I. Act, holding that the subsequent prosecution is barred by article 20(2) and Section 300(1) Cr.P.C. once the facts are the same. "

10. Accordingly, the order dated 17.01.2023, passed by the Special Judge, Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, Additional Session Judge, Court No.-08. Barabanki in Gangster Case No. 2009/2021, State Vs Ramesh Kumar & others, arising out case crime no. 215/2020, under section-3(1) Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, Police Station- Satrikh, District- Barabanki, and its consequential criminal proceeding are hereby ***quashed***.

11. In view of above, the petition is ***allowed***, so far as the petitioner is concerned.

(2024) 1 ILRA 263
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 4182 of 2022

Sumitra & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Rajendra Pratap Singh, Surendra Singh,Vijay Kumar Tripathi

Counsel for the Opp. Parties:
G.A., Kaushal Kishore, Saurabh Kumar

Criminal Law - Code of Criminal Procedure,1973 - Section 482– Indian Penal Code,1860 - Sections 420, 468, 471, 504, 506, 120-B & 467 -Criminal Proceedings Quashed – The applicants sought quashing of a charge sheet dated 12.08.2021 under Sections 420, 468, 471, 504, 506, 120-B, 467 IPC, summoning order dated 02.09.2021, and non-bailable warrant dated 20.06.2022 – Held, the proceedings were quashed as the dispute was civil in nature, and continuing the criminal prosecution would be an abuse of process and defeat the ends of justice. (Paras 2, 13, 14)

B. Civil Dispute Misrepresented as Criminal Offence – The complainant alleged that the applicants prepared fake rent receipts and obtained government documents using his house's address to claim ownership – Held, as per *Indian Oil Corpn. Vs NEPC India Ltd.*, the dispute over tenancy and vacation of premises was civil, and the FIR was lodged to falsely criminalize it, warranting quashing to prevent misuse of criminal law. (Paras 9, 10, 12)

C. No Evidence of Forgery – The complainant relied on a civil court order rejecting an injunction due to unsigned rent receipts – Held, unsigned receipts do not constitute forgery, and as there was no allegation that the applicants prepared them, no case for prosecution under Sections 467, 468, or 471 IPC was made out. (Paras 8, 12)

D. Legitimate Use of Tenanted Premises Address – The applicants, tenants since 2010-11, used the complainant's house address for Aadhaar, PAN, and other documents – Held, tenants are entitled to use the tenanted premises' address for government documents, and this does not imply a claim to ownership or constitute an offence. (Para 7)

E. Inherent Powers u/s 482 Cr.P.C. – Exercise to Prevent Abuse – The court invoked its inherent powers under Section 482 Cr.P.C., as clarified in *Geo Varghese Vs St. of Rajasthan* and *St. of Karnataka Vs L. Muniswamy*, to quash proceedings that were an abuse of process, emphasizing the need to prevent harassment through unwarranted criminal prosecutions. (Paras 11, 13)

Application Allowed.

List of Cases cited:

1. Indian Oil Corpn. Vs NEPC India Ltd., (2006) 6 SCC 726

2. G. Sagar Suri Vs St. of U.P., (2000) 2 SCC 636

3. Geo Varghese Vs St. of Raj., 2021 SCC OnLine SC 873

4. St. of Karnataka Vs L. Muniswamy, (not fully cited, referenced in Geo Varghese)

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

1. Heard Sri Rajendra Pratap Singh, the learned counsel for the applicants, Sri Surya Prakash Upadhyaya, the learned AGA and Sri Kaushal Kishore, the learned counsel for the complainant and perused the records.

2. By means of the instant application filed under Section 482 Cr.P.C. the applicant has prayed for quashing of the charge sheet dated 12.08.2021 bearing No. 01 of 2021, under Sections 420, 468, 471, 504, 506, 120-B, 467 IPC along with order dated 02.09.2021, the summoning order dated 02.9.2021 as well as the order dated 20.06.2022 passed by the learned Chief Judicial Magistrate, Sultanpur whereby a non-bailable warrant has been issued against the applicant.

3. The aforesaid case has been registered on the basis of an application under Section 156(3) Cr.P.C. stating that the complainant had let out his house to Sabhajeet Verma-the deceased husband of the applicant no. 1 and father of the applicant no. 2. The accused persons prepared fake rent receipts and got their Aadhaar Card, PAN card, bank passbook and handicap certificate issued with that address and they filed a suit with intention of taking possession of the complainant's house and they were demanding Rs. 5 lakh from the complainant for entering into a settlement in the suit.

4. In the statement of the informant recorded by the Investigating Officer, he stated that he had let out the house to Late Sabhajeet in the year 2010-11 at Rs. 2,200/- per month rent. After some time he had asked the tenant to vacate the premises but he did not vacate the tenanted house. The complainant had given an application in police station for getting his house vacated and the police had called late Sabhajeet Verma and had made him enter into a settlement dated 05.4.2018, that the house will be vacated by 30.06.2018 but the house was not vacated. Thereafter, Sabhajeet Verma died and whenever he asks the accused persons to vacate the house, they demand Rs. 5 lakh from him.

5. After investigation, the investigating Officer has sumitted a charge sheet dated 12.08.2021 for commission of offence under Sections 420, 468, 471, 504, 506, 120-B, 461 IPC.

6. The opposite party no. 2 has filed a counter affidavit opposing the application.

7. The learned counsel for the opposite party no. 2 has submitted that the accused persons have got Aadhaar Card, PAN card etc. issued showing their address as the house of the complainant. Undisputedly, the applicants are residing in the house of the opposite party no. 2 as his tenant since the year 2010-11 and while residing in a tenanted premises, the tenant is entitled to use the address as his/ her own and getting government documents issued with the address of the tenanted premises is no offence. A mere mention of the address of a house in any of the aforesaid documents does not establish that the holder of the document is claiming ownership of the house.

8. The learned counsel for the opposite party no. 2 has next alleged that the accused persons have prepared forged rent receipts and in support of this contention, he has relied upon the order dated 07.09.2021 passed by Civil Judge (Jr. Div.) South, Court No. 24, Sultanpur in Suit No. 515 of 2018 filed by late Sabhajeet Verma, whereby the application for temporary injunction filed in that suit has been rejected. It is mentioned in the order that the plaintiff had filed rent receipts, which are not on any format and which do not bear any signature of the landlord or the tenant. When there is no signature of any person on the receipts, it cannot be said that the receipts are forged.

9. In ***Indian Oil Corpn. v. NEPC India Ltd. & Ors., (2006) 6 SCC 726***, the Hon'ble Supreme Court has held as under:-

"13. While on this issue, 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. In G. Sagar Suri v. State of U.P. [(2000) 2 SCC 636 : 2000 SCC (Cri) 513] this Court observed: (SCC p. 643, para 8)

"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. 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."

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. 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 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

10. In the present case also, the dispute between the parties is essentially of civil nature and it appears that the F.I.R. has been lodged to give a false colour of criminality to the civil dispute.

11. In ***2021 SCC Online SC 873, Geo Varghese Vs. State of Rajasthan***, the Hon'ble Supreme Court held as under:-

"35. The scope and ambit of inherent powers of the Court under Section 482 CrPC or the extra-ordinary power under Article 226 of the Constitution of India, now stands well defined by series of judicial pronouncements. Undoubtedly, every High Court has inherent power to act ex debito justitiae i.e., to do real and substantial justice, or to prevent abuse of the process of the Court. The powers being very wide in itself imposes a solemn duty on the Courts, requiring great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power vested in the Court should not be exercised to stifle a legitimate prosecution. However, the inherent power or the extra-ordinary power conferred upon the High Court, entitles the said Court 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 the ends of justice require that the proceeding ought to be quashed.

36. The following observations made by this Court in the case of State of Karnataka v. L. Muniswamy may be relevant to note at this stage:--

"The whole some power under Section 482 CrPC entitles the High Court

to quash a proceeding when 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 High Courts have been invested with inherent power, both in civil and criminal matters, to achieve a salutary public purposes. A Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. The Court observed in this case that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature."

12. From the aforesaid discussion, it appears that the opposite party no. 2 had let out his house in the year 2010-11. He wants to get the house vacant by the tenant. However, instead of initiating appropriate civil proceedings for getting the house vacated by the tenant, he had lodged the FIR with the aforesaid object. The receipts in question do not bear any signature of any person, there is no question of any signature having been forged by any person. Moreover, since there is no allegation that the receipts were prepared by the applicants, they cannot be prosecuted for the offence of forgery in preparation of receipts. Therefore, no case is made out for prosecution of the applicant.

13. In view of the aforesaid discussion, I am of the view that the continuance of criminal proceedings against the applicants will defeat the ends of justice and it would be in the interest of justice that the proceedings be quashed.

14. Accordingly, the application is ***allowed*** and the charge sheet dated 12.08.2021 bearing No. 01 of 2021, under Sections 420, 468, 471, 504, 506, 120-B, 467 IPC along with order dated 02.09.2021 as well as the summoning order dated 02.9.2021 as well as non bailable order dated 20.06.2022 passed by the learned Chief Judicial Magistrate, Sultanpur, are quashed.

(2024) 1 ILRA 267
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.12.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application u/s 482 No. 5525of 2023
and
Application u/s 482 Nos. 12429 of 2023 & 12443 of 2023

Khursheed & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Girish Chandra Sinha

Counsel for the Opp. Parties:
G.A., Avinash Singh Vishen, Avinash Singh Vishen (Amicus Curiae), Rudra Mani Shukla

Criminal Law - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 3(1)(Da), 3(1)(Dha), 3(2)(V) & 18 - Indian Penal Code, 1860 - Sections 147, 148, 149, 323, 504, 506, 332, 353, 342 & 364 - Code of Criminal Procedure, 1973 - Section 438 - Constitution of India, 1950- Article 21 - Appellant challenged rejection of anticipatory bail in Case Crime No. 433 of 2022 for offences under SC/ST Act and IPC, alleging incident occurred at night inside an electricity office, not in public view. Court held: (1) Section 18 of SC/ST Act bars anticipatory bail, but bar is not absolute; it yields to constitutional protections under Article 21 in exceptional cases (Prathvi Raj Chauhan Vs U.O.I., (2020) 4 SCC 727). (2) Offences under Sections 3(1)(Da), 3(1)(Dha),

3(2)(V) of SC/ST Act require insult or intimidation in public view; private incident inside office at night, without public humiliation, does not attract these provisions (Hitesh Verma Vs St. of Uttarakhand, (2020) 10 SCC 710). (3) IPC offences (Sections 147, 148, 149, 323, 504, 506, 332, 353, 342, 364) may not apply without public element or evidence of assembly, rioting, or assault on public servant; private dispute lacks prima facie criminality (Gopal Mishra Vs St. of U.P., Crl. Misc. Writ Petition No. 16343 of 2020). (4) Trial court erred in mechanically applying Section 18 bar without assessing public view requirement or Article 21 rights (Dataram Singh Vs St. of U.P., (2018) 3 SCC 22). (5) Appellant entitled to anticipatory bail; in event of arrest, released on Rs. 50,000/- bond with conditions for cooperation and non-intimidation. Impugned order set aside; appeal allowed. (Paras 5-13)

Appeal Allowed.

List of Cases cited:

1. Prathvi Raj Chauhan Vs U.O.I., (2020) 4 SCC 727 (Para 7)

2. Gopal Mishra Vs St. of U.P., Crl. Misc. Writ Petition No. 16343 of 2020 (Para 7)

3. Hitesh Verma Vs St. of Uttarakhand, (2020) 10 SCC 710 (Para 7)

4. Dataram Singh Vs St. of U.P., (2018) 3 SCC 22 (Para 10)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Shri G.C. Sinha, Advocate and Shri Avinash Singh Vishen, Advocate (Amicus Curiae), who appeared in the APPLICATION U/S 482 No. - 5525 of 2023, Shri Anurag Kumar Singh along with Shri Pushpendra Kumar Singh, learned counsel for the applicants in APPLICATION U/S 482 No. - 12429 of 2023 and Shri Salil Kumar Srivastava, Advocate, counsel for the applicant in APPLICATION U/S 482 No. - 12443 of 2023.

2. In all the applications noted below, the question is as to "Whether charge-sheet and/or criminal proceedings based upon the compromise, can be quashed in part." In other words "Whether the charge-sheet and/or criminal proceedings based upon the compromise can be quashed qua the accused-applicant." As such, all the petitions are being clubbed together and are being decided by this common order.

3.1 In APPLICATION U/S 482 No.-5525 of 2023, the following main relief(s) has been sought:-

"For the facts & circumstances enumerated in the accompanying affidavit it is humbly prayed that the order of taking cognizance and the summoning order dated 20-07-2019 passed by the Special Judge, SC/ST Act at court no. 2, District Sultanpur in Sessions Trial No. 362 of 2019 in reference to case crime no. 256 of 2017, P.S.-Kamrauli, District Amethi under section 147, 279, 337, 233, 504, 506 &452 IPC read with section 3(1)(D)& 3(2) V(A) of SC/ST Act as well as the entire proceeding drawn by the police including the charge sheet submitted by the police in criminal case no. 256 of 2017, may kindly be quashed and any other appropriate order which the Hon'ble Court may deem fit & proper in the circumstances of the case may also be passed for the end of justice."

3.2 In APPLICATION U/S 482 No.-5525 of 2023, this Court on 30.05.2023 after considering the issue involved passed the following order:

"Sri Rudra Mani Shukla, Advocate has put in appearance by way of filing Vakaltanama on behalf of opposite party no. 2 and the same is taken on record.

Office is directed to print the name of Sri Rudra Mani Shukla, Advocate as counsel for the opposite party no.2 when the case is listed next.

Learned counsel appearing for the applicants shall apprise the court that as to whether on the basis of compromise entered into between the two accused persons and the opposite parties, apart from the fact that there are five accused persons, the part trial can be quashed.

List/put up this matter in the first week of June, 2023 as fresh."

3.4 After the aforesaid order, this Court passed the order dated 07.08.2023 whereby Shri Avinash Singh Vishen, Advocate was appointed Amicus Curiae to assist the Court on the issue aforesaid. The order dated 07.08.2023 reads as under:-

"Counter affidavit filed today by opposite party no.2, is taken on record.

This Court invites Shri Avinash Singh Bisen, Advocate to assist this Court and he is hereby appointed as amicus curiae. He will be paid fee as per the norms of legal aid services authorities.

List/put up this matter on 24.08.2023 at 3.30 PM.

The counsel for the appellant shall also provide a copy of the record to the amicus curiae in between."

3.5 It would be apt to indicate that the applicants earlier approached this Court by means of APPLICATION U/S 482 No.- 8536 of 2019 and the same was disposed of on 25.04.2023 by this Court for the purpose of verification of compromise by the trial court and in terms of the order of this Court dated 25.04.2023, the trial court verified the compromise on 03.05.2023 and the present application has been filed seeking relief(s) quoted above based upon the compromise dated 03.05.2023 duly verified by the trial court on 03.05.2023.

4.1 In the APPLICATION U/S 482 No. - 12443 of 2023, (Karamveer Tripathi and others vs. State of U.P. and Another), the following main relief has been sought:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the proceedings of Criminal Case No.95018 of 2019; State Versus Karamveer Tripathi and others, arising out of Case Crime No.71 of 2018, under sections- 323, 504 I.P.C., relating to Police Station-Mahanagar, District-Lucknow, pending in the Court of learned Special Additional Chief Judicial Magistrate, (C.B.I./Ayodhya Prakaran), Lucknow, as well as impugned chargesheet dated 23.8.2019, submitted against the petitioners by the Investigating Officer in aforesaid case crime number, and impugned cognizance and summoning order dated 22.10.2019, passed by the learned Special Additional Chief Judicial Magistrate, (C.B.I./Ayodhya Prakaran), Lucknow, as contained in Annexure nos.1 and 2 respectively to the instant petition, in the light of compromise, attained between the parties, in the interest of law and justice."

4.2 It would be apt to indicate that earlier the applicants approached this Court by means of APPLICATION U/S 482 No.- 9837 of 2022, (Karamveer Tripathi And Others vs. State of U.P. And Others), and the said petition was disposed of vide order dated 23.12.2022 with direction to the concerned court to verify the compromise

dated 28.11.2022 and liberty was also granted to the applicants to approach this Court for quashing of the proceedings and in terms of the order of this Court dated 23.12.2022, the trial court verified the compromise dated 28.11.2022 on 18.03.2023 as appears from the order passed by the trial court on 18.03.2023, which is annexed as Annexure No.6 to the application and the present application has been filed for the relief(s) sought, quoted above, on the basis of the compromise dated 28.11.2022 duly verified by the trial court on 18.03.2023.

5.1 In the APPLICATION U/S 482 No. - 12429 of 2023, (Arvind Singh Bhadauria vs. State of U.P.), the following main relief has been sought:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the proceedings of Criminal Case No. 10694 of 2020; State Versus Surya Lal Yadav and others, arising out of Case Crime No.62 of 2018, under sections- 341, 323, 506 I.P.C., relating to Police Station-Mahanagar, District-Lucknow, pending in the Court of learned Special Additional Chief Judicial Magistrate, (C.B.I./Ayodhya Prakaran), Lucknow, as well as impugned chargesheet dated 15.8.2019, submitted against the petitioner by the Investigating Officer in aforesaid case crime number, and impugned cognizance and summoning order dated 18.1.2020, passed by the learned Special Additional Chief Judicial Magistrate, (C.B.I./Ayodhya Prakaran), Lucknow, so far as the same relate to the petitioner-Arvind Singh Bhadauria, as contained in Annexure nos.1 and 2 respectively to the instant petition, in the light of compromise, attained between the parties, in the interest of law and justice."

5.2 It would be apt to indicate that the applicant earlier approached this Court by means of APPLICATION U/S 482 No.-9798 of 2022 and the same was disposed of on 23.12.2022 by this Court and a perusal of the order dated 23.12.2022 passed by this Court indicates that the application was disposed of for the purpose of verification of compromise by the trial court and in terms of the order of this Court dated 23.12.2022, the trial court verified the compromise dated 28.11.2022 on 18.03.2023 and the present application has been filed seeking relief, quoted above, based upon the compromise dated 03.05.2023 duly verified by the trial court on 03.05.2023.

6. Admittedly in the application under consideration, all the accused have not entered into the compromise and all the applications have been filed for quashing of charge-sheet and/or criminal proceedings qua the applicants based upon the compromise.

7.1 Before considering the issue involved in this case, it would be apt to indicate that the issue regarding quashing of criminal proceedings in exercise of power under Section 482 CrPC has already been settled by the Hon'ble Apex Court in the following judgment.

7.2 A three judge Bench of the Apex Court in the case of **GIAN SINGH V. STATE OF PUNJAB (2012) 10 SCC 303**, observes the plenitude of power of this Court for its exercise under Section 482 of the Cr.P.C. and holds that cases can be closed on account of settlement barring heinous offences, the Apex Court has held as follows:-

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in

quashing a criminal proceeding or FIR or complaint to exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz.: (i) to secure the ends of, or (ii) to prevent abuse of the process of any court. In what cases power to quash the criminal proceeding or complaint or FIR may be where the and the victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed.

However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have a serious impact on society. Similarly, any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, etc., cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and predominating civil stand on a different footing for the purposes of quashing, particularly the offences arising from commercial, financial mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc, or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, the High Court may quash the criminal proceedings if in its view, because of the compromise between the offender and the victim, the possibility of conviction is remote and bleak and continuation of the criminal case would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that the criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding."

(Emphasis supplied)

7.3 A three Judge Bench of the Apex Court again in **PARBATBHAI AAHIR V. STATE OF GUJARAT (2017) 9 SCC 641** has held as follows:-

"16. The broad principles which emerge from the precedents on the subject, may be summarised in the following propositions:

16.1. Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognises and preserves powers which inhere in the High Court.

16.2. The invocation of the jurisdiction of the High Court to quash a first

information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

16.3. In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power.

16.4. While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised (i) to secure the ends of justice, or (ii) to prevent an abuse of the process of any court.

16.5. The decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

16.6. In the exercise of the power under Section 482 while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences.

16.7 As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing insofar as the exercise of the inherent power to quash is concerned.

16.8. Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute.

16.9. In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and 16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offences involving the financial and economic well- being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

(Emphasis supplied)

7.4 The Hon'ble Apex Court after considering the various pronouncements including the judgments passed in the cases of **Gian Singh vs. State of Punjab [2012, 10 SCC 303], Narindra Singh and others vs. State of Punjab, (2014) 6 SCC 466, Parbatbhai Aahir vs. State of Gujarat,**

(2017) 9 SCC 641 and State of Madhya Pradesh vs. Laxmi Narayan, 2017 SCC OnLine SC 1799 in the case of observed as under:-

"15. Considering the law on me point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:

15.1. That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves:

15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;

15.3. Similarly, such power is not to be exercised for the offences under the special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that Capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

15.4. Offences under Section 307 IPC and the Arms Act, etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act, etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, off the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest, its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge-sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paras 29.6 and 29.7 of the decision of this Court in Narinder Singh should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;

15.5. While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender the High Court is required to consider the antecedents of the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter compromise, etc.

7.5 A two Judge Bench of the Apex Court again in **Ramgopal vs. State of M.P. (2022) 14 SCC 531** has held as follows:-

"19. ... Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind:

19.1. Nature and effect of the offence on the conscience of society; 19.2. Seriousness of the injury, if any;

19.3. Voluntary nature of compromise between the accused and the victim; and

19.4. Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations."

8. In nutshell, the High Court in exercise of power under Section 482 CrPC can quash the charge-sheet and/or criminal proceeding even if the offence is non-compoundable under Section 320 of the CrPC and the said power can be exercised by the High Court in the light of the observations made in the judgments referred above which includes quashing of criminal proceeding on the basis of compromise.

9. Reverting to the issues involved in these applications, Shri Anurag Kumar Singh, Advocate and Shri Avinash Singh Visen, Advocate (Amicus Curiae) stated that there is no bar in quashing the charge-sheet and/or criminal proceeding in part or qua the accused-applicant. It is also stated that trial Court is empowered to discharge one or some accused, if case is not made out, and can try other co-accused and in the relevant provisions of CrPC viz. Sections 227, 239 and 245 in regard to the same there is no bar. It is also stated that a perusal of various pronouncements would show that the Court can quash the F.I.R., the basis of criminal proceedings including the charge-sheet, charge-sheet and criminal proceedings qua the accused-applicant. To substantiate the submissions, reliance has been placed on the following judgments:-

(i) **Chandra Bhal vs. State of U.P.** reported in **(1971) 3 SCC 983.**

(ii) **Madhavrao Jiwajirao Scindia and Others vs. Sambhajirao Chandrojirao Angre and Others** reported in **1998 1 SCC 692.**

(iii) **Rajbir Singh vs. State and Another** passed in **Crl.M.C. No.880/2007.**

(iv) **Sanjay Kriplani vs. State of NCT of Delhi and Others** passed in **CRL.M.C. 1981/2013.**

(v) **Geeta Mehrotra and another vs. State of U.P.** reported in **(2012) 10 SCC 741.**

(vi) **Lovely Salhotra and Another vs. State (NCT of Delhi) And Another** reported in **2018 12 SCC 391.**

(vii) **Poonam Khanna vs. State and Others** reported in **2018 SCC OnLine Del 6918**.

(viii) **Sunil Tomar vs. The State of NCT of Delhi and Another** passed in **CRL.M.C.1741/2021.**

(ix) **Mrs. Ridhi Kumar vs. The State (Govt. of NCT of Delhi) And Another** passed in the **W.P. (CRL) 1399/2021.**

(x) **Karan Sharma vs. The State of NCT of Delhi and Another** passed in the **CRL. M.C.2987/2022&CRL.M.A. 12562/2022.**

(xi) **Ramawatar vs. State of Madhya Pradesh** reported in **2022 13 SCC 635.**

(xii) **Kapil Gupta vs. State of N.C.T. of Delhi and Another** reported in **2022 SCC OnLine SC 1030.**

(xiii) **Ganganpal Singh Ahuja and Others vs. State of U.P.** reported in **2023 AHC 118620.**

(xiv) **Haji Iqbal @ Bala vs. State of U.P., Criminal Appeal No. 2343 of 2023** decided on **08.08.2023.**

9.1 The case of **Chandra Bhal (supra)** has been relied upon to show that separate trial is permissible.

9.2 In **Madhavrao Jiwajirao Scindia (supra),** the Hon'ble Apex Court quashed the FIR qua the petitioner based upon the compromise. As per the observations made by the Hon'ble Apex Court, the High Court while exercising the power of quashing under Section 482 CrPC, is required to consider as to whether it is expedient and in the justice to permit the prosecution to continue and whether the chances of conviction are bleak and no useful purpose is likely to be served.

9.3 In the case of **Rajbir Singh (supra)**, the Delhi High Court based upon the compromise quashed the FIR qua the applicant.

9.4 In the case of **Sanjay Kriplani (supra)**, the Delhi High Court quashed the FIR qua the petitioner in exercise of power under Section 482 CrPC after considering the judgment passed in the case of Rajbir Singh (supra).

9.5 In **Geeta Mehrotra (supra)**, the FIR was lodged by the wife under Section 498-A, 323, 504 and 506 IPC and 3/4 Dowry Prohibition Act, 1961 against the husband, father-in-law, mother-in-law, brother-in-law and sister-in-law and the sister-in-law and brother-in-law of complainant, after dismissal of writ petition, approached the Hon'ble Apex Court and after considering the facts and circumstances of the case, the Hon'ble Apex Court quashed the proceedings qua the appellants (sister-in-law and brother-in-law). Thus, the criminal proceedings were quashed by the Hon'ble Apex Court in part.

9.6 In the case of **Lovely Salhotra (supra)**, the Hon'ble Apex Court specifically observed that " The High Court was wrong in holding that the FIR cannot be quashed in part." In this case, the Hon'ble Apex Court quashed the FIR qua the appellants.

9.7 In the case of **Ms. Poonam Khanna (supra)**, the Delhi High Court after considering the various pronouncements quashed the FIR qua the petitioner in exercise of power under Section 482 CrPC.

9.8 In the case of **Sunil Tomar (supra)**, the Delhi High Court after considering the judgment of the Hon'ble Apex Court in the case of **Madhavrao Jiwajirao Scindia (supra)** quashed the FIR qua the applicant in exercise of power under Section 482 CrPC.

9.9 In the case of **Mrs. Ridhi Kumar (supra)**, the Delhi High Court after taking note of **Lovely Salhotra (supra)** and **Sunil Tomar (supra)** quashed the FIR qua the petitioner in exercise of power under Section 482 CrPC.

9.10 In the case of **Karan Sharma (supra)**, the Delhi High Court after considering the judgment passed in the case of **Kapil Gupta (supra)** quashed the FIR and all the criminal proceedings emanating therefrom qua the petitioner based upon the compromise.

9.11 In the case of **Ramawatar (supra)**, Hon'ble Apex Court quashed the proceedings arising out of FIR No.18 of

1994 at Police Station-O.E. Panna under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act), 1989 (in short "the SC/ST Act") read with Section 34 of the Penal Code, 1860 (in short "IPC") which were pending against Ramawatar (appellant before the Hon'ble Apex Court) and as per the observations of the Hon'ble Apex Court in this judgment, the High Court can quash the criminal proceedings based upon the compromise even with regard to non-compoundable offence.

9.12 In the case of **Kapil Gupta (supra)**, the Hon'ble Apex Court considering the compromise arrived between the parties quashed the two FIRs lodged against the appellant before the Hon'ble Apex Court.

9.13 In the case of **Haji Iqbal (supra)**, the Hon'ble Apex Court quahsed the FIR No. 195 of 2022 registered under Sections 376-D and 506 IPC and the consequential criminal proceedings qua the accused-appellant.

10. From the reports referred above it is apparent that an FIR/charge-sheet/criminal proceedings can be quashed in part. In other words, "the FIR/charge-sheet/criminal proceedings can be quashed qua the accused-applicant in exercise of power under Section 482 CrPC. However, this power can be exercised if the case of the said accused-applicant falls within the proposition settled by the Hon'ble Apex Court in the judgments referred above. Questions framed above are answered accordingly.

11. Now, coming to the facts of the case. In the APPLICATION U/S 482 No. 12429 of 2023 (Arvind Singh Bhadauria Vs. State of U.P. Thru. Prin. Secy. Home Deptt. Lko. And Another) and APPLICATION U/S 482 No. 12443 of 2023 (Karamveer Tripathi and 2 Others Vs. State of U.P. Thru. Prin. Secy. Home Deptt. Lko. And Another), indisputably, the offences are compoundable and in these cases both the sides lodged cross FIRs i.e. FIR No. 0062 dated 02.02.2018 lodged by Akhilesh Tripathi (Applicant No. 3 in Application U/S 482 No. 12443 of 2023) and FIR No. 0071 dated 08.02.2018 lodged by Arvind Singh Bhadauria (Applicant in Application U/S 482 No. 12443 of 2023) and now, the parties to these applications which include informant(s) namely Akhilesh Tripathi and Arvind Singh Bhadaurai have settled the dispute and to the same effect, a compromise was entered into and the same has been verified by the trial court on 18.03.2023 in terms of the order of this Court dated 23.12.2022 passed in APPLICATION U/S 482 No.-9837 of 2022 and APPLICATION U/S 482 No.- 9798 of 2022, respectively, and taking note of the same as also the nature of accusation and the fact that after compromise, the chance of conviction of the applicants of these applications are bleak, this Court is of the view that no fruitful purpose would be served in keeping the proceedings pending against these applicants. Accordingly, the prayer(s) sought in theAPPLICATION U/S 482 No. 12429 of 2023 (Arvind Singh Bhadauria Vs. State of U.P. Thru. Prin. Secy. Home Deptt. Lko. And Another) andAPPLICATION U/S 482 No. 12443 of 2023 (Karamveer Tripathi and 2 Others Vs. State of U.P. Thru. Prin. Secy. Home Deptt. Lko. And Another) are hereby allowed. Criminal proceedings including the charge-sheet(s) and summoning order, indicated herein-under,

are hereby quashed qua the applicant(s) of APPLICATION U/S 482 No.12429 of 2023 namely Arvind Singh Bhadauria and APPLICATION U/S 482 No. 12443 of 2023 namely Karamveer Tripathi, Dharmveer Tripathi and Akhilesh Tripathi.

a. Proceedings of Criminal Case No.95018 of 2019; (State Versus Karamveer Tripathi and others), arising out of Case Crime No.71 of 2018, under Sections- 323, 504 I.P.C., Police Station-Mahanagar, District- Lucknow, pending in the Court of learned Special Additional Chief Judicial Magistrate, (C.B.I./Ayodhya Prakaran), Lucknow, as well as impugned charge-sheet dated 23.8.2019 and impugned cognizance and summoning order dated 22.10.2019, passed by the learned Special Additional Chief Judicial Magistrate, (C.B.I./Ayodhya Prakaran), Lucknow.

b. Proceedings of Criminal Case No. 10694 of 2020; (State Versus Surya Lal Yadav and others), arising out of Case Crime No.62 of 2018, under Sections-341, 323, 506 I.P.C.,Police Station-Mahanagar, District- Lucknow, pending in the Court of learned Special Additional Chief Judicial Magistrate, (C.B.I./Ayodhya Prakaran), Lucknow, as well as impugned charge-sheet dated 15.8.2019, and impugned cognizance and summoning order dated 18.1.2020, passed by the learned Special Additional Chief Judicial Magistrate, (C.B.I./Ayodhya Prakaran), Lucknow.

12. In regard to Application U/S 482 No.5525 of 2023, the victim and the applicants have settled the dispute amicably out of the court and to the same effect, a compromise was entered into and the same has already been verified by the trial court on 03.05.2023 in terms of the earlier order of this Court dated 25.04.2023 passed in Application U/S 482 No.8536 of 2019 and taking note of the same as also the accusation made against the applicants in the FIR as also the observations made by the Hon'ble Apex Court in the case of **Ramawatar (supra)**, this Court is of the view that chances of conviction of applicants are extremely bleak and no fruitful purpose would be served in keeping the proceeding pending against the applicants of this application. Accordingly, the Application U/S 482 No.5525 of 2023 is **allowed**. The entire proceeding of Sessions Trial No. 362 of 2019 arising out of Case Crime No. 256 of 2017 under section 147, 279, 337, 233, 504, 506 &452 IPC read with section 3(1)(D)& 3(2) V(A) of SC/ST Act, Police Station.-Kamrauli, District Amethi including the charge-sheet submitted by the police in Criminal Case no. 256 of 2017 as also the cognizance and the summoning order dated 20-07-2019 passed by the Special Judge, SC/ST Act at court no. 2, District Sultanpur, are hereby quashed qua the applicants namely Khursheed and Rihan.

(2024) 1 ILRA 277
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 11016 of 2023

Manjeet Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Adarsh Shukla, Rajiv Raman Srivastava

Counsel for the Opp. Parties:
G.A.

Criminal Law - Code of Criminal Procedure,1973 - Indian Penal Code,1860 – Section 406 -Charge-Sheet Quashed – The petitioner challenged the charge-sheet dated 29.01.2023 and summoning order dated 31.03.2023 in a case under Section 406 IPC, arising from an FIR lodged on 10.11.2022 – Held, the charge-sheet was quashed due to an unexplained delay of over four years in lodging the FIR and lack of sufficient evidence to establish an offence under Section 406 IPC. (Paras 4, 16, 17)

B. Unexplained Delay in FIR – Fatal to Prosecution – The FIR was lodged after a delay of more than four years, exceeding the three-year limitation period for Section 406 IPC – Held, as per *Amrit Lal Vs Shanti Lal Soni* and *Sarah Mathew Vs Institute of Cardio Vascular Diseases*, the relevant date for limitation under Section 468 Cr.P.C. is the date of filing the complaint, and the unexplained delay rendered the prosecution unsustainable. (Paras 8, 9, 14, 15)

C. Lack of Evidence for Section 406 IPC – The prosecution failed to provide material evidence to support the charge of criminal breach of trust under Section 406 IPC – Held, the charge-sheet was filed without corroborating evidence, and the trial court's cognizance was an abuse of process, as per *St. of Haryana Vs Bhajan Lal*. (Paras 7, 10, 16)

D. Delay in FIR and Risk of Embellishment – The court relied on *Manoj Kumar Sharma Vs St. of Chhattisgarh* and *Jai Prakash Singh Vs St. of Bihar* to hold that an inordinate and unexplained delay in lodging an FIR risks introducing a colored version or exaggerated account, undermining its reliability and truthfulness. (Paras 13, 14)

E. Inherent Powers u/s 482 Cr.P.C. – Preventing Abuse of Process – The court exercised its inherent powers under Section 482 Cr.P.C. to quash the proceedings, finding that continuing the prosecution would misuse the legal process and defeat the ends of justice, given the lack of evidence and unexplained delay. (Paras 12, 16, 17)

Application Allowed.

List of Cases cited:

1. Amrit Lal Vs Shanti Lal Soni, 2022 LiveLaw (SC) 248

2. Sarah Mathew Vs Institute of Cardio Vascular Diseases, (2014) 2 SCC 62

3. Krishna Pillai Vs T.A. Rajendran, 1990 Supp SCC 121

4. Bharat Damodar Kale Vs St. of A.P., (2003) 8 SCC 559

5. Japani Sahoo Vs Chandra Sekhar Mohanty, (2007) 7 SCC 394

6. Manoj Kumar Sharma Vs St. of Chhattisgarh, (2016) 9 SCC 1

7. Jai Prakash Singh Vs St. of Bihar, (2012) 4 SCC 379

8. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335

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

1. Heard Sri Adarsh Shukla, learned counsel for the petitioner and Sri Aniruddha Singh, learned Additional Government Advocate for the State.

2. Sri Aniruddha Singh, learned Additional Government Advocate has filed counter affidavit, today in the Court, the same is taken on record.

3. As per the office report dated 04.12.2023, the Chief Judicial Magistrate, District-Lakhimpur Kheri has apprised the Court that the notice has been served upon the opposite party No.2 in person, however,

no one has appeared on behalf of opposite party No.2.

4. By means of this petition filed under Section 482 Cr.P.C., the petitioner has assailed the impugned Charge-sheet No.01 dated 29.01.2023 pending in the Court of Civil Judge (Junior Division)/ F.T.C., Lakhimpur Kheri in Criminal Case No.1450 of 2013 (State vs. Manjeet Singh) arising out of Case Crime No.618 of 2022, under Section 406 I.P.C., Police Station-Bheera, District-Kheri as well as the summoning order dated 31.03.2023 passed by the Judicial Magistrate, Court No.3, Lakhimpur Kheri.

5. The precise contention of learned counsel for the petitioner is that the impugned First Information Report (in short F.I.R.) bearing No.618 of 2022, under Section 406 I.P.C., Police Station-Bheera, District-Kheri has been lodged on 10.11.2022 for the alleged incident which is more than four years old.

6. Learned counsel for the petitioner has stated that the delay of more than four years has not been explained in the F.I.R. He has drawn attention of this Court towards Annexure No.CA-1 of the counter affidavit which is a statement of the informant recorded under Section 161 Cr.P.C. wherein the delay of more than four years has not been explained.

7. Learned counsel for the petitioner has stated that in an offence under Section 406 I.P.C. maximum punishment is three years but the impugned F.I.R. has been lodged after the delay of four years and such delay has not been explained. He has further submitted that despite the aforesaid fact the Investigating Agency has filed the charge-sheet against the petitioner without having any relevant material and the corroborating evidences supporting the case of the prosecution.

8. Learned counsel for the petitioner has drawn attention of this Court towards the dictum of Apex Court rendered in re: ***Amrit Lal vs. Shanti Lal Soni & Ors. reported in 2022 LiveLaw (SC) 248***. In the aforesaid judgement, the Apex Court has considered the judgment of Apex Court delivered by a Constitution Bench in re: ***Sarah Mathew vs. Institute of Cardio Vascular Diseases by its Director Dr. K.M. Cherin & Ors. (2014) 2 SCC 62***, wherein two questions have been decided. The first question was whether for the purposes of computing the period of limitation under Section 468 Cr.P.C. the relevant date is the date of filing of the complaint or the date of institution of the prosecution or whether the relevant date is the date on which a Magistrate takes cognizance of the offence? And the second question was that which of two cases i.e. **Krishna Pillai [Krishna Pillai v. T.A. Rajendran, 1990 Supp SCC 121] or Bharat Kale (Bharat Damodar Kale v. State of A.P. (2003) 8 SCC 559]** (which is followed in **Japani Sahoo [Japani Sahoo v. Chandra Sekhar Mohanty (2007) 7 SCC 394]),** lays down the correct law?

The Constitution Bench answered the aforesaid questions as follows:-

"51. In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 Cr.P.C. the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale [Bharat Damodar Kale v. State of A.P. (2003) 8 SCC 559]

which is followed in Japani Sahoo [Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394] lays down the correct law. Krishna Pillai [Krishna Pillai v. T.A. Rajendran, 1990 Supp SCC 121: 1990 SCC (Cri) 646] will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 Cr.P.C."

(emphasis supplied)

9. Learned counsel for the petitioner has stated that when the Constitution Bench has held that for the purposes of computing the period of limitation under Section 468 Cr.P.C. the relevant date is the date of filing of the complaint or the date of institution of the prosecution, not the date on which the Magistrate takes cognizance, then the relevant date in the present case would be the date which is four years old and no specific date has been indicated in the F.I.R. The delay has not been explained.

10. On being asked from the learned Additional Government Advocate, Sri Aniruddha Singh, as to what is the relevant material/ evidence which might have convinced the Investigating Agency that the present petitioner has committed offence under Section 406 I.P.C. or material/ evidence might have convinced the learned trial court to take cognizance on the charge-sheet which has been filed against the petitioner, Sri Aniruddha Singh, has stated that the statement of the complainant and other persons were recorded by the Investigating Agency and on the basis of those statements the charge-sheet has been filed.

11. On being further asked about the delay of more than four years in lodging an F.I.R., Sri Aniruddha Singh has stated that though there is no limitation prescribed in lodging the F.I.R. and if the offence is having recurring cause of action, such F.I.R. may be lodged but the allegations of the complainant should be tested on the material available on record. However, in view of the present facts and circumstances, no material could be shown to the Court that the delay of four years has been explained properly.

12. Having heard learned counsel for the parties and having perused the material available on record, at the very outset, I must observe that despite the notice having been issued by this Court to the private opposite party and despite the service upon the private opposite party on or before 04.12.2023 but neither the private opposite party appeared nor any counsel on his behalf is appeared nor any request for adjournment of the case has been prayed, therefore, prima-facie, it appears that the private opposite party is not interested to contest the present case.

13. So far as the factum of inordinate and unexplained delay in lodging the F.I.R. is concerned, the Apex Court in the case in re: ***Manoj Kumar Sharma and others vs. State of Chhattisgarh and others*** reported in ***(2016) 9 SCC 1*** has observed in para-18 as under:-

"18. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. In our opinion, such extraordinary delay in lodging the FIR raises grave doubt about the truthfulness of allegations made by

Respondent No. 2 herein against the appellants, which are, in any case, general in nature. We have no doubt that by making such reckless and vague allegations, Respondent No. 2 herein has tried to rope the appellants in criminal proceedings. We are of the confirmed opinion that continuation of the criminal proceedings against the appellants pursuant to this FIR is an abuse of the process of law. Therefore, in the interest of justice, the FIR deserves to be quashed. In this context, it is apt to quote the following decision of this Court in ***Jai Prakash Singh vs. State of Bihar & Anr. (2012) 4 SCC 379*** *wherein it was held as under:-"*

"12. The FIR in a criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of the eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the firsthand account of what has actually happened, and who was responsible for the offence in question."

(emphasis supplied)

14. Therefore, the law is trite that if there is any delay in lodging the F.I.R., that should be explained properly inasmuch as an inordinate and unexplained delay may be fatal to prosecute the accused person. Besides, the offence for which the instant F.I.R. was lodged is having maximum punishment of three years but the present F.I.R. has been lodged after more than four years without having any proper explanation to that effect.

15. In view of the decision of Apex Court rendered in re: ***Amrit Lal(supra)***, the relevant date would be the date four years prior to the date of lodging of the F.I.R., as the date of F.I.R. is 10.11.2022.

16. When the delay has not been explained properly and the prosecution is having no proper material/ evidence to convince that any offence under Section 406 I.P.C. has been made out, then to file the charge-sheet by the Investigating Agency and to take cognizance by the trial court is nothing but to misuse and abuse of process of law in view of the dictum of Apex Court rendered in re: ***State of Haryana and others vs. Shri Bhajan Lal & others reported in 1992 Supl. (1) Supreme Court Cases 335.***

17. Accordingly, the present petition is allowed. The Charge-sheet No.01 dated 29.01.2023 pending in the Court of Civil Judge (Junior Division)/ F.T.C., Lakhimpur Kheri in Criminal Case No.1450 of 2013 (State vs. Manjeet Singh) arising out of Case Crime No.618 of 2022, under Section 406 I.P.C., Police Station-Bheera, District-Kheri, is quashed/ set aside.

18. Consequences to ***follow.***

19. No order as to costs.

Before parting with, I appreciate the efforts and research done by Mr. Piyush Tripathi, Law Clerk Trainee attached with me and Ms. Tanya Prasad and Ms. Adisri Kapoor, Law Interns for finding out the relevant case laws application in the present case.

(2024) 1 ILRA 282
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 12244 of 2023

Sunil Dutt Tripathi ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Ishan Baghel, Sagar Singh, Umang Rai

Counsel for the Opp. Party:
G.A.

Criminal Law - Code of Criminal Procedure,1973 - Section 482– The applicant challenged the order dated 02.11.2023 rejecting the release of his licensed pistol, four live cartridges, and arms license, seized in connection with Case Crime No. 25 of 2023 under Sections 504, 506, 286, 323 IPC and Section 30 Arms Act – Held, the order was legally unsustainable as the applicant's act of firing in the air in self-defense did not violate the conditions of the arms license, and no license cancellation proceedings were initiated, warranting the release of the seized items. (Paras 10, 11, 12)

Self-Defense and Arms Act Violation – The applicant fired his licensed pistol in the air to escape an attacking mob, as supported by a witness St.ment – Held, firing a licensed firearm in self-defense does not constitute a violation of Section 30 of the Arms Act, 1959, as the prosecution failed to specify which license condition was breached, and no evidence showed intent to cause harm. (Paras 9, 10, 11)

Evidentiary Considerations – The FIR alleged firing with intent to kill under Section 307 IPC, but the charge was dropped during investigation, and the chargesheet was filed under Sections 504, 506, 286, 323 IPC and Section 30 Arms Act – Held, no injuries were caused to others, and the applicant and co-accused sustained injuries, supporting the claim of self-defense, as corroborated by the witness St.ment of the co-accused's sister. (Paras 4, 8, 9, 11)

Judicial Discretion in Release of Seized Property – The trial court rejected the release application solely on the ground that a chargesheet under Section 30 Arms Act was filed, despite no pending license cancellation proceedings – Held, the court's reasoning was flawed, as the mere filing of a chargesheet does not justify withholding licensed property when no license violation was established, and the applicant was already on bail. (Paras 5, 7, 11, 12)

No Pending Cancellation Proceedings – The police report confirmed no arms license cancellation proceedings were pending before the District Magistrate – Held, in the absence of such proceedings and evidence of license misuse, the continued retention of the pistol, cartridges, and license was unjustified, entitling the applicant to their immediate releas(Paras 5, 11, 12)

Application under Section 482 Code of Criminal Procedure,1973 Allowed.

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

1. प्रार्थी के विद्वान अधिवक्ता श्री इशान बघेल तथा विद्वान अतिरिक्त शासकीय अधिवक्ता श्री राकेश कुमार सिंह को सुना व पत्रावली का परिशीलन किया।

2. धारा 482 दं०प्र०सं० के अंतर्गत प्रस्तुत इस प्रार्थना-पत्र द्वारा प्रार्थी ने

मु०अ०सं०-25 सन् 2023 अंतर्गत धारा 504, 506, 286, 323 भा०द०वि० एवं धारा 30 आयुध अधिनियम, थाना-गाजीपुर, जनपद-लखनऊ के आधार पर संस्थित वाद संख्या-39329 सन् 2023 में विशेष मुख्य न्यायिक मजिस्ट्रेट (कस्टम) लखनऊ द्वारा पारित आदेश दिनांक 02.11.2023 की वैधता को चुनौती दी, जिसके द्वारा प्रार्थी की पिस्टल, 4 जिन्दा कारतूस और पिस्टल के लाइसेन्स को अवमुक्त किए जाने का प्रार्थना-पत्र निरस्त किया गया है।

3. संक्षेप में, वाद के कथन इस प्रकार हैं कि दिनांक 14.01.2023 को प्रार्थी तथा सह-अभियुक्त सचिन शर्मा के विरुद्ध धारा 307, 504, 506 के अपराध के लिए थाना - गाजीपुर, जनपद लखनऊ में प्रथम सूचना रिपोर्ट संख्या 25 सन् 2023 इन कथनों के साथ अंकित की गई कि शिकायतकर्ता तथा अन्य लोगों को जान से मारने की नीयत से अभियुक्तगण तथा कुछ माफिया ने जान से मारने की नीयत से लगातार गोलियां चलाईं, किंतु किसी भी व्यक्ति को किसी भी प्रकार की चोट नहीं आई।

4. विवेचना के दौरान धारा 307 का आरोप पुष्ट नहीं हुआ तथा दिनांक 27.03.2023 को दोनों अभियुक्तों के विरुद्ध धारा 504, 506, 286, 323 भा०द०वि० एवं धारा 30 आयुध अधिनियम, 1959 के अपराध के संबंध में आरोप पत्र प्रस्तुत हुआ।

5. प्रस्तुत मामले में प्रार्थी को दिनांक 23.01.2023 के आदेश द्वारा सत्र न्यायालय से जमानत मिल चुकी है। दिनांक 22.05.2023 को प्रार्थी ने अपने पिस्तौल, 4 कारतूस तथा आयुध लाइसेन्स को अवमुक्त किए जाने हेतु प्रार्थना-पत्र दिया। इस प्रार्थना-पत्र पर विद्वान अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट ने पुलिस से एक रिपोर्ट मांगी जिस पर पुलिस द्वारा सूचित किया गया कि शस्त्र निरस्तीकरण के संबंध में कोई भी वाद जिलाधिकारी महोदय के समक्ष विचाराधीन नहीं है।

6. आयुध अवमुक्ति प्रार्थना-पत्र के विरुद्ध कोई आपत्ति प्रस्तुत नहीं की गई।

7. प्रार्थना-पत्र को निरस्त किए जाने के आदेश दिनांक 02.11.2023 में न्यायालय ने कहा है कि प्रतिपक्षीगण को पकड़े जाने का भय दिखाई देने पर बचने के लिए वादी व उनके साथियों को धमकाने की नीयत से पिस्टल से फायर करते हुए मौके से निकलकर भाग गए। आरोप-पत्र धारा 30 आयुध अधिनियम में भी प्रेषित किया गया है। मात्र धारा 307 दं०प्र० सं० का लोप होना माल का अभियुक्त के पक्ष में अवमुक्त किए जाने का आधार नहीं है।

8. घटना में मात्र दोनों अभियुक्तगण को चोट कारित हुई है तथा उनकी चोट प्रपत्र शपथ-पत्र के साथ संलग्न किए गए हैं। अभियुक्तगण द्वारा किसी व्यक्ति को कोई चोट कारित किया जाना सिद्ध नहीं हो पाया है।

9. राज्य की तरफ से प्रस्तुत प्रति - शपथ पत्र के साथ सह-अभियुक्त सचिन शर्मा की बहन हर्षिता सिंह का बयान संलग्न किया गया है जिसमें उन्होंने यह कहा कि आठ-दस लोग सचिन शर्मा के साथ मारपीट कर रहे थे, जिनको प्रार्थी ने बचाने का प्रयास किया तब भीड़ दोनों लोगों पर उग्र होकर हमलावर होने लगी। बचाव का कोई रास्ता न देख और भीड़ को हावी होता देख प्रार्थी द्वारा अपनी लाइसेंसी पिस्टल से आसमान में ऊपर की तरफ फायर कर दिया गया था तथा इसके बाद दोनों लोग वहां से अपनी जान बचाकर चले गये थे। शिकायतकर्ता ने दुर्व्यवहार किया व अभियुक्तगण को मारापीटा भी और घटना को बढ़ा-चढ़ाकर मुकदमा भी दर्ज करा दिया। जबकि जान से मारने की नीयत से कोई फायर नहीं किया गया था।

10. धारा 30 आयुध अधिनियम, आयुध लाइसेंस की शर्तों का उल्लंघन करने को अपराध घोषित करती है, किंतु लाइसेंसी आयुध से आत्मरक्षा में फायर किया जाना आयुध अधिनियम की किस शर्त का उल्लंघन है यह न तो आलोच्य आदेश दिनांक 02.11.2023 में विद्वान मजिस्ट्रेट ने अंकित किया है और न ही विद्वान अतिरिक्त शासकीय अधिवक्ता न्ययालय को बता पाए।

11. उपरोक्त तथ्यों को दृष्टिगत रखते हुए, जबकि घटना में प्रार्थी तथा सह-अभियुक्त को कई चोटें आई हैं तथा उनके द्वारा किसी व्यक्ति को कोई चोट कारित नहीं की गई है, प्रति शपथ-पत्र के साथ संलग्न साक्षी के बयान के अनुसार मारे-पीटे जाने पर आत्मरक्षा में हवाई फायर किया गया था; आयुध लाइसेंस निरस्तीकरण की कोई कार्यवाही प्रारंभ नहीं की गई है; आत्मरक्षा में पिस्टल से फायर करना लाइसेंस की शर्त का उल्लंघन नहीं है तथा धारा 30 आयुध अधिनियम का अपराध होना प्रतीत नहीं हो रहा है, न्यायालय का मत है कि विद्वान विशेष न्यायिक मजिस्ट्रेट (कस्टम) द्वारा पारित आदेश दिनांक 02.11.2023 विधि में संधार्य नहीं है तथा अपास्त होने योग्य है।

12. तदनुसार, यह प्रार्थना-पत्र **स्वीकार** किया जाता है, आदेश दिनांक 02.11.2023 अपास्त किया जाता है तथा प्रार्थी द्वारा विद्वान अतिरिक्त न्यायिक मजिस्ट्रेट के समक्ष प्रस्तुत किया गया प्रार्थना पत्र दिनांक 22.05.2023 स्वीकार किया जाता है तथा यह आदेश दिया जाता है कि प्रार्थी की पिस्टल संख्या "S.H.N.P.B. 45 BORE PISTOL NO. AECM-496 GLOCK 21 MADE IN USA", चार जिन्दा कारतूस (.45 AUTO S&B) तथा आयुध लाइसेंस संख्या 565 थाना विकास नगर (336201003461562021) प्रार्थी के पक्ष में अविलंब अवमुक्त किया जाए।

(2024) 1 ILRA 284
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 12525 of 2023

Israr Ahmad ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Ajmal Khan, Javed Khan

Counsel for the Opp. Parties:
G.A.

Criminal Law - Code of Criminal Procedure,1973 - Section Application 195(1)(a)(i) – Indian Penal Code,1860 – Section 143, 188 & 342 - Criminal Proceedings Quashed – The petitioner challenged the charge-sheet dated 24.11.2019, summoning order dated 12.02.2020, and proceedings in Criminal Case No. 2355 of 2020 under Sections 143, 188, 342 IPC – Held, the proceedings were quashed due to non-compliance with Section 195(1)(a)(i) Cr.P.C. for Section 188 IPC and because all offences formed part of the same transaction, rendering the prosecution invalid. (Paras 2, 11, 14)

B. Bar Under Section 195(1)(a)(i) Cr.P.C. – Cognizance Invalid – The charge-sheet included Section 188 IPC, but the complaint was filed by a Sub-Inspector, not the authorized public servant who issued the Section 144 Cr.P.C. order – Held, as per *D.K. Rajendran Vs St. of T.N.*, Section 195 Cr.P.C. mandates a written complaint by the concerned or superior public servant, and non-compliance vitiates the prosecution. (Paras 4, 8, 11, 12)

C. Offences Part of Same Transaction – No Splitting Allowed – The charge-sheet included Sections 143 and 342 IPC alongside Section 188 IPC – Held, as per *Sri Rajashekharananda Swamiji Vs St. of Karnataka* and *Merubhai Mandanbhai Chandera Vs St. of Gujarat*, offences forming part of the same transaction as Section 188 IPC cannot be split for prosecution, as they are integrally linked to the violation of the Section 144 Cr.P.C. order. (Paras 5, 7, 9, 12)

D. Disagreement with Jharkhand High Court – The St. relied on *Amitabh Choudhary Vs St. of Jharkhand*, which allowed prosecution for Section 143 IPC despite quashing Section 188 IPC – Held, the court disagreed, finding that the genesis of Sections 143 and 342 IPC offences was tied to the Section 188 IPC violation, making it impermissible to sustain prosecution for other offences. (Paras 10, 12, 13)

E. Casual Investigation and Mechanical Cognizance – The Investigating Officer conducted a cursory investigation, and the trial court took cognizance mechanically – Held, the lack of proper investigation and failure to adhere to Section 195 Cr.P.C. rendered the charge-sheet and summoning order an abuse of process, warranting quashing under Section 482 Cr.P.C. (Paras 3, 11, 14)

Application Allowed.

List of Cases cited:

1. Sri Rajashekharananda Swamiji Vs St. of Karn., Writ Petition No. 13328 of 2018 (GM-RES), decided on 18.06.2021

2. St. of Karnataka Vs Hemareddy, (1981) 2 SCC 185

3. Merubhai Mandanbhai Chandera Vs St. of Gujarat, Criminal Misc. Application No. 17286 of 2017, decided on 10.11.2017

4. D.K. Rajendran Vs St. of T.N., AIR 2010 SC 3718

5. St. Vs Kathi Unad, AIR 1955 Saurashtra 10

6. Bashirul Haq Vs St., AIR 1953 SC 293

7. Makaradhwaj Sahu Vs St., AIR 1954 Orissa 175

8. Amitabh Choudhary Vs St. of Jharkhand, MANU/JH/0171/2022, decided on 25.03.2022

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

1. Heard Sri Ajmal Khan, learned counsel for the petitioner and Sri

Aniruddha Kumar Singh, learned Additional Government Advocate-I for the State.

2. By means of this petition filed under Section 482 Cr.P.C., the petitioner has prayed to quash the proceeding of Criminal Case No. 2355 of 2020, State Vs. Israr Ahmad and Others, arising out of Case Crime No. 839 of 2019, under Sections 143, 188, 342 IPC, Police Station Kotwali Nagar, District Pratapgarh, pending in the court of learned Chief Judicial Magistrate, Pratapgarh as well as chargesheet dated 24.11.2019 and summoning order dated 12.02.2020.

3. The contention of learned counsel for the petitioner is that the Investigating Officer has conducted the investigation in sheer casual and cursory manner and filed the chargesheet against the petitioner under Sections 143, 188, 342 IPC. The court concerned took cognizance in a mechanical manner and has issued the summoning order without applying its judicial mind against the petitioner on 12.02.2020.

4. Learned counsel for the petitioner has stated that the cognizance of the chargesheet by the learned Chief Judicial Magistrate, Pratapgarh in the present case is violation of Section 195(1)(a)(i) of Cr.P.C. He has further submitted that Section 195(1)(a)(i) provides that no court shall take cognizance of an offence under Section 188 IPC except on the complaint in writing of the public servant concerned or of some other public servant, to whom he is administratively subordinate.

5. Attention has been drawn towards the judgment and order dated 18.06.2021 passed by Karnataka High Court in **Writ Petition No. 13328 of 2018(GM-RES), Sri Rajashekharananda Swamiji and Another Vs. The State of Karnataka**, referring para nos. 7, 8, 9,10 and 11 which read as under:

"7. As rightly pointed out, Section 188 of IPC is the main offence. The other offences flow from that. Section 195(1)(a) of Cr.P.C. bars the Court to take cognizance of such offence unless in accordance with the procedure laid down therein. Section 195(1)(a) reads as follows:

"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence

(1) No Court shall take cognizance-

(a)(i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, 1860 (45 of 1860); or

(ii) of any abetment of, or attempt to commit, such offence; or

(iii) of any criminal conspiracy to commit such offence,

except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;"

8. Reading of the above provision makes it clear that to take cognizance there should be a written complaint and such complaint should be filed either by the officer issuing such promulgation order or the officer above his rank. In the case on hand, as per the complaint itself, prohibitory order under Section 144 of IPC was promulgated by the Commissioner of Police and not the complainant.

*9. Further Section **2(d) of Cr.P.C. defines complaint as allegations made orally or in writing to the Magistrate with a view to the Magistrate** taking action on such complaint under the Code. Only on such complaint, the Magistrate can take*

cognizance under Section 190(1)(a) of Cr.P.C. Thereafter the procedure prescribed under Section 200 of Cr.P.C. has to be followed. Therefore the first information report, charge sheet and the order taking cognizance on such charge sheet are without jurisdiction.

10. Then the question is Annexures-A to D get vitiated only so far as the offence under Section 188 of IPC. In para 8 of the judgment in State of Karnataka v. Hemareddy [(1981) 2 SCC 185], the Hon'ble Supreme Court held as follows:

"8. We agree with the view expressed by the learned Judge and hold that in cases ***where in the course of the same transaction an offence*** *for which no complaint by a Court is necessary under Section 195(1)(b) of the Code of Criminal Procedure and an offence for which a complaint of a Court is necessary under that sub-section, are committed,* ***it is not possible to split up and hold that the prosecution of the accused for the offences not mentioned in Section 195(1)(b) of the Code of Criminal Procedure should be upheld."***

(Emphasis supplied)

11. Reading of the above judgment makes it clear that if the offences form part of same transaction of the offences contemplated under Section 195(1) of Cr.P.C, then it is not possible to split up and hold that prosecution of the accused for the other offences should be upheld. Therefore the entire complaint, first information report, charge sheet and the order taking cognizance are liable to be quashed. The petition is allowed.

The impugned first information report, complaint, the charge sheet and the proceedings in C.C.No. 3660/2016 are hereby quashed."

(Emphasis supplied)

6. Learned counsel for the petitioner has stated that the facts and circumstances of the present case are similar to the case dealt by the Karnataka High Court, inasmuch as in the present case, the complaint has not been lodged by the authority who has issued the promulgation order under Section 144 Cr.P.C. but by one Sub Inspector. Further, in the case decided by the Karnataka High Court Re: **Sri Rajashekharananda Swamiji (supra)**, the FIR was lodged under Sections 143, 144, 145, 147, 148, 153, 188, 332, 353 of IPC and Sections 2(a) and 2(b) of the Karnataka Prevention of Destruction and Loss of Property Act, 1981 and in the present case the FIR was lodged against the petitioner under Sections 143, 188 and 342 of IPC.

7. Further attention has been drawn by learned counsel for the petitioner towards the judgment and order dated 10.11.2017 passed by Gujarat High Court rendered in **Criminal Misc. Application (For Quashing & Set Aside Fir/order) No. 17286 of 2017, Merubhai Mandanbhai Chandera and 1 others Vs. State of Gujarat and 1 others**, referring Para nos. 45 and 46 which read as under:

"45. In ***State v. Kathi Unad, AIR 1955 Saurashtra 10: (1955 Cri LJ 52),*** *the learned Judge relying on the Supreme Court case of* ***Bashirul Haq AIR 1953 Supreme Court 293:(1953 Cri LJ 1232)*** *said that the very act of obstruction lay in the assault and the hurt to complainant and that the offence primarily committed was under Section 186, I.P.C. and to convict the accused for the offence under Section 332, I.P.C. would be tantamount to holding them guilty under Section 186, I.P.C. and then convicting them for the offence under Section 332, I.P.C. They came to the conclusion that the prosecution could not*

circumvent the provisions of Section 195 by a dubious method. (See also ***Makaradhwaj Sahu vs. State AIR 1954 Orissa 175: (1954 Cri LJ 950).*** *The decision in AIR 1953 Nag 290 : (1953 Cri LJ 1573) is also pertinent.*

46. In some of the applications before me, the only offence is either section 186 or 188 of the IPC. In such type of cases, there should not be any difficulty in quashing the prosecution in view of the bar of Section 195 of the Cr.P.C., 1973 However, there are few cases on hand, in which, over and above sections 186 or 188 of the I.P.C., the other offences are also there which are not covered under section 195 of the Cr.P.C., 1973. It is only in such cases, the court has to be careful. I have noticed that in some of the cases, there is a charge of section 353 of the IPC along with section 186 of the IPC. I am of the view that the very act of obstruction lies in the alleged assault and use of criminal force. In truth and substance, such an offence would fall in the category of sections mentioned in section 195 of the Code and it is not open to bye pass its provisions even by choosing to prosecute under section 353 of the IPC only. There is no scope, in any of the matters on hand, having regard to the materials on record, to split up the offences so as to avoid the bar of section 195 of the Cr.P.C. 1973 as all the offences can be said to have been committed in the course of one transaction. All the offences can be said to have been an integral part of one transaction."

(Emphasis supplied)

8. Learned counsel for the petitioner has also drawn attention of this Court towards judgment of Apex Court rendered in the case of **D.K. Rajendran and Ors. etc. etc. Vs. State of T.N.**, reported in **AIR 2010 SC 3718**, referring Para 25 which reads as under:

"25. Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the pubic servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction."

(Emphasis supplied)

9. Learned counsel for the petitioner has stated that the Karnataka High Court as well as Gujarat High Court, in the aforesaid judgments, have held that if the offences form part of same transaction of the offences contemplated under Section 195(1) of Cr.P.C., then it is not possible to split up and hold that prosecution of the accused for the other offences should be upheld, therefore, learned counsel has stated that in view of the bar under Section 195 of Cr.P.C., the prosecution under Section 188 IPC may fall against the petitioner and since the offences form part of same transaction, therefore, the chargesheet consisting Section 188 IPC and other Sections and further proceedings are liable to be quashed.

10. Per contra, Sri Aniruddha Kumar Singh, learned AGA-I has submitted that so far as the chargesheet under Section 188 IPC is concerned, he has nothing to say against the contention of learned counsel for the petitioner in view of the specific bar to that effect under Section 195 of Cr.P.C. He has also stated that the complainant of the said FIR is not the authority who has issued the proclamation but the same has been lodged by one police officer.

However, so far as the applicability of Sections 143 and 342 IPC is concerned, the chargesheet has been filed against the petitioner and knowing fully well about the proclamation, so issued by the Administrative Authority, under Section 144 of Cr.P.C., the petitioner and others have breached such proclamation, therefore, he may be prosecuted under Sections 143 and 342 IPC. In support of his argument, Sri Aniruddha Kumar Singh has placed reliance of the decision of Jharkhand High Court dated 25.03.2022 rendered in the case of **Amitabh Choudhary Vs. The State of Jharkhand and Ors, reported in MANU/JH/0171/2022**, referring Para nos. 43, 44 and 45 which read as under:

"43. Accordingly, the impugned order taking cognizance dated 03.09.2014/09.05.2014 passed by the learned Judicial Magistrate, Ranchi arising out of Angara P.S. Case No. 23 of 2014 dated 11.03.2014 corresponding to G.R. Case No. 1449 of 2014 is set aside to the extent it relates to offence under Section 126 of the Representation of People Act, 1951 and offence under Section 188 IPC. Since cognizance under section 188 IPC has been set-aside on technical grounds, the concerned authorities may proceed in accordance with law as already indicated above. As a result, the present criminal miscellaneous petition is partly allowed.

44. So far as the offence under section 143 of IPC is concerned, the impugned order taking cognizance does not call for any interference and accordingly, the learned court below is directed to proceed with the matter expeditiously.

45. It is made clear that dismissal of this petition with regards to offence under Section 143 IPC and any observation made in this order will not prejudice the case of the respective parties before the learned court below in any manner."

(Emphasis supplied)

11. Having heard learned counsel for the parties, having perused the material available on record and having regard the decisions of Apex Court and various High Courts, I am also of the considered opinion that no Court can take cognizance of any offence indicated in the chargesheet under Section 188 of IPC in absence of written complaint by the officer authorized for that purpose in view of the specific bar of Section 195 Cr.P.C. The provisions of Section 195 Cr.P.C. are mandatory and non-compliance of it would vitiate the prosecution and other consequential orders.

12. In the present case, notably, the complaint has not been filed by the officer who has issued proclamation under Section 144 of Cr.P.C., therefore, the trial court could have not taken cognizance of the chargesheet indicating the offence under Section 188 IPC. Besides other offences i.e. Section 143 IPC: Punishment of unlawful assembly and Section 342: Punishment for wrongful confinement since form part of the same transaction of the offence contemplated under Section 195(1) of Cr.P.C., so it is not possible to split up and hold that prosecution of the accused for the other offences, inasmuch as the genesis of other offences depends under Section 188 IPC. To me, had it not been any proclamation under Section 144 Cr.P.C. there would have been no offence of the petitioner under Section 188 IPC. Further, the offence of unlawful assembly is also part and parcel of Section 188 IPC. On account of the promulgation order, the offence of wrongful confinement in the present case is said to have been committed by the petitioner alongwith so many

persons who have gathered when promulgation order was in operation and due to that some persons of public and vehicles thereof stucked in jam.

13. In view of the above and having regard to the dictum of Apex Court in re: **D.K. Rajendran (supra)**, I am in agreement with the decisions of Karnataka High Court and Gujarat High Court and to that extent I am respectfully disagreeing with the decision of Jharkhand High Court in Re: **Amitabh Choudhary** (supra).

14. In view of the above, the present petition under Section 482 Cr.P.C. is ***allowed.*** The impugned complaint, chargesheet dated 24.11.2019, summoning order dated 12.02.2020 and the proceedings of Criminal Case No. 2355 of 2020, State Vs. Israr Ahmad and Others, arising out of Case Crime No. 839 of 2019, under Sections 143, 188, 342 IPC, Police Station Kotwali Nagar, District Pratapgarh, pending in the court of learned Chief Judicial Magistrate, Pratapgarh, are hereby quashed.

15. No order as to costs.

(2024) 1 ILRA 290
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.12.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

Appeal U/s 37 of Arbitration & Conciliation Act 1996 No. 58 of 2022

Harish Tripathi ...Appellant
Versus
Competent Auth., N.H. & Ors. ...Respondents

Counsel for the Appellant:
Sharad Pathak, Piyush Pathak

Counsel for the Respondents:
Vimlesh Kumar

A. Civil Law-Arbitration and Conciliation Act, 1996-Section 37-National Highway Act, 1956-Section 3-G(5)-Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013-Section 26-In the instant case, land was used for commercial purpose-compensation of the land has been denied at the commercial rates-the petrol pump being commercial enterprise, the constructions raised by the appellant was of a commercial nature and the calculation for the aforesaid construction ought to have been considered as per the Collector's rate list and on the basis of cogent material on record-The authorities below ought to have considered the parameters enumerated in Section 3-G (7) (b) (c), (d) r/w sections 28, 29 of the Act, 2013 in the light of the evidence led by the appellant in respect of the constructions as applicable to the commercial building and shall also determine whether the appellant is entitled to damages-Matter be decided afresh within a period of six months.(Para 5 to 57)

The appeal is allowed. (E-6)

List of Cases cited:

1. NHAI Vs P. Nagaraju @ Cheluvaiah & anr. (2022) SCC Online SC 864

2. Reddy Veerana Vs St. of U.P & ors.(2022) SCC Online SC 562 UOI Vs Parimal Singh & ors.(2009) 1 SCC 618

3. Gajanan &Ors VS St. of Mah. & anr.. (2011) 12 SCC 286

4. Chandra Kishori Vs U.O.I. & ors.(2023) AHC-LKO 69836

5. NHAI Vs Pankaj Singh Arbtn. Appeal No. 1 of 2019

6. UOI Vs Savitri Devi & anr. (2018) 12 SCC 545

7. MMTC Vs Ltd Vs Vedanta Ltd (2019) 4 SCC 163

8. Batliboi Environmental Engineers Ltd VS HPCL & anr. (2023) SCC online SC 1208

9. ONGC Ltd Vs Saw Pipes Ltd (2023) 5 SCC 705

10. Asso. Builder Vs DDA (2015) 3 SCC 49

11. NHAI Vs M. Hakeem & anr.(2021) 9 SCC 1

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

1. The Court has heard Sri Sharad Pathak, learned counsel for the appellant and Sri Vimlesh Kumar for the National Highway Authority of India.

2. The instant appeal has been preferred under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act of 1996) against the order dated 03.11.2022 in Civil Misc. Case No. 156 of 2018 whereby the petition of the appellant under Section 34 of the Arbitration and Conciliation Act, 1996 was partly allowed as a consequence the award dated 23.03.2018 passed by the Arbitrator/the Collector was set aside only in respect of the compensation relating to the cost of construction upon the acquired land.

3. Briefly, the facts giving rise to the instant appeal are being noticed hereinafter, first:-

4. That the appellant was the recorded owner of Khasra Plot No. 108 measuring 0.1032 hectares situate in Village Bikahar Pargana Chanda, Tehsil Lambhua, District Sultanpur.

5. In the year 2012, the National Highway Authority had acquired the land for the purpose of widening the National Highway-56, Lucknow to Varanasi and for the aforesaid purpose, the land of the appellant was also acquired and in lieu thereof the appellant was granted a compensation of Rs. 2,07,81,620/-.

6. The petitioner filed a petition before the Collector who acts as a Statutory Arbitrator under Section 3-G (5) of the National Highway Act, 1956 (hereinafter referred to as the "Act of 1956"). The Arbitrator rejected the petition of the appellants vide its award dated 23.03.2018. This was challenged by the appellant before the District Judge, Sultanpur by filing a petition under Section 34 of the Act of 1956 which has been decided by means of order dated 03.11.2022 whereby the award dated 23.03.2018 has been partly set aside only on one ground and the matter was remitted to the Arbitrator for passing a fresh award.

7. The contention of learned counsel for the appellant is that the Arbitrator as well as the Court in exercise of powers under Section 34 of the Act of 1996 committed an error of law in failing to consider that the appellant was utilizing the land acquired for commercial purposes as admittedly a petrol pump was running on the said land.

8. It is further urged that the provisions of Section 3 -G of the Act of 1956 are to be read with Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the "LARA Act of 2013") and this has not been appropriately considered.

9. From a conjoint reading of Section 3-G of the Act of 1956 with Section 26 of the LARA Act, 2013, it would indicate that there are certain factors which have to be

taken note of while determining the compensation which has not been done.

10. It is also urged that the reasoning given by the Court while rejecting the petition under Section 34 of the Act of 1996 is also erroneous, inasmuch as, it has been noticed by the Court below that even though the appellant was running a petrol pump but since that petrol pump was only the commercial activity being done in the area, hence, it cannot be said that the said land is commercial to attract rates as applicable to commercial lands.

11. It is further submitted that the Court while rejecting the application under Section 34 of the Act 1996 further erred in stating that had there been other members of the Society doing commercial activity only then the said land could have been treated to be commercial, which is not quite correct and the reasoning is flawed.

12. It is submitted that under law once the land is declared as non-agricultural, it can be utilized for residential, commercial or even industrial purposes but the fact remains that it is the activity which is being done on the said land which will determine as to what rate is applicable for the grant of compensation.

13. It is further submitted that there is no provision in law which declares a land as non-agricultural with a further classification of declaring it as commercial. In the instant case, since the land admittedly was used for commercial purposes where the appellant had got himself registered under the U.P. Shop and Commercial Establishment Act, 1962 and the activity being run was definitely commercial in nature, hence, by denying the compensation of the land at the commercial rates, the Arbitrator as well as the Court has committed an error.

14. It is further submitted that as per the Collector's rate list which was applicable to the case in hand dated 07th July, 2012 whereas the notification under Section 3-A was made on 12th December, 2012, hence, the Collector's rate list has also been ignored which clearly provides the rates regarding non-agricultural land and for the aforesaid reasons, the order turning down the contentions of the appellant and partly allowing the petition only on the ground relating to computation of compensation relating to construction has caused injustice to the appellant, hence the appeal.

15. It is further urged that the the Authorities have failed to consider the interest on delayed payment as the petitioner was entitled to get the interest from the date the possession was taken and this aspect has also not been properly considered.

16. The learned counsel for the appellant has relied upon the decision of the Apex Court in ***National Highways Authority of India Vs. P. Nagaraju alias Cheluvaiah and Another; 2022 SCC Online SC 864, Reddy Veerana Vs. State of U.P. and Others; 2022 SCC Online SC 562, Union of India Vs. Parimal Singh and Others; 2009 (1) SCC 618 and Gajanan and Others Vs. State of Maharashtra and Another; (2011) 12 SCC 286*** and also on a decision of this Court in ***Chandra Kishori Vs. Union of India and Others; 2023:AHC-LKO:69836.***

17. Sri Vimlesh Kumar, learned counsel appearing for the National Highway Authority has submitted that from

the bare perusal of the provisions contained in the National Highway Act, 1956, it would reveal that the compensation is granted for the land and for determining the compensation it is the date on which the notification under Section 3-A is issued is important. The nature of the land as recorded in the revenue records on the date of notification under Section 3-A of the Act of 1956 is to be seen. Once the compensation of land is determined thereafter but simultaneously recourse is taken to other provisions for the purposes of calculating the value of constructions, trees or other improvements made on the land which is the subject matter of acquisition as per the provisions of the Act of 1956 read with LARA Act of 2013.

18. Sri Vimlesh Kumar further submits that in the instant case, the land apparently was recorded as non-agricultural and the Competent Authority has rightly computed the compensation as per the non-agricultural rate of Rs. 4,000/- per square meter which is in consonance with the rates as mentioned in the Collector's rate list and therefore it cannot be said that the appellant has suffered any prejudice. This aspect has also been noticed by the Competent Authority, the Arbitrator as well as the Court in exercise of powers under Section 34 of the Act of 1996 and it cannot be said that there is any error therein.

19. The further submission of learned counsel for the respondents is that the issue has already been considered by this Court in Arbitration Appeal No. ***1 of 2019; National Highway Authority of India Vs. Pankaj Singh*** decided on ***22.01.2020*** and thus it is no more open for the appellant to urge that appropriate rates have not been awarded to the appellant insofar as the land is concerned.

20. It is further submitted that regarding the interest, the Competent Authority has appropriately calculated the interest and it shall be evident that the same has been calculated in accordance with the rules from the date of the notification till the date of the award and to that extent the submission made by learned counsel for the appellant does not stand to reason.

21. It is further submitted that in so far as the calculation regarding the compensation for construction is concerned this issue, has already been remitted for a fresh determination by the order passed by the Court on 03.11.2022 and as such the same has to be recalculated, hence, at present, the contention of learned counsel for the appellant is not tenable and is liable to be turned down and the appeal deserves to be dismissed.

22. Sri Vimlesh Kumar, learned counsel for the respondent has relied upon the decisions of the Apex Court in ***Union of India Vs. Savitri Devi and Another; 2018 (12) SCC 545, MMTC Vs. Ltd. Vs. Vedanta Ltd. 2019 (4) SCC 163*** as well as a decision of this Court in ***Arbitration Appeal No. 1 of 2019 National Highway Authority of India Vs. Pankaj Singh*** decided on ***22.01.2020.***

23. This Court at the outset is of the view that in order to test the submissions of the respective parties, it will be relevant first to notice the statutory provisions applicable to the controversy at hand.

24. In this regard, Section 3-G of the National Highway Act, 1956 is being reproduced as under:-

"Section 3 G:- Determination of amount payable as compensation.—

1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent, of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government--

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration—

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.]"

25. Simultaneously it will also be relevant to notice Section 26, 27 to 30 of the Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act, 2013, which reads as under:-

"26. Determination of market value of land by Collector.

(1) The Collector shall adopt the following criteria in assessing and determining the market value of the land, namely:—

(a) the market value, if any, specified in the Indian Stamp Act, 1899 (2 of 1899) for the registration of sale deeds or agreements to sell, as the case may be, in the area, where the land is situated; or

(b) the average sale price for similar type of land situated in the nearest village or nearest vicinity area; or

(c) consented amount of compensation as agreed upon under sub-section (2) of

section 2 in case of acquisition of lands for private companies or for public private partnership projects, whichever is higher:

Provided that the date for determination of market value shall be the date on which the notification has been issued under section 11.

Explanation 1.—The average sale price referred to in clause (b) shall be determined taking into account the sale deeds or the agreements to sell registered for similar type of area in the near village or near vicinity area during immediately preceding three years of the year in which such acquisition of land is proposed to be made.

Explanation 2.—For determining the average sale price referred to in Explanation 1, one-half of the total number of sale deeds or the agreements to sell in which the highest sale price has been mentioned shall be taken into account.

Explanation 3.—While determining the market value under this section and the average sale price referred to in Explanation 1 or Explanation 2, any price paid as compensation for land acquired under the provisions of this Act on an earlier occasion in the district shall not be taken into consideration.

Explanation 4.—While determining the market value under this section and the average sale price referred to in Explanation 1 or Explanation 2, any price paid, which in the opinion of the Collector is not indicative of actual prevailing market value may be discounted for the purposes of calculating market value.

(2) The market value calculated as per sub-section (1) shall be multiplied by a factor to be specified in the First Schedule.

(3) Where the market value under sub-section (1) or sub-section (2) cannot be determined for the reason that—

(a) the land is situated in such area where the transactions in land are restricted by or under any other law for the time being in force in that area; or

(b) the registered sale deeds or agreements to sell as mentioned in clause (a) of sub-section (1) for similar land are not available for the immediately preceding three years; or

(c) the market value has not been specified under the Indian Stamp Act, 1899 (2 of 1899) by the appropriate authority, the State Government concerned shall specify the floor price or minimum price per unit area of the said land based on the price calculated in the manner specified in sub-section (1) in respect of similar types of land situated in the immediate adjoining areas:

Provided that in a case where the Requiring Body offers its shares to the owners of the lands (whose lands have been acquired) as a part compensation, for acquisition of land, such shares in no case shall exceed twenty-five per cent, of the value so calculated under sub-section (1) or sub-section (2) or sub-section (3) as the case may be:

Provided further that the Requiring Body shall in no case compel any owner of the land (whose land has been acquired) to take its shares, the value of which is deductible in the value of the land calculated under sub-section (1):

Provided also that the Collector shall, before initiation of any land acquisition proceedings in any area, take all necessary steps to revise and update the market value of the land on the basis of the prevalent market rate in that area:

Provided also that the appropriate Government shall ensure that the market value determined for acquisition of any land or property of an educational institution established and administered by a religious or linguistic minority shall be such as would not restrict or abrogate the

right to establish and administer educational institutions of their choice.

27.Determination of amount of compensation.*–The Collector having determined the market value of the land to be acquired shall calculate the total amount of compensation to be paid to the land owner (whose land has been acquired) by including all assets attached to the land.*

28. Parameters to be considered by Collector in determination of award:- *In determining the amount of compensation to be awarded for land acquired under this Act, the Collector shall take into consideration—*

firstly, the market value as determined under section 26 and the award amount in accordance with the First and Second Schedules;

secondly, the damage sustained by the person interested, by reason of the taking of any standing crops and trees which may be on the land at the time of the Collector's taking possession thereof;

thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;

fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings; fifthly, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change;

sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under section 19 and the time of the Collector's taking possession of the land; and

seventhly, any other ground which may be in the interest of equity, justice and beneficial to the affected families.

29. Determination of value of things attached to land or building.*–(1) The Collector in determining the market value of the building and other immovable property or assets attached to the land or building which are to be acquired, use the services of a competent engineer or any other specialist in the relevant field, as may be considered necessary by him.*

(2) The Collector for the purpose of determining the value of trees and plants attached to the land acquired, use the services of experienced persons in the field of agriculture, forestry, horticulture, sericulture, or any other field, as may be considered necessary by him.

(3) The Collector for the purpose of assessing the value of the standing crops damaged during the process of land acquisition, may use the services of experienced persons in the field of agriculture as may be considered necessary by him.

30. Award of Solatium:- (1) The Collector having determined the total compensation to be paid, shall, to arrive at the final award, impose a "Solatium" amount equivalent to one hundred per cent of the compensation amount.

Explanation.---For the removal of doubts it is hereby declared that solatium amount shall be in addition to the compensation payable to any person whose land has been acquired.

(2) The Collector shall issue individual awards detailing the particulars of compensation payable and the details of payment of the compensation as specified in the First Schedule.

(3) In addition to the market value of the land provided under section 26, the Collector shall, in every case, award an amount calculated at the rate of twelve per cent. per annum on such market value for the period commencing on and from the date of the publication of the notification of the Social Impact Assessment study under sub-section (2) of section 4, in respect of such land, till the date of the award of the Collector or the date of taking possession of the land, whichever is earlier.

26. Upon taking a look at the aforesaid provisions, this Court finds that while determining the compensation, the authority is required to take into account the market value of the land on the date of publication of the notification under Section 3-A of the NHAI Act, 1956. In order to determine the market value, it will have to be seen as to what was the nature of the land and how and under what category was it recorded in the revenue records. It will also be relevant to notice that wherever the Collector makes or publishes a rate list regarding ascertaining the market value for the purposes of stamp duty, the same also becomes applicable as provided under Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

27. From the provisions of Section 3-G(7) of the Act, 1956 read with Section 26 to Section 29 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, it would be clear that compensation is made in respect of the land which is acquired and the status of the land is to be seen in context with the nature and the category in which it is recorded on the date of notification under Section 3-A of the Act, 1956. The provisions which have been noticed here-in-above also indicates that construction, trees or other improvements made on the said land has to be considered and while determining the final compensation various factors such as (a) the average sale price for same type of land situate in the nearest village or vicinity; (b) the damages sustained by the person interested by reason of taking of any standing crop or trees, which may be on the land at the time of taking possession; (c) the damages, if any, sustained by a person interested at the time of Collector's taking possession which affects his other immovable property; (d) damages in case, if suffered relating to the acquisition by virtue of which the person interested is compelled to change his residence or place of business and reasonable expenses incidental to such change and any other ground which in the interest of equity justice and is beneficial to the affected families, is also to be taken into account.

28. After having noticed the aforesaid provisions regarding the determination of compensation, at this very stage, it will be relevant to notice the scope of an appeal under Section 37 of the Act of 1996 and in this regard the decision of the Apex Court in ***NMTC Vs. Vedanta Ltd. 2019 (4) SCC 163*** can be gainfully referred wherein the Apex Court has held as under:-

"10. Before proceeding further, we find it necessary to briefly revisit the existing position of law with respect to the scope of interference with an arbitral award in India, though we do not wish to burden this judgment by discussing the principles regarding the same in detail. Such interference may be undertaken in terms of Section 34 or Section 37 of the Arbitration and Conciliation Act, 1996 (for

short ?the 1996 Act?). While the former deals with challenges to an arbitral award itself, the latter, inter alia, deals with appeals against an order made under Section 34 setting aside or refusing to set aside an arbitral award.

11. As far as Section 34 is concerned, the position is well-settled by now that the Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided under Section 34(2)(b)(ii) i.e. if the award is against the public policy of India. As per the legal position clarified through decisions of this Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award. Additionally, the concept of the ?fundamental policy of Indian law? would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] reasonableness. Furthermore, ?patent illegality? itself has been held to mean contravention of the substantive law of India, contravention of the 1996 Act, and contravention of the terms of the contract.

12. It is only if one of these conditions is met that the Court may interfere with an arbitral award in terms of Section 34(2)(b)(ii), but such interference does not entail a review of the merits of the dispute, and is limited to situations where the findings of the arbitrator are arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter. An arbitral award may not be interfered with if the view taken by the arbitrator is a possible view based on facts. (See Associate Builders v. DDA [Associate Builders v. DDA, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204] . Also see ONGC Ltd. v. Saw Pipes Ltd. [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705] ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation [Hindustan Zinc Ltd. v. Friends Coal Carbonisation, (2006) 4 SCC 445] ; and McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181])

13. It is relevant to note that after the 2015 Amendment to Section 34, the above position stands somewhat modified. Pursuant to the insertion of Explanation 1 to Section 34(2), the scope of contravention of Indian public policy has been modified to the extent that it now means fraud or corruption in the making of the award, violation of Section 75 or Section 81 of the Act, contravention of the fundamental policy of Indian law, and conflict with the most basic notions of justice or morality. Additionally, sub-section (2-A) has been inserted in Section 34, which provides that in case of domestic arbitrations, violation of Indian public policy also includes patent illegality appearing on the face of the award. The proviso to the same states that an award shall not be set aside merely on the ground of an erroneous application of the law or by re appreciation of evidence.

As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of

power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."

29. At this juncture, in order to examine whether an award is bad or against the public policy or it suffers from patent illegality, it will be worthwhile to notice a recent pronouncement of the Apex Court in **Batliboi Environmental Engineers Limited Vs. HPCL and another [2023 SCC online SC 1208** and the relevant paragraphs 31, 32, 34 to 38, 41, 42 and 44 read as under:-

"31. ... The foundation of arbitration is party autonomy. Parties have the freedom to enter into an agreement to settle their disputes/claims by an arbitral tribunal, whose decision is binding on the parties. 23 It is argued that the purpose of arbitration is fast and quick one-stop adjudication as an alternative to court adjudication, and therefore, post award interference by the courts is unwarranted, and an anathema that undermines the fundamental edifice of arbitration, which is consensual and voluntary departure from the right of a party to have its claim or dispute adjudicated by the judiciary. The process is informal, and need not be legalistic. Per contra, it is argued that party autonomy should not be treated as an absolute defence, as a party despite agreeing to refer the disputes/claims to a private tribunal consensually, does not barter away the constitutional and basic human right to have a fair and just resolution of the disputes. The court must exercise its powers when the award is unfair, arbitrary, perverse, or otherwise infirm in law. While arbitration is a private form of dispute resolution, the conduct of arbitral proceedings must meet the juristic requirements of due process and procedural fairness and reasonableness, to achieve a 'judicially' sound and objective outcome. If these requirements, which are equally fundamental to all forms of adjudication including arbitration, are not sufficiently accommodated in the arbitral proceedings and the outcome is marred, then the award should invite intervention by the court.

32. To disentangle and balance the competing principles, the degree and scope of intervention of courts when an award is challenged by one or both parties needs to be stated. Reconciliation as a statement of law and in particular application in a particular case has not been an easy exercise. We begin by first referring to the views expressed by this Court in interpreting the width and scope of the post award interference by the courts under Section 34 of the A&C Act.

34. Sub-section (1) to Section 34 of the A&C Act requires that the recourse to a court against an arbitral award is to be made by a party filing an application for setting aside of an award in accordance with sub-sections (2) and (3) of Section 34. Sub-section (2) to Section 34 of the A&C Act stipulates seven grounds on which a court may set aside an arbitral award. Sub-section (2) consists of two clauses, (a) and (b). Clause (b) consists of two sub-clauses, namely, sub-clause (i) which states that when the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, and sub-clause (ii), which states that the court can set aside an arbitral award when the award is 'in conflict with public policy of India'. We shall subsequently examine the decisions of this Court interpreting 'in

conflict with public policy of India' and the explanation.

35. Under sub-clause (a) to sub-section (2) to Section 34 of the A&C Act, a court can set aside an award on the grounds in sub-clauses (i) to (v) namely, when a party being under some incapacity; arbitration agreement is not valid under the law for the time being in force; when the party making an application under Section 34 is not given a proper notice of appointment of the arbitrator or the arbitration proceedings, or was unable to present its case; and when the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement between the parties, unless such agreement was in conflict with the mandatory and binding non-derogable provision, or was not in accordance with Part I of the A&C Act. Sub-clause (iv) states that the arbitral award can be set aside when it deals with a dispute not contemplated by, or not falling within the terms of submission of arbitration, or it contains a decision on matters beyond the scope of submission to arbitration. However, the proviso states that the decision in the matters submitted to arbitration can be separated from those not submitted, then that part of the arbitral award which contains the decision on the matter not submitted to arbitration can be set aside. In the present case, we are not required to examine sub-clauses to clause (a) to sub-section (2) to Section 34 of the A&C Act in detail. Hence, this decision should not be read as making any observation, even as obiter dicta on the said clauses.

36. Explanation to sub-clause (ii) to clause (b) to Section 34(2) of the A&C Act, as quoted above and before its substitution by Act No.3 of 2016, had postulated and declared for avoidance of doubt that an award is 'in conflict with the public policy of India', if the making of the award is induced or affected by fraud or corruption, or was in violation of Sections 75 or 81 of the A&C Act. Both Sections 75 and 81 of the A&C Act fall under Part III of the A&C Act, which deal with conciliation proceedings. Section 75 of the A&C Act relates to confidentiality of the settlement proceedings and Section 81 deals with admissibility of evidence in conciliation proceedings. Suffice it is to note at this stage that while 'fraud' and 'corruption' are two specific grounds under 'public policy', these are not the sole and only grounds on which an award can be set aside on the ground of 'public policy'.

37. Act No. 3 of 2016 with retrospective effect from 23.10.2015 has substituted the explanation referred to above, by two new explanations that are differently worded.25 Sub-section (2-A) to Section 34 of the A&C Act, which was instituted by Act No. 3 of 2016 with retrospective effect from 23.10.2015, states that the arbitral award arising out of arbitrations other than international commercial arbitrations can be set aside by the court, if it is vitiated by patent illegality appearing on the face of the award. The proviso to sub-section (2-A) to Section 34 of the A&C Act also states that the award shall not be set aside merely on the ground of erroneous application of law or by reappreciation of evidence. The aforesaid sub-section need not be examined in the facts of the present case, as we are not required to interpret and apply the substituted explanations to (ii) to sub-clause (b) to 34(2) of the A & C Act in the present case.

38. The expression 'public policy' under Section 34 of the A&C Act is capable of both wide and narrow interpretation. Taking a broader interpretation, this Court

in ONGC Limited. v. Saw Pipes Limited., held that the legislative intent was not to uphold an award if it is in contravention of provisions of an enactment, since it would be contrary to the basic concept of justice. The concept of 'public policy' connotes a matter which concerns public good and public interest. An award which is patently in violation of statutory provisions cannot be held to be in public interest. Thus, expanding on the scope and expanse of the jurisdiction of the court under Section 34 of the A&C Act, it was held that an award can be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Nevertheless, the decision holds that mere error of fact or law in reaching the conclusion on the disputed question will not give jurisdiction to the court to interfere. However, this will depend on three aspects: (a) whether the reference was made in general terms for deciding the contractual dispute, in which case the award can be set aside if the award is based upon erroneous legal position; (b) this proposition will also hold good in case of a reasoned award, which on the face of it is erroneous on the legal proposition of law and/or its application; and (c) where a specific question of law is submitted to an arbitrator, erroneous decision on the point of law does not make the award bad, unless the court is satisfied that arbitrator had proceeded illegally. In the said case, the court set aside the award on the ground that the award had not taken into consideration the terms of the contract before arriving at the conclusion as to whether the party claiming the damages is entitled to the same. Reference was made to the provisions of Sections 73 and 74 of the Contract Act, which relate to liquidated damages, general damages and penalty stipulations. This view had held the field for a long time and was applied in subsequent judgments of this Court in ***Hindustan Zinc Ltd. v. Friends Coal Carbonisation27 , Centrotrade Minerals and Metals Inc. v. Hindustan Copper Limited28 , Delhi Development Authority v. R.S. Sharma and Co29 ., J.G. Engineers (P) Ltd. v. Union of India and Another30, and Union of India v. L.S.N. Murthy.***

41. Subsequently, in ***ONGC Ltd. v. Western Geco International Ltd.,*** *a three Judge Bench of this Court observed that the Court, in Saw* ***Pipes Ltd****., did not examine what would constitute 'fundamental policy of Indian law'. The expression 'fundamental policy of Indian law' in the opinion of this Court includes all fundamental principles providing as basis for administration of justice and enforcement of law in this country. There were three distinct and fundamental juristic principles which form a part and parcel of 'fundamental policy of Indian law'. The first and the foremost principle is that in every determination by a court or an authority that affects rights of a citizen or leads to civil consequences, the court or authority must adopt a judicial approach. Fidelity to judicial approach entails that the court or authority should not act in an arbitrary, capricious or whimsical manner. The court or authority should act in a bona fide manner and deal with the subject in a fair, reasonable and objective manner. Decision should not be actuated by extraneous considerations. Secondly, the principles of natural justice should be followed. This would include the requirement that the arbitral tribunal must apply its mind to the attending facts and circumstances while taking the view one*

way or the other. Non- application of mind is a defect that is fatal to any adjudication. Application of mind is best done by recording reasons in support of the decision. As noticed above, Section 31(3)(a) of the A&C states that the arbitral award shall state the reasons on which it is based, unless the parties have agreed that no reasons are to be given. Sub-clauses (i) and (iii) to Section 34(2) also refer to different facets of natural justice. In a given case sub-clause to Section 34(2) and sub-clause (ii) to clause (b) to Section 34(2) may equally apply. Lastly, is the need to ensure that the decision is not perverse or irrational that no reasonable person would have arrived at the same or be sustained in a court of law. Perversity or irrationality of a decision is tested on the touchstone of Wednesbury principle of reasonableness. At the same time, it was cautioned that this Court was not attempting an exhaustive enumeration of what would constitute 'fundamental policy of Indian law', as a straightjacket definition is not possible. If on facts proved before them, the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which on the face of it, is untenable resulting in injustice, the adjudication made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards, may be challenged and set aside.

42. The decision of this Court in ***Associate Builders*** *elaborately examined the question of public policy in the context of Section 34 of the A&C Act, specifically under the head 'fundamental policy of Indian law'. It was firstly held that the principle of judicial approach demands a decision to be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would not satisfy the said requirement.*

44. As observed previously, we need not examine the amendment made to the A&C Act vide Act No. 3 of 2016 with retrospective effect from 23.10.2015 and the judgments that deal with the amended Section 34 of the A&C Act. Pertinently, the amendment to Section 34 of the A&C Act was effected, pursuant to the observations of the Supplementary Report to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996 by the Law Commission of India, titled 'Public Policy – Developments post-Report No. 246' published in February 2015. This Supplementary Report observed that the power to review an arbitral award on merits under Section 34 of the A&C Act, as elucidated in the case of ***Western Geco****, subsequently followed in Associate Builders, is contrary to the object of the A&C Act and international practice on minimization of judicial intervention. A reference can also be conveniently made to* ***MMTC Ltd. v. Vedanta Ltd., and Ssangyong Engg. & Construction Co. Ltd. v. National Highways Authority of India*** *which examine the scope of intervention of courts under Section 34 of the A&C Act as amended by Act No. 3 of 2016.* ***MMTC Ltd. and Ssangyong Engg.,*** *and other judgments which deal with the amended Section 34 of the A&C Act that are not applicable in the present case."*

30. The Apex Court in **Batliboi (supra)** has also noticed and followed its earlier decisions in **Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd (2003) 5 SCC 705** and **Associate Builders vs Delhi Development Authority (2015) 3 SCC 49.**

31. Having noticed the statutory provisions as well as the scope of appeal and the scope of interference in a petition

under Section 34 of the Act of 1996 which has been delineated by the Apex Court in Batliboi (supra) and if the principles as extracted above are applied to in the instant case, it would be seen that it is not disputed between the parties that on the date of notification issued under Section 3-A of the Act of 1956, the land in question was recorded as non-agricultural. It is also not in dispute that on the said date of acquisition, the petitioner was running a petrol pump on the said land.

32. It is the case of the appellant that his entire land was not acquired rather only a part abutting the main road was acquired, as a consequence, the appellant had to demolish such constructions which remained on his unacquired land and after purchasing additional land, had to shift his petrol pump for which he had to obtain fresh clearances and raise fresh constructions for setting up a fresh petrol pump site.

33. This Court now proposes to examine the first submission of the learned counsel for the appellant regarding the compensation for the acquired land to be granted at commercial rates.

34. At this stage, if the Collector's rate list is seen, it clearly indicates that certain rates are prescribed for villages which are situate on the road/highway.

35. For better appreciation the relevant portion of the Collector's rate list is being reproduced hereinafter:-

"प्रेषक,
जिलाधिकारी,
सुलतानपुर।
सेवा में,
सचिव,
कर एवं निबन्धन अनुभाग-5,
उ०प्र० शासन, लखनऊ।
संख्या 859/स्टाम्प लिपिक दिनांक 7जुलाई, 2012

विषयः-जनपद सुलतानपुर के उपजिलों में सम्पत्ति के मूल्यांकन हेतु सर्किल रेट सूची प्रभावी किया जाये।

महोदय,

अवगत कराना है कि जनपद सुलतानपुर के उप जिलों में स्थित परिसम्पत्तियों के मूल्यांकन/स्टाम्प शुल्क निर्धारण हेतु सर्किल रेट सूचियों का पुनरीक्षण दिनांक 10.07.2012 से प्रभावी किया जा रहा है। मूल्यांकन सूचियों की प्रति संलग्न कर अवलोकनार्थ प्रेषित की जा रही है।

<u>संलग्नक -यथोक्त।</u>

भवदीय
(राकेश)
जिलाधिकारी,
सुलतानपुर

"उत्तर प्रदेश स्टाम्प (सम्पत्ति का मूल्यांकन) नियमावली, 19971

भारतीय स्टाम्प अधिनियम, 1866 (अधिनियम संख्या 2 सन् 1866) की धारा 27, 47-क और 75 के अधीन शक्ति का प्रयोग करके राज्यपाल निम्नलिखित नियमावली बनाते हैंः-

1.....
2.
(क).....
(ख).....
(ग).....
(घ) "वाणिज्यिक" भवन का तात्पर्य उत्तर प्रदेश दुकान और वाणिज्य अधिष्ठान अधिनियम,

1962 की धारा 2 के खण्ड (4) और (16) में यथापरिभाषित वाणिज्य अधिष्ठान दुकान से है।

(ड़).....

ग्रामीण क्षेत्रों में आने वाले सामान्य ग्राम-

1. कृषिक भूमि की दरें

कृषि भूमि	राष्ट्रीय/प्रान्तीय मार्ग पर दर रू० प्रति 0.001 हे०	जनपदीय मार्ग मार्ग पर दर रू० प्रति 0.001 हे०	सम्पर्क मार्ग मार्ग पर दर रू० प्रति 0.001 हे०	अन्य दर
क) कृषि भूमि 0.050 हे० तक	15400	14000	10500	7000
ख) 0.050 हे० से अधिक तथा 0.100 हे० तक	6500	5200	3700	3300
ग) 0.100 हे० से अधिक	3500	2500	2100	1400

2. गैर कृषिक भूमि की दरें-(applicable in the instant case)

क) राष्ट्रीय एवं प्रान्तीय मार्ग पर सड़क के मध्य से 70 मीटर तक सम्पत्ति का मूल्य 4000 रू०/वर्ग मी०

ख)……

ग)….

घ).....

3. व्यवसायिक भवन

क. राष्ट्रीय एवं प्रान्तीय मार्ग का मसिक किराया 80 रु० प्रति वर्गमीटर

ख.

ग.

भाग-3

ग्रामीण क्षेत्रों में स्थित भवनों का मूल्यांकन (भवनों) के निर्माण का न्यूनतम मूल्यांकन रु० प्रति वर्ग मी०।

1….

2…..

3……

4…..

5…..

6….

7. गैर वाणिज्यिक/आवासीय भवनों का मूल्यांकन सम्पत्ति मूल्यांकन नियमावली के सुसंगत प्रावधानों के अनुसार भूमि की दर X क्षेत्रफल +निर्मित क्षेत्रफल X निर्धारण निर्माण की दर को जोड़कर किया जायेगा। यदि भवन कई मंजिल का हो तो प्रत्येक मंजिल के आच्छादित क्षेत्रफल का अलग-अलग मूल्य जोड़कर सम्पूर्ण मंजिल का मूल्य माना जायेगा।

8. वाणिज्यिक/व्यवसायिक भवनों का मूल्यांकन सम्पत्ति मूल्यांकन नियमावली के सुसंगत प्रावधानों के अनुसार निर्धारित मासिक किराये की दर X निर्मित क्षेत्रफल X 300 करके किया जायेगा।

भाग-4

<u>सामान्य निर्देश</u>

3……...

4. ऐसे कृषि बैनामें जिनके 100मीटर की त्रिज्या के अन्तर्गत गैर कृषिक क्रिया कलाप/ आबादी होंगे तो उसके मूल्यांकन निर्धारित दर से 40 प्रतिशत अतिरिक्त दर जोड़कर किया जायेगा।

5…….

36. From the perusal of the aforesaid portion, it would be clear that in so far as

the agricultural land is concerned, if it is situate on State Highways or other roads, it would still be assessed at the minimum rates at serial no. 1, however, in so far as the non-agricultural land is concerned which is situate on national/state highways up to 70 meters, they are assessed at Rs. 4,000/- per square meter as per clause 2.

37. This apparently is the rate which has been adopted in the case of the petitioner, however, the contention of the learned counsel for the petitioner is that he must be granted the rate as applicable to commercial land Rs. 80/- per square meter. This submission may not be correct as the said rate is applicable to commercial building contained in Clause 3 and is not applicable to land.

38. From the provisions contained in Section 3-G read with Section 26, it can safely be inferred that the market value has to be determined in light of the provisions contained in Section 26 of the LARA Act of 2013 relating to the land. This has also been reiterated by the Apex Court in ***P. Nagaraju (Supra)*** wherein in paragraph 18 the Apex Court has held as under:-

"In that view of the matter, though Section 3G(7)(a) of the NH Act provides the parameters to be taken into consideration, it only provides the basic parameters to be taken note of, for determining the amount payable as compensation. While applying the said parameters for determination of compensation, since RFCTLARR Act, 2013 is also applicable as NH Act is contained in Fourth Schedule, the factors as provided under Section 26 and 28 RFCTLARR Act, 2013 including the seventh factor will also be applicable in appropriate cases for the determination of the market value as fair compensation for the acquired land. When land is acquired from a citizen, Articles 300A and 31A of the Constitution will have to be borne in mind since the deprivation of property should be with authority of law, after being duly compensated. Such law should provide for adequately compensating the land loser keeping in view the market value. Though each enactment may have a different procedure prescribed for the process of acquisition depending on the urgency, the method of determining the compensation cannot be different as the market value of the land and the hardship faced due to deprivation of the property would be the same irrespective of the Act under which it is acquired or the purpose for which it is acquired. In that light, if Section 28 of RFCTLARR Act, 2013 is held not applicable in view of Section 3J of NH Act, the same will be violative of Article 14 of the Constitution. In that circumstance, the observation in Tarsem Singh (supra) that Section 3J of NH Act is unconstitutional to that extent though declared so while on the aspect of solatium and interest, it is held so on all aspects relating to determination of compensation. In any event, the extracted portion of the notification dated 28.08.2015 is explicit that the benefits available to the land owners under RFCTLARR Act is to be also available to similarly placed land owners whose lands are acquired under the 13 enactments specified in the Fourth Schedule, among which NH Act is one. Hence all aspects contained in Section 26 to 28 of RFCTLARR Act for determination of compensation will be applicable notwithstanding Section 3J and 3G(7)(a) of NH Act."

39. Apparently, the land which is acquired by exercising the power of eminent domain, in a sense, is a forced sale for the land owner who is entitled to get the

compensation, strictly, as per the provisions contained in law. Once the Competent Officer has determined the compensation and if the compensation amount is not acceptable to the land owner then he can assail it before the Arbitrator for enhancement and if the land owner does not succeed then he has a right to assail the award in court provided he is able to establish that the grounds for challenge to such an award is within the spectrum of Section 34 of the Act of 1996 which enables the Court to interfere and it is subject to further scrutiny under Section 37 of the Act of 1996.

40. The very fact, that, whether the appropriate provisions have been applied for determining the compensation or not is an issue which can be scrutinized by the Court under Section 34 of the Act of 1996.

In this regard, the observations of the Apex Court in ***P. Nagaraju (supra)*** is worthwhile to be noticed and the relevant portion thereof is being reproduced hereinafter:-

"…….26……..The terms of arbitration and the rights and obligations will also be a part of the agreement and a reference to the same in the award will constitute sufficient reasons for sustaining the award in terms of Section 31(3) of Act, 1996. Whereas, in the arbitration proceedings relating to NH Act, the parties are not governed by an agreement to regulate the process of arbitration. However, in the process of determination of just and fair compensation, the provisions in Section 26 to 28 of RFCTLARR Act, 2013 will be the guiding factor. The requirement therein being adverted to, should be demonstrated in the award to satisfy that Section 28(2) and 31(3) of Act, 1996 is complied. Therefore, what is also to be kept in perspective while noticing the validity or otherwise of an award regarding which the non-furnishing of reasons is contended as patent illegality is the reason assigned for determining just compensation in terms thereof. The situation which may arise in cases when a lesser compensation is determined in the arbitration proceedings and the land loser is complaining of the award is also to be kept in perspective since the requirement of reasons to be given by the learned Arbitrator in cases for determination of market value and compensation should indicate reasons since the same will have to be arrived at on a comparative analysis for which the reasons should be recorded and Section 26 to 28 of RFCTLARR Act will be relevant. Neither the land loser nor the exchequer should suffer in the matter of just and fair compensation. Hence the reasons under Section 31(3) is to be expected in that manner, the absence of which will call for interference under Section 34 of Act, 1996."

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".....33.Be that as it may, in our opinion the mere provision as contemplated under Section 3G(5) of NH Act providing for either of the parties to assail the determination made by the SLAO by itself does not provide a better status to the award passed by the SLAO. Even the award passed by the SLAO under the provisions of NH Act would still continue to remain as an offer of compensation by the Acquiring Authority to the land loser and the materials relied on by the SLAO even if discussed in detail does not provide the status of a judicially considered order so as to interfere with the same only if error is pointed out. It is not necessary to critically examine the award made by SLAO before

considering enhancement. Notwithstanding the documents relied upon by the SLAO it would still be open for the learned Arbitrator to rely upon any additional material that may be brought before the learned Arbitrator not necessarily to point out an error in the consideration made by SLAO but such material could be considered despite the consideration made by the SLAO if such material aids in deciding just and fair compensation. Though, as contended by the learned Additional Solicitor General it is seen that inTarsem Singh(supra) it is held that there is a regime change and the stage to offer an amount by way of compensation is removed, it only means that the process of award notice etc. from Section 9 to 15A, before possession under Section 16 of L.A. Act is removed, which only alters the procedure and enables immediate vesting of the land with the acquiring authority but does not take away the character of the SLAO award from being an offer of compensation. Hence, in the present case, though the SLAO has taken note of the guideline dated 07.11.2014 it would be open for the learned Arbitrator to take note of any other evidence that would be more relevant than the said guideline to re-determine the compensation in terms of the parameters under Sections 26 and 28 of RFCTLARR Act, 2013."

41. Even, this Court in case of ***Chandra Kishori Vs. Union of India and Others; 2023:AHC-LKO:69836*** had the occasion to consider this aspect of the matter and in paragraph 19 it held as under:-

"19. From the perusal of the aforesaid dictum and applying the principles to the instant case, this Court finds that where the land is acquired by the State, which is in the nature of compulsory acquisition, in exercise of its powers of eminent domain and the compensation which is payable as per the guiding factors enumerated in Section 3-G (7) of the NHAI Act, 1956 read with Section 26 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, apparently is an issue, which is absolutely core of the controversy, which requires consideration. Since the award passed by the Arbitrator in violation of the said provisions would definitely be a ground to invoke the jurisdiction of the Court under Section 34 of the Act 1996 on the ground of 'the Public Policy of India'. More so, where the land of a person, over which he has a constitutional right in terms of Article 300-A of the Constitution of India, is taken away by the State by compulsory acquisition and the requisite provisions for grant of compensation is not adhered then it would definitely incur the scrutiny of the Court in terms of Section 34 of the Arbitration & Conciliation Act, 1996."

42. In the aforesaid backdrop, what is to be noticed is the fact that while determining the compensation even though the land was non-agricultural, the rate has been adopted as mentioned in the rate list as noticed hereinabove but at the same time for the constructions which are of commercial in nature, the rates mentioned in the Collector's rate list also ought to have been considered.

43. This Court is not in agreement with the submission of learned counsel for the appellant on this point that even for the land, the commercial rates must be given for the reason that the land which is situate in villages even though for the purposes of stamp duty is governed by the rates

prescribed by the Collector's rate list but the land primarily is of two types and i.e. agricultural or non-agricultural.

44. It is only a Development Authority or the State which can declare a land as commercial or industrial. This is to be seen where any land is within the development area as governed by the Uttar Pradesh Urban Planning and Development Act or the Masterplan which are published and notified by the State Government and other Development Authorities who create certain zones for commercial and industrial activity and unless such land is notified as such and the land land acquired falls within it, it cannot be said that only because the land owner is undertaking commercial activity, the land is to be treated as commercial which otherwise is not within the development area or and has been declared as commercial or industrial by either the State or any Competent Authority.

45. The reasoning given by the District Judge in its order dated 03.11.2022 that even though the land is being used for commercial purpose but since it is only the single enterprise of the appellant, hence, the land cannot be treated as commercial and had the commercial activities being done by several members of the society in and around the vicinity where the land in question is located then it could be considered as commercial, is also not based on sound reasoning.

46. In the humble opinion of this Court, the land if it is outside the development area can only be agricultural or non-agricultural unless it is declared by the Development Authority or the State for a certain specific purpose and the land acquired falls within such notified area till then the land shall continue to be governed as such and as recorded in the revenue records on the date of the notification. It is for the said reason that the Collector in his rate list has taken the land which though non-agricultural but as it situate on the Highway or the State Highways, a specific value has been ascribed. In the instant case, it is the rate prescribed by the Collector which has been adopted for computing the compensation of land especially when the exemplars for past two years were also considered and higher rate as ascertained from the two modes considered has been adopted, hence, it cannot be said that the basis for computing the compensation for the land is erroneous.

47. The Collector's rate list would also indicate that separates rates have been prescribed for agricultural lands situate on main roads/State/National Highways. So also, separate rates have been prescribed for non-agricultural lands. Similarly, separate rates and mode of calculation for arriving at market value relating to buildings both commercial and non-commercial has been mentioned.

48. Distinctly, there is a clear divide for rates prescribed for lands and buildings and one cannot be interchanged for the other. Thus while computing and ascertaining market value the rates and mode for computation for land and building is also different. Buildings situate is rural areas which includes both residential and commercial are assessed separately for computing market value and this shall be evident from Part 3 of the Collector's rate list reproduced hereinabove in para 34 of the judgment.

49. This also is a clear indicator that the rates for land and the building thereon

is computed differently. Moreover, Section 3-G of the Act of 1956 clearly states that the compensation is paid for the land which is acquired under the Act of 1956 but while determining the compensation the market value has to be ascertained, however, certain other criteria is specially provided in Section 3 (G) (7) (c) and (d) which is to be noticed for determining the wholesome compensation.

50. Thus, though the reasoning of the District Judge may not be sound but for the reasons as noticed aforesaid, this Court also arrives at the conclusion that appropriate rate has been adopted for ascertaining the compensation for the land alone, but for different reasons as indicated hereinabove. Thus, this Court turns down the first submission of the learned counsel for the appellant.

51. Now, considering the second submission which is also an offshoot of the first but relating to compensation of constructions. The District Judge has merely found that the Project Director had computed a higher sum of Rs. 31,57,247/- but the Competent Authority granted only Rs. 13,07,433/- and for the aforesaid reason simplicitor an error has been committed, as a result, the District Judge has set aside only part of the award.

52. Nevertheless, what this Court finds is that for computing the compensation for constructions/improvements, the Competent Authority as well as the Arbitrator were also required to consider the provisions of Section 3-G (7) (b) (c) and (d) read with Section 28 and Section 29 of the LARA Act of 2013 and then it ought to have arrived at a finding relating to compensation which also form part of the final determination of the compensation. Needless to say this aspect has not been considered either by the Competent Authority or the Arbitrator and not even by the Court in Section 34 of the Act of 1996 nor there is any conscious deliberation on the said issue and further it does not reflect from the award of the statutory Arbitrator or the order of the Court under Section 34 of the Act of 1996 that the provisions of Section 3-G (7) (b) (c) and (d) read with Section 28 and 29 of the LARA Act of 2013 were kept in mind while determining the compensation for construction.

53. In so far as the compensation for the construction is concerned, it is true that there was a commercial enterprise run by the appellant. Collector's rate list specifies a different rate for commercial buildings, accordingly, the petrol pump being a commercial enterprise, the constructions raised by the appellant was of a commercial nature and the calculation for the aforesaid construction ought to have been considered as per the Collector's rate list and on basis of cogent material on record.

54. The Authorities below including the Court ought to have considered the parameters enumerated in Section 3-G (7) (b) (c) and (d) read with Sections 28 and Section 29 of the Act of the Act of 2013 in light to the evidence led by the appellant in this context before it. Needless to say, there has been no considerations in this regard nor any finding that for want of such evidence the appellant was not entitled to claim compensation as claimed by him. How was the construction valued by the NHAI or how much would be ascertained, if the compensation for construction as per the mode and rate prescribed by the Collector is applied. Whether the appellant was able to prove his claim for specific

head under Section 3-G (7) (b) (c) and (d) read with Section 28 and 29 of the LARA Act of 2013 has not been appropriately considered, hence, this also needs a re-look.

55. This Court in exercise of powers under Section 37 of the Act of 1996 is not empowered to enter into factual methodology for computing the compensation nor can it correct the award. If the the Court is not satisfied with the orders impugned and the award it can set aside the same and remit the matter for re-consideration.***[See NHAI v. M. Hakeem and Another (2021) 9 SCC 1 and P. Nagaraju (supra).]*** Hence, the award and the order of the District Judge in Section 34 of the Act of 1996 is not tenable and the same is liable to be set aside.

56. Lastly, turning to the submission of the learned counsel for the appellant regarding non-payment of interest, this Court finds that the interest has been awarded from the date of notification under Section 3-A of the Act of 1956 till the date of award passed by the Competent Authority and hence it cannot be said to be bad. No statutory provision has been pointed out under which the appellant can get interest for a larger period than already provided. Accordingly, this Court is not inclined to accept the submission of the learned counsel for the appellant for grant of inadequate interest.

57. In view of the aforesaid, the instant appeal is ***allowed***. The judgment passed by the District Judge dated 03.11.2022 in Civil Misc. Case No. 156 of 2018 and the award made by the Arbitrator dated 23.03.2018 are set aside to the extent as mentioned herein. The Arbitrator shall re-determine the compensation afresh in light of the observations made by this Court including taking note of the relevant clauses of the Collector's rate list and relating provisions and its applicability including considering the evidence already produced and placed on record by the parties and shall also take into account the specific provision contained in Section 3-G (7) (b) (c) & (d) of the National Highways Act, 1956 along with Sections 28, Section 29 of the LARA Act of 2013 in respect of the constructions as applicable to the commercial building and shall also determine whether the appellant is entitled to damages as provided in the above quoted provisions and for the aforesaid purpose, aid shall be taken of the Collector's rate list and the matter be decided afresh, expeditiously, preferably within a period of six months from the date, a certified copy of this order is placed before the Authority concerned. It is clarified that the appellants shall not be permitted to lead any fresh evidence. Subject to the aforesaid, the appeal shall stands allowed in the aforesaid terms. In the aforesaid facts and circumstances, there shall be no order as to costs. The records of the Court below shall be returned forthwith.

(2024) 1 ILRA 310
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2023

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Appeal U/s 37 of Arbitration & Conciliation Act 1996 No. 701 of 2023

Marson's Electrical Indus. ...Appellant
Versus
Chairman, M.P. Electricity Board & Anr. ...Respondents

Counsel for the Appellant:
Sri Alok Kumar Yadav, Sri Shantanu Srivastava

Counsel for the Respondents:
Sri Varun Srivastava, Sri Aditya Khandekar

A. Civil Law - Arbitration and Conciliation Act, 1996-Section 34-Micro, Small and Medium Enterprises Development Act, 2006-Section 18(1)- MSMED Act, 2006 being special Act will have overriding effect over Arbitration and Conciliation Act, 1996-judgment of commercial court which was passed placing reliance on Clause 20 of agreement wherein it was stated that only courts at Jabalpur will have jurisdiction , is incorrect-Since proceeding was initiated under MSMED Act, 2006 and was filed before Facilitation Council, Kanpur, hence Commercial court Kanpur will have jurisdiction to entertain section 34 application-Parties to an arbitration have an autonomy to decide not only on procedural law to be followed but also on substantive law-Private agreement between parties cannot obliterate statutory provisions-Once statutory mechanism under section 18(1) of MSMED Act, 2006 is triggered by any party it would override any agreement entered into between parties-Commercial court has not considered provisions of MSMED Act, 2006 and has held that only Courts at Jabalpur would jurisdiction-impugned order is set aside-Award passed by Facilitation Council restored.(Para 45 to 48)

The appeal is allowed. (E-6)

List of Cases cited:

1. M/s Silpi Indus. Vs KSRTC (2021) SCC Online SC 439

2. Edukanti Kistamma (Dead) thru LRs Vs 9. Venkatareddy (Dead) thru LRS & ors. (2010) 1 SCC 756

3. Guj. St. Civil Supply. Corp. Ltd Vs Mahakali Foods Pvt. Ltd. (2023) 6 SCC 401

4. Bharat Heavy Elec. Ltd Vs Vector Engg. Co. (2021) SCC Online Mad 11701

5. Bajaj Auto Ltd Vs St. of Mah. (2022) AIR Online BOM 1200

6. Konkan Rail Corp. Ltd Vs Chenab Bridge Project Undertaking (2023) SCC Online SC 1020

7. Lion Engg. Consultants Vs St. of M.P. & ors.(2018) 16 SCC 758

8. Vaishno Enterprises Vs Hamilton Medical AG & anr.(2022) SCC Online SC 355

9. Dhule Municip. Corp. Vs Microvision Technos. & anr. (2021) SCC Online Bom

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Alok Kumar Yadav and Sri Shantanu Srivastava, learned counsel for the appellant and Sri Aditya Khandekar, Advocate along with Sri Varun Srivastava, learned counsel for the respondent.

FACTUAL MARTIX OF THIS CASE

2. The appellant was engaged in the business of manufacturing transformers of various capacities. The appellant initially was a Proprietorship Firm known as MEI Power Private Limited. However, it was registered as a Private Limited Company with the name of Marsons Electrical Industries but it is now changed to MEI Power Private Limited.

3. The appellant has set up a small scale manufacturing industry in Agra and the same was acknowledged by the Director of Industries as the "small scale industry" and a certificate to that effect was also issued on 9.2.1971. This certification was given under the provisions of the Industrial Development and Regulation Act, 1951. The appellant claims that he has

been working as small scale industry since then.

4. The Parliament in its wisdom in the year 1993 had promulgated an Act called 'Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993' (hereinafter referred to as '1993 Act'). This Act was later on repealed and a new Act known as 'Small Scale Industries Act, 2006' was promulgated in the year 2006.

5. The appellant, who already had a certificate of a small scale industry and was running since 1971 as a small scale industry, after the promulgation of the new Act, applied for certificate, which was issued to the appellant on 29.10.2007 as per the provisions of Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as 'MSMED Act, 2006'). The appellant submitted that the certificate issued in 2006 was actually a continuation of the certificate issued in 1971. Later, the Central Government again modified the rule for small scale industries and all the small scale industries registered under the 2006 Act were supposed to get a Udyog Adhaar Number. The appellant applied for the same and a fresh Udyog Adhaar Number was issued on 10.5.2016. This Udyog Adhaar Certificate clearly showed that it was in continuation of the original certificate of Small Scale Industry, which was issued to the appellant on 9.2.1971.

6. A contract was entered into between appellant and the respondent, M.P. State Electricity Board. Thereafter, various work orders had been issued to the appellant for supply of transformers. The details of the work orders are as follows:-

S. No.	Dates	Work Order Numbers
1.	14-10-1993	06-01/Ord/14998
2.	03-03-1994	Extn. Order No.06-01/CE(S & P)/SE(P-I)/EE(P-II)/15240
3.	10-02-1995	06-01/CE(S & P)/SEP-I/EEP-II/15719 Extn.15837
4.	11-01-1996	Extn. Order No.06-01/CE(S & P)/ORD/SEP-I/EEP-II)/16266
5.	27-06-1996	06-01/CE(S&P)/ORD/SEP-I/EEP-III/16482
6.	10-09-1996	06-01/CE(S&P)/ORD/SEP-I/EEP-III/Extn-I/16551
7.	13-09-1996	06-01/CE(S&P)/ORD/SE(P-I)/EE(P-II)/Extn.116575
8.	03-12-1998	06-01/CE(S&P)/ORD/SE(P-IV)/EE(P-II)/17723
9.	10-11-1997	06-01/CE(S&P)/ORD/SEP-I/EEP-III)/Extn.-I/17094
10.	03-07-1998	06-01/CE(S&P)/ORD/SEP-I/EEP-III)/Extn-II/17514
11.	22-08-1997	06-01/CE(S&P)/SE(P-IV)/ORD/SE(P-I)/EE(P-II)/16957
12.	29-06-1998	6-01/CE(S&P)/SE(P-IV)/EE(P-II)/17458

7. The relevant clauses of the contract are being reproduced hereinunder for ready reference:-

Clause 8 *laid down the mode of payment, which reads as under:-*

"8. TERMS OF PAYMENT:-

8.1 The supplier shall forward the original RR/MTR and Excise gate pass directly to consignee alongwith copies of following documents:-

(i) A copy of bill

(ii) Delivery challan

(iii) Original copy of excise duty gate pass alongwith photocopy

(iv) The inspection and or T.C. approval

(v) Detailed packing list

8.2 The original bills should be forwarded to the paying authority and should be marked "ORIGINAL". The bill should indicate the Sales Tax Registration Certificate Number and date allotted to him under the Sales Tax Act.

8.3 The following documents will have to be forwarded to the paying authority alongwith bills in triplicate:-

(i) Bill/Invoice-Each invoice shall carry the endorsement that there has been no negative price variation in the month; in the absence of this endorsement, it shall be presumed that there has been negative price variation in the month.

(ii) Xerox copy of despatch documents i.e. RR/MTR.

(iii) Inspection and Test Certificate approval or despatch clearance.

(iv) Detailed packing list.

(v) Photocopy of Excise Duty gate pass.

8.4 The Material Receipt Certificate will be forwarded by the consignee to the paying authority alongwith certificate of payment of ED or attested copy of ED Gate pass for payment under intimation to the supplier towards acknowledgement of receipt of material.

Clause 8.5 100% payment alongwith excise duty and taxes corresponding to the consignment shall be paid generally within 45 days after acceptance of material at stores/site in good condition against MATERIAL RECEIPT CERTIFICATE issued by the consignees on direct basis and not through bank.

(ii) For payment the invoice in triplicate with relevant documents such as Material Receipt Certificate in good condition etc. should be submitted to the Sr. AO(Bills), MPEB, Jabalpur for value more than Rs.60,000/- and to concerned Sr. A.O./RAO for bills upto Rs.60,000/- as the case may be.

(iii) Price Variation claims, if any, as per contract will be paid separately on faithful completion of Contract after due verification within reasonable time by Sr.A.O.(Bills) on submission of necessary documents.

***Clause 14** laid down the arbitration clause which is as under: **ARBITRATION** :-*

If, at any time, question of dispute or difference whatever shall arise between the Purchaser and the supplier upon, or in relation to, or in connection with the Contract, either party may forthwith give to the other a notice in writing of the existence of such question, dispute or difference, and the same shall be referred to the adjudication of two arbitrators, one to be nominated by the Purchaser and the other to be nominated by the supplier or in the case if said arbitrators not agreeing, then to .....adjudication of the Umpire to be appointed by the Arbitrators, whose decision shall be final and binding on the parties and the provisions of the Indian Arbitration Act 1940, and of the rules thereunder and any statutory modification thereof shall be deemed to apply. The arbitrators or the Umpire, as the case may be, are bound to give a detailed speaking award assigning reasons for the findings.

Supplies under the contract shall be continued by the Contractor during the arbitration proceedings, unless otherwise directed in writing by the Purchaser or unless the matter is such that the work cannot possibly be continued until the decision of the arbitrators or of the Umpire, as the case may be, is issued.

Clause 20 laid down the jurisdiction clause which is as under:

20. JURISDICTION:-

Any dispute or difference, arising under, out of, or in connection with this tender/contract order shall be subject to exclusive jurisdiction of competent court at Jabalpur only.

8. The appellant as per work order given by the respondent had supplied the goods in time, but no payment was made within the stipulated time, which was to be made as per Clause 8(5) of the contract. Hence, the appellant made repeated representations on 23.8.1999, 1.9.1999, 11.9.1999, 16.10.1999 and 30.10.1999 but neither any heed was paid on the representation nor payment was made. Instead of making the payment in time, when there was a delay, the same was paid without paying interest thereon, which was against the provisions of 1993 Act. On demand of the interest made by the appellant, the appellant was blacklisted by the respondents. Feeling aggrieved by the blacklisting, the appellant filed a writ petition before Jabalpur High Court. The same was numbered as Writ Petition No.742 of 2008, which is still pending before Jabalpur High Court.

9. However, on 22.1.2000 the State of U.P. had notified establishment of U.P. Industry Facilitation Council at Kanpur (hereinafter referred to as 'Council'), which was under the 1993 Act. When the appellant felt that the respondent may not pay the aforesaid interest although delayed payment for the transformer was made, then a claim petition for delayed payment was filed by the appellant and the same was numbered as Claim Petition No.25 of 2001 before the Council at Kanpur for payment of the interest on the delayed payment made by the opposite party, as per the provisions of 1993 Act.

10. This claim petition was contested by the respondent by filing a preliminary objection. During pendency of the claim petition an offer was made by the respondent that in case the appellant enters into a compromise the claim of the appellant would be considered by the respondent. The same would be considered only after the appellant withdraws the claim petition and only then the respondents would be ready to negotiate. Having fallen for the bait of compromise, as suggested by the respondent, the appellant made an application on 17.5.2002 for withdrawal of the claim petition. However, no order was passed on the said withdrawal application and the same remained pending. During the pendency of this application, the MSMED Act, 2006 was enacted, which repealed and replaced the earlier Act of 1993. Since, respondent neither honoured the compromise nor settled the account, so the appellant was left with no other alternative, but to again make an application on 19.12.2006 before the Council to restart the proceedings of aforesaid claim petition. On 19.6.2007, the Facilitation Council, established under the MSMED Act, 2006, rejected the claim petition filed before the erstwhile Council under the 1993 Act, however, giving liberty to the appellant to file a fresh claim before the newly established Facilitation Council under the MSMED Act, 2006. Accordingly, the appellant preferred a fresh claim application on 31.7.2007 before the Facilitation Council requesting to restart the proceedings of the said claim. The respondent opposed the petition on the ground that, once the order dated 19.6.2007 was passed, the Council cannot reopen and restart the proceedings. This objection was rejected by the Council vide its order dated 4.2.2008 and the Council proceeded with the matter on merits and asked the

respondents to file a reply. The matter was heard by the Council on various dates and both the parties appeared before the Council. After considering the evidence on record and the arguments advanced by the parties, the Facilitation Council passed an award on 2.7.2009, which was signed on 9.7.2011 and published on 3.2.2012.

11. The respondents herein being aggrieved by the award dated 2.7.2009, which was signed on 7.9.2011 and published on 3.2.2012, challenged the same by filing an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Act, 1996') before the District Judge, Kanpur Nagar. This was registered as Arbitration Case No.76/70/12, which was transferred to the Commercial Court, Kanpur when the Commercial Court was established. In response to this Section 34 application, the appellant herein had filed his reply submitting therein that the appellant submitted that as per Section 19 of the MSMED Act, 2006, the respondent was supposed to deposit 75% of the awarded amount, which was thereafter deposited by the respondent out of which the appellant was allowed to withdraw 65% of the amount (which was Rs.1.49 crores), which the appellant did.

12. The Commercial Court vide its order dated 23.6.2023 was pleased to allow the Section 34 application filed by the respondent on the ground of jurisdiction. Aggrieved by which the appellant has filed the instant appeal under Section 37 of the Act, 1996.

13. The impugned order herein was passed on the ground of jurisdiction. The learned Commercial Court had come to the conclusion that as per the contract/agreement, the parties have decided that the Court in Jabalpur would have jurisdiction to entertain a writ petition and as per Section 20(2) of the Act, 1996, if the parties have decided a place for arbitration then the Courts having jurisdiction of the place can only entertain a petition. In this case, since the parties had agreed that all the disputes would be subject to the jurisdiction of Jabalpur Court, hence the Commercial Court in Kanpur would have no jurisdiction to entertain such a case. The Court had further held that the ground of jurisdiction was raised before the Council but the Council has given no finding on the jurisdiction. As regards the second issue as to whether award passed by the Council is liable to the rejected, the Commercial Court has held that the Council has passed an award without considering that the agreement between the parties clearly lays down that Council has no jurisdiction to entertain such claim, since, the claim was without jurisdiction and hence the award passed by the Council dated 2.7.2009, signed on 7.9.2011 and published on 3.2.2012, is liable to be rejected and accordingly, the same was rejected.

SUBMISSIONS OF APPELLANT

14. Learned counsel for the appellant submits as follows:-

(a) The contract cannot prevail over the provisions of the MSMED Act, 2006 and hence, the finding that the Court at Jabalpur alone will have the jurisdiction, is incorrect and will not be applicable for the reasons that it had not considered the provisions of Sections 2(b), 2(d) and 2(n) of the MSMED Act, 2006. It also did not consider the provisions of Section 15 of the MSMED Act, 2006. Further it had also

failed to consider the provisions of Sections 18(1), 18(2) and 18(4) of the MSMED Act, 2006. The relevant provisions of the MSMED Act, 2006 are being reproduced hereunder for ready reference:-

"Section 2(b) *"appointed day" means the day following immediately after the expiry of the period of fifteen days from the day of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier.*

(d) *"buyer" means whoever buys any goods or receives any services from a supplier for consideration.*

(n) *"supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes,-*

(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956;

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956;

(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;

Section 15. Liability of buyer to make payment.*—Where any supplier, supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day: Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.*

"Section 18. Reference to Micro and small Enterprises Facilitation Council.

(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.

(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.

……..

(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India."

15. Counsel for the appellant submitted that, no objection was ever raised, about the appellant being not registered under the provision of Section 8(1) of the Act, either before the Industry Facilitation Council at Kanpur or in application under Section 34 of the Act, therefore, no fresh objections can be raised for the first time, before this Court by means of the objection filed in the

abovementioned Arbitration Appeal. However, it is clarified that the appellant was registered as small scale industry with Director of Industries at Agra on 9.2.1971 under the provisions of Act of 1951 and thereafter as per provisions of Section 8(1) of the MSMED Act, 2006.

16. A bare perusal of Section 18(4) of the MSMED Act, 2006 provides that, the Facilitation Council shall have jurisdiction to decide the dispute between the parties as an Arbitrator, in a dispute where the supplier is located within its jurisdiction and the buyer can be located anywhere in India. As per the provisions of this Act since the supplier, who is appellant herein, is situated within the jurisdiction of Facilitation Council and hence the award passed by the Facilitation Council was within jurisdiction.

17. Counsel for the appellant further submits that Section 24 of the MSMED Act, 2006 provides that the provisions of Section 15 to 23 of the MSMED Act, 2006 shall have overriding effect on any other law for the time being enforced. Hence, MSMED Act, 2006 being a special Act will have an overriding effect on any other Act even over the provisions of Arbitration and Conciliation Act, 1996. For ready reference Section 24 of MSMED Act, 2006 is quoted below:-

"24. Overriding effect.*—The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

18. Counsel for the appellant further submits that units registered as small scale industry can claim under Section 18(1) of the MSMED Act, 2006, the benefits of MSMED Act, 2006 before the Facilitation Council within whose jurisdiction it is registered. Since the appellant was registered with Director of Industries at Agra which falls within Facilitation Council at Kanpur and is registered continuously with effect from 9.2.1971, therefore, he is entitled to get all the benefits of the MSMED Act, 2006 and the amendments introduced in the Act.

19. Counsel for the appellant submits that buyer and supplier have been defined in Section 2(d) and 2(n) of the MSMED Act, 2006. Clearly, the appellant falls within definition of "supplier" and the respondent also falls within ambit of definition of the "buyer". A plain reading of the Section 15 of the MSMED Act, 2006 makes it very clear that, supplies of any good or service, the buyer is duty bound to make payment before the date accorded between them and if there is no such agreement on the date of payment then the payment has to be made within 45 days from the date of acceptance or from the date of due acceptance.

20. Section 16 lays down the rate of interest which a buyer has to pay in case of default. The provisions of Section 16 are being reproduced hereinunder for ready reference:-

"16. Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed

upon, at three times of the bank rate notified by the Reserve Bank."

21. A plain reading of Section 16 makes it very clear that if there is delay in payment by the buyer then he is liable to pay the bank interest with monthly rates from appointed day, which would be three times the bank rate of interest as notified by the Reserve Bank of India.

22. Learned counsel for the appellant further submits that during course of arguments the respondents had taken ground of limitation, though the same was never taken before the Council or before the Commercial Court. However, that being a legal question the appellant in response to the objection raised by the respondents submitted that the issue of limitation is misconceived as the last payment made by the respondents against various supplies of transformers was on 31.12.1998 and the claim petition was filed on 2.7.2001 under the 1993 Act before the Director of Industries, Facilitation Council at Agra, which was well within time. This claim was never withdrawn. The claim was rejected by the Council on the ground that since a new Act has been introduced, so liberty was given to the appellant to withdraw the same and file it afresh. Accordingly, the appellant taking liberty filed a fresh claim petition under the MSMED Act, 2006.

23. Counsel for the appellant further submits that, no objections were ever raised by the respondent claiming that, the appellant was not registered under the provisions of Section 18(1) of the MSMED Act, 2006 before the Council, nor was raised in their Section 34 application. However, a feeble objection has been raised by the respondent on this issue. The appellant clarifies that he was registered as the small scale industry with the Director of Industries, Agra way back on 9.2.1971 under the provisions of 1951 Act and thereafter as per provisions of Section 8(1) of the MSMED Act, 2006. He still continues as a small scale industry.

24. As per Section 18(4) of the MSMED Act, 2006, the appellant, who has been registered as "Small Scale Industry" can approach the Facilitation Council. The Commercial Court in its order (which is impugned herein) did not discuss or consider the provisions of Section 18 of the MSMED Act, 2006. In fact, the Commercial Court only relied upon Section 20(2) of the Arbitration and Conciliation Act, 1996 which is incorrect as the provisions of Section 18(2) of the MSMED Act, 2006 would prevail over the provisions of Arbitration and Conciliation Act, 1996.

25. Section 18(2) of the MSMED Act, 2006 provides that the Act adopts Section 65 to 81 of the Arbitration and Conciliation Act, 1996 only and, therefore, Section 20 of the Act, 1996 cannot be relied upon. Counsel for the appellant further submitted that all the judgments relied on by the Commercial Court in the impugned order which are 2015(3) SCC 49, 2006(4) SCC 45, 2003(5) SCC 705 and 2020 (7) SCC 167, all are related to Section 20 of the Act, 1996, since the provisions of Section 20 of the Act, 1996 is not applicable in this case. Hence, all the authorities relied by the Commercial Court has no relevance in this case.

26. Counsel for the appellant further submitted that the Commercial Court in the impugned judgment has wrongly concluded that "the contract would prevail over the provision of the MSMED Act, 2006,

therefore, the Court at Jabalpur alone will have jurisdiction". While coming to this conclusion, the Commercial Court did not look into the provisions of Sections 2(b), 2(d) & 2(n), 15 and 18(1), (2) and (4) of the MSMED Act, 2006. He further submitted that any industry registered with MSME can file claim under Section 18(1) of the MSMED Act, 2006 before the Facilitation Council within whose jurisdiction it is registered.

27. Counsel for the appellant further submits that his case is squarely covered by judgment of **M/s Silpi Industries vs. Kerala State Road Transport Corporation**[1] wherein Hon'ble Supreme Court in paragraph 23 has held as follows:-

23. The obligations of the buyer to make payment, and award of interest at three times of the bank rate notified by Reserve Bank in the event of delay by the buyer and the mechanism for recovery and reference to Micro and Small Enterprises Facilitation Council and further remedies under the 2006 Act for the party aggrieved by the awards, are covered by Chapter V of the 2006 Act. The provisions of Section 15 to 23 of the Act are given overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. From the Statement of Objects and Reasons also it is clear that it is a beneficial legislation to the small, medium and micro sector. The Arbitration and Conciliation Act, 1996 is a general law whereas the Micro, Small and Medium Enterprises Development Act, 2006 is a special beneficial legislation which is intended to benefit micro, small and medium enterprises covered by the said Act. The Act of 2006 contemplates a statutory arbitration when conciliation fails. A party which is covered by the provisions of 2006 Act allows a party to apply to the Council constituted under the Act to first conciliate and then arbitrate on the dispute between it and other parties. There are fundamental differences in the settlement mechanism under the 2006 Act and the 1996 Act. The first difference is, the Council constituted under the 2006 Act to undertake mandatory conciliation before the arbitration which is not so under the 1996 Act. Secondly, in the event of failure of conciliation under the 2006 Act, the Council or the centre or institution is identified by it for arbitration. The 1996 Act allows resolution of disputes by agreed forum. The third difference is that, in the event of award in favour of seller and if the same is to be challenged, there is a condition for pre-deposit of 75% of the amount awarded. Such is not the case in the 1996 Act. When such beneficial provisions are there in the special enactment, such benefits cannot be denied on the ground that counter-claim is not maintainable before the Council. In any case, whenever buyer wish to avoid the jurisdiction of the Council, the buyer can do on the spacious plea of counter-claim, without responding to the claims of the seller. When the provisions of Sections 15 to 23 are given overriding effect under Section 24 of the Act and further the 2006 Act is a beneficial legislation, we are of the view that even the buyer, if any claim is there, can very well subject to the jurisdiction before the Council and make its claim/ counter claim as otherwise it will defeat the very objects of the Act which is a beneficial legislation to micro, small and medium enterprises. Even in cases where there is no agreement for resolution of disputes by way of arbitration, if the seller is a party covered by Micro, Small and Medium Enterprises Development Act, 2006, if such party approaches the Council for resolution of

dispute, other party may approach the civil court or any other forum making claims on the same issue. If two parallel proceedings are allowed, it may result in conflicting findings. At this stage, it is relevant to notice the judgment of this Court in the case of ***Edukanti Kistamma (Dead) through LRs. v. 9. Venkatareddy (Dead) through LRS. & Ors.***[2]*, where this Court has held that a special Statute would be preferred over general one where it is beneficial one. It was explained that the purport and object of the Act must be given its full effect by applying the principles of purposive construction. Thus, it is clear that out of the two legislations, the provisions of MSMED Act will prevail, especially when it has overriding provision under Section 24 thereof. Thus, we hold that MSMED Act, being a special Statute, will have an overriding effect vis-à-vis Arbitration and Conciliation Act, 1996, which is a general Act. Even if there is an agreement between the parties for resolution of disputes by arbitration, if a seller is covered by Micro, Small and Medium Enterprises Development Act, 2006, the seller can certainly approach the competent authority to make its claim. If any agreement between the parties is there, same is to be ignored in view of the statutory obligations and mechanism provided under the 2006 Act. Further, apart from the provision under Section 23(2A) of the 1996 Act, it is to be noticed that if counter-claim is not permitted, buyer can get over the legal obligation of compound interest at 3 times of the bank rate and the "75% pre- deposit contemplated under Sections 16 and 19 of the MSMED Act.*

28. Counsel for the appellant further submits that he is bound by the law laid down by Hon'ble Supreme Court in the matter of **Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Private Ltd**[3] in which Hon'ble Court has held that, there cannot be any disagreement to the proposition of law laid down in various decisions of the Hon'ble Supreme Court. The Court has to read the agreement as it is and cannot rewrite or create a new one, and that the parties to an arbitration agreement have an autonomy to decide not only on the procedural law to be followed but also on the substantive law. However, it is equally settled legal position that no agreement entered into between the parties could be given primacy over the statutory provision. When the Special Act i.e. MSMED Act, 2006 has been created for ensuring timely and smooth payment to the suppliers, who are the micro and small industries, and to provide a legal framework for resolving the dispute with regard to the recovery of dues between the parties under the Act, also providing an overriding effect to the said law over any other law for the time being in force, any interpretation in derogation thereof would frustrate the very object of the Act.

29. Counsel for the appellant further submitted that the provisions of MSMED Act, 2006, shall, therefore, prevail over the Arbitration and Conciliation Act, 1996 and the impugned order passed by the Commercial Court is liable to be set aside.

SUBMISSIONS OF RESPONDENT

30. Per contra, Sri Aditya Khandekar, Advocate assisted by Sri Varun Srivastava, learned counsel for the respondents very vociferously argued that the appellant was not the supplier as per Section 2(n) of the MSMED Act, 2006. The work orders were issued by the respondent between 14.3.1998 to 29.6.1998 which was much prior to coming into force of the MSMED

Act, 2006. The claim petition was filed before the Facilitation Council under the 1993 Act. The claimant registered itself as a small scale industry as per Section 8(1) of the MSMED Act, 2006, on 10.5.2016 which goes to show that he was not registered under the MSMED Act, 2006, on the date the claim was made and also on the date when the award was passed, signed and published. Since, he was not registered on the date and it is trite law that the benefits of small scale industry cannot be given under the MSMED Act, 2006, retrospectively.

31. Counsel for the respondent further submitted that the Facilitation Council under the MSMED Act, 2006 had no jurisdiction to entertain the claim as the claimant was not the supplier on the relevant date and was not a small enterprise as per MSMED Act, 2006.

32. Counsel for the respondent further relied on para 51 of the judgment passed in **Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Private Ltd (supra)**. He further relied on para 12 of the judgment passed in **Bharat Heavy Electricals Ltd vs. Vector Engineering Company**[4]. Counsel for the respondent has also relied on judgment passed by Bombay High Court in the matter of **Bajaj Auto Limited vs. State of Maharashtra**[5]. Counsel for the respondent further claimed that an application was made by the appellant to withdraw his claim on 17.5.2002 along with the undertaking that the appellant will not pursue the claim petition and the case was closed by the Council vide its order dated 13.5.2003. Thereafter the Council in its meeting dated 19.6.2007 rejected the prayer of restoring the proceedings and directed that if aggrieved the appellant may file a fresh claim. Hence, the subsequent claim could not have been filed by the appellant.

33. Counsel for the respondent further submitted that the claim of the appellant is time barred. He submitted that the work order has been issued on 14.10.1993 to 29.6.1998 but the claim was filed on 2.7.2001 i.e. after a period of three years. Counsel for the respondent further relied on para 26 of the judgment passed in **M/s Silpi Industries (supra)** wherein Hon'ble Supreme Court has held that if any registration is obtained then the benefit would be given to the industries prospectively and cannot get benefit retrospectively.

34. Counsel for the respondent further argued that the scope of interference under Section 37 of the Act, 1996 is limited and for which he had relied on the judgment passed in **Konkan Railway Corporation Ltd. vs. Chenab Bridge Project Undertaking**[6] and **Lion Engineering Consultants vs. State of M.P. and others**[7].

ANALYSIS, REASONING AND CONCLUSIONS

35. We have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, we have perused the pleadings, grounds taken in the petition, annexures thereto and reply filed by the concerned respondent.

36. It is not in dispute that the appellant was acknowledged and registered as "Small Scale Industry" by the Director of Industries, Agra way back on 9.2.1971. It is also not disputed that the parties have entered into an agreement for supply of transformers, which the appellant had done.

The last work order was issued by the respondent on 3.12.1998. After the work was executed, transformers were supplied, the appellant issued letter for release of his dues on 23.8.1999. The Industry Facilitation Council was established in Kanpur under the provisions of Interest on Delayed Payments to Small Scale and Ancillary Undertakings Act, 1993. It was thereafter the appellant had preferred an application for arbitration before the Industry Facilitation Council on 2.7.2001, which was just within two and half years of the last work order been issued. MSME Development Act, 2006 came into force on 18.7.2006. Since thereafter the appellant filed an application to restore the claim petition, which was pending before the Industry Facilitation Council. The application was restored and award was passed on 2.7.2009, which was signed on 7.9.2011 and final award was signed on 3.2.2012. Aggrieved by the award passed by the Facilitation Council under MSMED Act, 2006, the respondent herein had filed application under Section 34 of the Arbitration and Conciliation Act, 1996. During pendency of the Section 34 application, the appellant again got a new Udyog Aadhar Registration done under the new Act and the appellant's Company was re-registered as a Small Scale Industry and even in this certificate it was clearly mentioned that the date of commencement of the certificate would be treated as 12.9.1971. Hence, it cannot be said that there was any break of continuity or the appellant was not registered under the MSME Act on the date when he supplied the goods or from the date when he filed an application before the Council and even on the date when the award was passed. The appellant was registered as Small Scale Industry in 9.2.1971 and continues till date as Small Scale Industry.

37. The argument raised by respondent that the appellant was not a supplier, as defined under section 2(n) of the MSMED Act, 2006, cannot be sustained as the appellant was registered as Small Scale Industry under the 1993 Act and continued till date.

38. Section 32 of the MSMED Act, 2006 makes it very clear that any action taken under the 1993 Act shall be deemed to have been taken or taken under the corresponding provisions of MSMED Act, 2006. The provisions of Section 32 of the MSMED Act, 2006 is being reproduced herein for ready reference:-

> ***"32.*** *Repeal of the Act. (1) The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 (32 of 1993) is hereby repealed.*
>
> *(2) Notwithstanding such repeal, anything done or any action taken under the Act so repealed under sub-section (1) shall be deemed to have been done or taken under the corresponding provisions of this Act."*

39. A plain reading of provisions of Section 32 clarifies that all proceedings initiated under the 1993 Act shall be deemed to have been initiated under this Act.

40. Hon'ble Supreme Court in the matter of **Silpi Industries (supra)** has clearly held that MSMED Act, 2006 being a special Act will have overriding effect on the Arbitration and Conciliation Act, 1996 and if the seller comes under the ambit of MSMED Act, 2006, he can approach the competent authority and file his claim under the said Act. Any agreement to the contrary has to be ignored in view of the

statutory obligations. The Court further held that if any registration is obtained the same will be prospective and applies for supply of goods and service subsequent to its registration but cannot operate retrospectively.

41. However, in this case the appellant was registered as "Small Scale Industry" way back on 9.2.1971 and continues to be the same. The only thing which is to be noticed is that it was re-registered and even in the re-registration certificate the date of commencement has been mentioned as 9.2.1971. Though the respondent argued that re-registration certificate came much later so the benefit cannot be granted to the appellant. However, it is not a case of new registration. It is a case of continuous registration, hence, there is no question of any prospective application.

42. Counsel for the respondent had relied on a decision of Hon'ble Supreme Court in **Vaishno Enterprises vs. Hamilton Medical AG and another**[8] wherein Hon'ble Supreme Court has laid down that the provisions of the MSMED Act, 2006 will not be applicable if the supplier is registered under the MSMED Act, 2006 [under section 8(1)] after the contract has been executed. However, in the case in hand, the appellant was registered as Small Scale Industry much prior the parties entered into a contract, hence, the ratio of this judgment will not be applicable in this case.

43. Hon'ble Supreme Court in **Gujarat State Civil Supplies Corporation Ltd. (supra)** has followed the earlier ratio and has held that if the parties is not registered under the MSME Act on the date of entering into the contract he will not get the benefit as the supplier [as per Section 2(n)] under MSMED Act, 2006. Again, the ratio of this case will not be applicable as the appellant was registered as Small Scale Industry much prior to the execution of the agreement between the parties.

44. Counsel for the respondent has further cited judgment of Bombay High Court passed in **Dhule Municipal Corporation vs. Microvision Technologies and another**[9] in which the Court had held that filing of memorandum is mandatory only for the person who intend to establish micro, small or medium enterprise and not for already registered entities before coming into force the MSMED Act, 2006. In case, the memorandum was not filed before the contract was executed then they will not get the benefit under Chapter V of the MSMED Act, 2006. This ratio is also not applicable in this case as the appellant was registered as Small Scale Industry much prior to the date of agreement.

45. Counsel for the respondent has argued that during pendency of the application before the Facilitation Council, which was filed under the provisions of 1993 Act, the appellant moved an application that the issue pending under the 1993 Act can be treated under the MSMED Act, 2006 as provided under Section 32 of the Act and his claim application which was earlier filed on 17.5.2002 under the old act, may be permitted to be withdrawn. On this, the respondent herein filed objection. Thereafter, the Facilitation Council passed an order on 4.2.2008 and rejected the objection by passing an order stating that, they would decide the issue on merits and fixed next date of hearing on 7.4.2008. This order was never challenged and has

attained finality. In view of this, it is now not open for the respondent to say that since the appellant has moved an application for withdrawal, hence, the same should be treated as withdrawn.

46. Further, in case of MSMED Act, 2006 the agreement between the parties cannot have supremacy over the statutory provisions. The purpose of MSMED Act, 2006 was to ensure timely and smooth payment to the supplier registered as micro, small and medium enterprises.

47. After considering all the facts and the arguments advanced by the parties, this Court comes to the following conclusion :

(a) The appellant is a supplier as per Section 2(n) of the MSMED Act, 2006 and respondent is buyer as per Section 2(d) of the Act.

(b) The appellant was registered as "Small Scale Industry" on 9.2.1971 and continues to be registered as the same. Re-registration/Udyog Aadhar number issued by the respondent on 10.5.2016 clearly mentions that the date of commencement of the appellant's registration as "Small Scale Industry" with effect from 9.2.1971, hence, the unit of the appellant would be considered as Small Scale Industry with effect from 9.2.1971 up till date.

(c) As per Section 32 of MSMED Act, 2006 while repealing the 1993 Act it was made clear that anything done or any action taken under the 1993 Act shall be deemed to have taken under the MSMED Act, 2006. Hence, the application filed by the appellant before the Facilitation Council is deemed to have been filed under the provisions of MSMED Act, 2006.

(d) The appellant was justified in making application under Section 18(1) of the MSMED Act, 2006 and the Council had rightly proceeded under Section 18(2) of the MSMED Act, 2006 and under Section 18(4) the Council had jurisdiction to entertain the matter.

(e) Hon'ble Supreme Court in the matter of Silpi Industries (supra) has held that MSMED Act, 2006 being a special Act would have overriding effect over the 1993 Act. It further held that if there is any agreement between the parties, the same shall be ignored in view of statutory obligations and mechanism provided under the MSMED Act, 2006.

(f) The judgment of the Commercial Court which was passed placing reliance on Clause 20 of the agreement wherein it was stated that only the Courts at Jabalpur will have jurisdiction, is incorrect. MSMED Act, 2006 being a special Act will have overriding effect over the Arbitration and Conciliation Act, 1996 and the agreement entered into between the parties. Since the proceeding was initiated under the MSMED Act, 2006 and was filed before Facilitation Council, Kanpur, hence, the Commercial Court, Kanpur will have the jurisdiction to entertain the Section 34 application. The parties to an arbitration have an autonomy to decide not only on the procedural law to be followed but also on the substantive law. The private agreement between the parties cannot obliterate the statutory provisions. Once the statutory mechanism under Section 18(1) of the MSMED Act, 2006 is triggered by any party it would override any agreement entered into between the parties.

48. Since the Commercial Court in its order dated 23.6.2023 (impugned herein) has not considered and properly appreciated the provisions of the MSMED Act, 2006 and has held that only the Courts at Jabalpur would have the jurisdiction, the impugned order is incorrect, and hence, set

aside. The award passed by the Facilitation Council dated 2.7.2009, signed on 7.9.2011 and final award passed on 3.2.2012 is hereby restored and affirmed.

49. Accordingly, the instant appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 is allowed.

(2024) 1 ILRA 325
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE SAMEER JAIN, J.

Crl. Misc. Anticipatory Bail Application No. 14066 of 2023
(Under Section 438 Cr.P.C.)

Furkan Ahmad ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Kumar Beenu Singh, Sri Prashant Singh

Counsel for the Respondents:
G.A., Sri Anwar Hussain

A. Criminal Law – Code of Criminal Procedure,1973 - Section 438– Duration and Scope – Applicant sought anticipatory bail in Case Crime No. 187 of 2022 under Sections 498A, 323, 504, 506 IPC, 3/4 D.P. Act, and 3/4 Muslim Women (Protection of Rights on Marriage) Act, alleging false accusations of dowry demands and triple talaq – Held, the protection under Section 438 Cr.P.C. is not ordinarily time-bound and continues until the trial's conclusion unless limited by specific court conditions, as per Sushila Aggarwal Vs St. (NCT of Delhi) – The applicant's prior anticipatory bail granted on 16.08.2022 was not restricted to the submission of the police report under Section 173(2) Cr.P.C., and thus remains effective until the trial ends. (Paras 9, 10, 12, 13, 16, 17, 18, 19)

B. Judicial Review – Continuation of Anticipatory Bail – Applicant's earlier anticipatory bail application was rejected post-charge sheet, prompting a fresh application – Held, the order dated 16.08.2022 granting anticipatory bail did not specify a time limit, and no special circumstances necessitated restricting its tenure – The Constitution Bench in Sushila Aggarwal clarified that anticipatory bail generally extends till the trial's conclusion unless peculiar features of the case require otherwise, making a fresh bail application unnecessary. (Paras 6, 9, 12, 14, 16, 17, 18, 19)

C. Criminal Law – Allegations and Cooperation – Applicant denied allegations of dowry demands and torture, claiming the complainant's daughter left the matrimonial home voluntarily due to a matrimonial dispute – Held, the applicant's cooperation during investigation, lack of prior criminal history, and prior grant of anticipatory bail without misuse supported the continuation of bail – No new order was required, as the existing bail order remained valid, consistent with Sushila Aggarwal. (Paras 4, 5, 7, 12, 18, 19)

D. Procedural Clarification – Bail Documentation – The court noted that the bail papers submitted to the police form part of the case diary and are to be submitted to the trial court with the police report under Section 173(2) Cr.P.C. – Held, this procedural requirement does not imply a time-bound bail unless explicitly St.d in the order, reinforcing that the applicant's bail continues without need for fresh adjudication, as per the principles in Sushila Aggarwal. (Paras 12, 14, 15, 18)

E. Anticipatory Bail – No Fresh Order Required – Applicant expressed apprehension of arrest if he appeared before the trial court – Held, since the anticipatory bail granted on 16.08.2022 was not time-limited and no special circumstances warranted its termination, the applicant remains protected until the trial's conclusion – The application was disposed of without passing a fresh order, affirming the existing bail's validity. (Paras 8, 13, 18, 19, 20)

Anticipatory Bail Application Disposed.

List of Cases cited:

1. Sushila Aggarwal Vs State (NCT of Delhi), (2020) 5 SCC 1

(Delivered by Hon'ble Sameer Jain, J.)

1. Heard Sri Prashant Singh, Advocate holding brief of Sri Kumar Beenu Singh, learned counsel for the applicant and Sri Imran Khan, learned A.G.A. for the State-respondent.

2. The present anticipatory bail application has been filed on behalf of the applicant in Case Crime No. 187 of 2022, under Sections 498A, 323, 504, 506 IPC and 3/4 D.P. Act & 3/4 of Muslim Women (Protection of Rights on Marriage) Act, Police Station Akrabad, District Aligarh, with a prayer to enlarge him on anticipatory bail, till the conclusion of trial.

3. FIR of the present case was lodged against the applicant and his family members by his father in law and according to the FIR, applicant and his family members tortured the daughter of the informant since marriage for demand of dowry and on the instigation of his family members applicant gave triple talak to his daughter and thereafter his daughter was turned out from her matrimonial home by the accused persons including applicant.

4. Learned counsel for the applicant submitted that entire allegation made against the applicant is totally false and applicant is husband of the daughter of the informant and he never either demanded any dowry nor ever tortured the daughter of the informant.

5. He further submitted that actually daughter of the informant herself left her matrimonial house as she did not want to perform her matrimonial duties and it appears that some matrimonial dispute arose between applicant and his wife and only due to this matrimonial dispute on the basis of false allegation, FIR of the present case was lodged.

6. He further submitted that during investigation this Court on 16.8.2022 has enlarged the applicant on anticipatory bail but from the order dated 16.8.2022 which has been annexed as annexure-2 to the affidavit it appears that anticipatory bail was granted to the applicant in the present matter only till submission of the police report under section 173(2) Cr.P.C. and therefore, after submission of the charge sheet applicant applied for anticipatory bail before the court concerned but his anticipatory bail application has been dismissed.

7. He further submitted that as during investigation, after considering entire facts of the case this Court enlarged the applicant on anticipatory bail and applicant did not misuse the liberty of earlier granted to him and he fully co-operated with the investigation and he is not having any previous criminal history, therefore, he may be enlarged on anticipatory bail, till conclusion of the trial.

8. He further submitted that applicant is having apprehensions that if he will appear before the court concerned then he will be sent to jail.

9. On the other hand learned AGA submitted that from the order dated 16.8.2022 passed by this Court in Crl. Misc. Anticipatory Bail Application No. 5682 of 2022 it reflects that it was not the time bound order and it is nowhere mentioned in the order dated 16.8.2022 that applicant has enlarged on anticipatory bail, till submission of report under section 173(2) Cr.P.C.

10. He further submitted that in view of the law laid down by the Constitution Bench of the Apex Court in the case of ***[Sushila Aggarwal and others Vs. State (NCT of Delhi) (2020) 5 SCC 1]*** there was no need for the applicant to file fresh anticipatory bail application and he may continue on anticipatory bail till conclusion of the trial and therefore, there is no need to pass any fresh order in this regard.

11. I have heard learned counsel for both the parties and perused the record of the case.

12. From the record, it reflects that earlier on 16.8.2022 applicant during investigation has been released on anticipatory bail by this Court vide Criminal Misc. Bail Application No. 5682 of 2022 and while granting anticipatory bail to the applicant, this Court ordered that:-

"Having considered the submission of learned counsel for parties and taking into consideration the nature of offence, without expressing any opinion on the merits of the case, the applicant is entitled to be released on anticipatory bail in this case.

In the event of arrest, let the applicant-Furkaan Ahamad, be released forthwith in the aforesaid case crime number on bail on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the Arresting officer/ Investigating Officer S.H.O. concerned on the following conditions:

(i) The accused-applicant shall make himself available for interrogation by police authorities as and when required and will cooperate with the investigation:

(ii) The accused-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 them from disclosing such facts to the court or to any police officer, and

(iii) The accused-applicant shall not leave India without the previous permission of the Court.

The papers regarding bail submitted to the police officer on behalf of the accused/applicant shall form part of the case diary and would be submitted to the court concerned along with same at the time of submission of report under Section 173(2) Cr.P.C."

13. Therefore, from the order dated 16.8.2023 passed by this Court it reflects that it was not time bound order and this Court while granting anticipatory bail to the applicant did not observe that applicant is released on anticipatory bail till submission of report under section 173(2) Cr.P.C.

14. From the order dated 16.8.2022 it reflects that this Court only observed that in the event of arrest, applicant be released forthwith in the aforesaid case crime number on bail on furnishing a personal bond and two sureties each in like amount to the satisfaction of the arresting officer/Investigation Officer concerned subject to certain conditions.

15. This Court further observed that the papers regarding bail submitted to the police officer on behalf of the applicant/accused shall form part of the case diary and would be submitted to the court concerned alongwith him at the time of submission of the report under section 173(2) Cr.P.C.

16. The Constitution Bench of Apex Court in the case of ***Sushila Aggarwal(supra)*** while concluding the

matter in paragraph Nos. 84, 84.1 and 84.2 observed as under-

84. This court answers the reference in the following manner:

84.1. Regarding question No. 1, it is held that the protection granted under Section 438 Cr.P.C. should not always or ordinarily be limited to a fixed period; it should inure in favour of the accused without any restriction as to time. Usual or standard conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are peculiar features in regard to any crime or offence (such as seriousness or gravity etc.), it is open to the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event or time bound),etc.

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

17. Therefore, from the law laid down by the Constitution Bench of the Apex Court in the case of ***Sushila Aggarwal (supra)*** it reflects that the protection granted under Section 438 Cr.P.C. should not always or ordinarily be limited to a fixed period and it should inure in favour of the accused without any restriction as to time. Constitution Bench of the Apex Court, further observed that the life of an anticipatory bail does not end generally at the time and stage when the accused is summoned by the court, or after framing charges, but can also continue till the end of the trial. However Apex Court further observed that if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

18. In case at hand, while granting anticipatory bail to the applicant on 16.8.2022 this Court did not limit the tenure of his anticipatory bail and therefore, in view of the observation made by the Constitution Bench of the Apex Court in the case of Sushila Aggarwal (supra) anticipatory bail granted to the applicant vide order dated 16.8.2022 passed by this Court should continue till conclusion of the trial and no interpretation can be made that while earlier granting anticipatory bail to the applicant this Court enlarged the applicant on anticipatory bail only till submission of the police report under section 173(2) Cr.P.C.

19. In view of the above, there is no need to pass any fresh order on the anticipatory bail application of the applicant. Applicant shall continue on anticipatory bail earlier granted to him by this Court vide order dated 16.8.2022 passed in Crl. Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No. 5682 of 2022, till conclusion of the trial.

20. With the above observation, the anticipatory bail application, accordingly, stands disposed off.

(2024) 1 ILRA 328
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Civil Revision No. 27 of 2019

Sanjay Agarwal ...Revisionist
Versus
Rahul Agarwal & Ors. ...Respondents

Counsel for the Revisionist:
Subhash Vidyarthi, Pritish Kumar, Shantanu Gupta

Counsel for the Respondent:
Kshitij Mishra, Sanjay Bhasin, Sunil Sharma

(A) Civil Law - Code of Civil Procedure, 1908 - Section 115 - Revision , Section 47 - Questions to be determined by the court executing decree, The Arbitration and Conciliation Act, 1996 - Section 9 - power to grant interim measures of protection by the Court , Section 34 - Application for setting aside arbitral award ,Section 36 - Enforcement , Section 16(6) - party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34 - Arbitrator's award is subject to challenge by aggrieved parties, following the procedure provided by the Act of 1996 - Issue of jurisdiction should be raised before the Arbitrator under Section 16 of the Act, 1996 - Parties aggrieved by the award who have not taken any of the measures provided in the Act, 1996, are legally barred from challenging the validity or legality of the award at the execution stage, as per Section 36 of the Act, 1996.(Para - 31)
Association leased property to a revisionist and his grandfather - property was to be developed according to prescribed plan - lessees were entitled to profits - revisionist's father, executed a relinquishment deed declaring the property as the exclusive property of revisionist - Agreement was made for property distribution and development work - death of father - lead to legal disputes over his assets and the property leased by the association - Dispute relates to arbitration and proceedings - Meetings held - Final award - Maintainability of - application filed by opposite party under Section 47 of CPC - challenging legality and/or validity of award on diverse grounds - application rejected by District judge on ground of non-maintainability - Civil Revision filed - Controversy centers on validity of arbitration award made by arbitrator. **(Para - 2,3,14,31)**

HELD:-District Judge rightly exercised his jurisdiction and rejected objections filed by revisionist under Section 47 of the Civil Procedure Code. Revisionist should have raised objections to the award before the District Judge under Section 34 of the Act of 1996, and not in execution proceedings once the award is final as a Civil Court decree. **(Para -33)**

Revision dismissed. (E-7)

List of Cases cited:

1. L&T Ltd. Vs Maharaji Edu. Trust, (2010)10SCC Online All 1866

2. Dharma Prathisthanam Vs Madhok Construction (P) Ltd., (2005) 9 SCC 686

3. Major S.S. Khanna Vs Brig. F.J. Dillon, (1964) 4 SCR 409

4. Manick Chandra Nandy Vs Debdas Nandy, (1986) 1 SCC 512

5. L&T Ltd. Vs Maharaji Edu. Trust , 2011 (2) AWC 1682 (All)

6. Dharma Pratishthanam Vs Madhok Constructions , (2005) 9 SCC 686

7. Sanjay Gupta Vs S.K. Mishra, 2023 (7) ADJ 747 (LB)

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

1. Heard Sri Pritish Kumar, learned counsel for the revisionist as well as Sri Sanjay Bhasin, learned Senior Advocate assisted by Sri Sunil Sharma, learned counsel for the opposite parties.

2. The present civil revision has been filed assailing the order dated 30/01/2019 passed by the District Judge, Lucknow whereby he has rejected the application under Section 47 of the Civil Procedure

Code preferred by the revisionist. The controversy in the present case centers around the validity of an arbitration award made by the arbitrator Sri Anirudh Mithal, General Manager, Indian Railways (Retd.) dated 07/05/2008.

3. Sri Pritish Kumar, learned Counsel for the revisionist has submitted that National Council for Young Men's Christian Association of India had executed a lease deed in respect of the property situated at 13, Rana Pratap Marg, Lucknow in favour of revisionist and his grandfather Sri Kishori Lal Agarwal for a period of 65 years. He submitted that the property was to be developed in the manner prescribed, and the lessees were also entitled to the gains in profits which may accrue from the said property. On 19/11/1986 Sri Motilal Agarwal, the father of the revisionist executed a deed of relinquishment declaring that the said property was and has been the absolute and exclusive property of Sri Kishori Lal Agarwal and the revisionist, who are the exclusive lessees thereof from the society.

4. Subsequently, Sri Kishori Lal Agarwal and the revisionist entered into an agreement on 19/12/1986 providing that Wing "A" of the property will be exclusively developed by Sri Kishori Lal Agarwal and Wing "B" will be developed exclusively by the revisionist. The revisionist's father Sri Motilal Agarwal died on 31/12/2007 leaving behind his wife, Smt Sarojini Agarwal (opposite party No. 2), son -Sanjay Agarwal (Revisionist), son Rahul Agarwal (opposite party no.1) and Smt Pallavi Gupta, daughter (opposite party No. 3).

5. After the death of Sri Motilal Agarwal, there was dispute amongst the family with regard to the distribution of his assets and more specifically with regard to the leased property situated at 13,Rana Pratap Marg, Lucknow. It has been submitted that Sri Anirudh Mithal was a friend of revisionist's father and he intervened to make efforts to amicably resolve the disputes and differences among the family members. It is on his intervention that the award/family settlement dated 07/05/208 was passed after several meetings, consultations and after going through various documents.

6. Opposite Party no.1 filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "the Act of 1996"*) in the Court of District Judge, Lucknow which was rejected by means of order dated 01/01/2013 against which an appeal has been preferred before this Court being First Appeal No. 48 of 2013.

7. The award dated 07/05/2008 was never challenged before any Court as per provisions of Section 34 of the Act of 1996, and subsequently the opposite party No. 1 also filed an application for execution of the award dated 07/05/2010 which was registered as Execution Case No. 43 of 2011. The revisionist filed his objections under Section 47 of the Civil Procedure Code inter-alia stating that no arbitration agreement was executed between the parties and the alleged award was not an outcome of arbitration proceedings and therefore could not be executed. He also submitted that the said award was a nullity in the eyes of law and cannot be executed as an arbitration award.

8. The First appeal preferred by opposite party No. 1 filed against the rejection of his application under section 9

of the Act of 1996 came up for hearing before this Court on 01/09/2016 on which date considering the fact that the application for execution was pending before the District Judge, wherein objections under Section 47 of the CPC had also been filed by the revisionist, were pending consideration, directed the District Judge, Lucknow to dispose of the application for execution along with the objections within a period of 3 months from the date of communication of the order.

9. The District Judge by means of the impugned order dated 30/01/2019 has rejected the objections preferred by the revisionist and against the said order the present revision has been filed. The District Judge while rejecting the objections filed by the revisionist relied upon the judgment of this Court in the case of **Larsen and Toubro Limited vs Maharaji Educational Trust, (2010)10SCC Online All 1866** passed in Civil Revision No. 213 of 2010 (decided on 24/09/2010) where it was held that the "award" passed in the arbitration proceedings is not a "decree" within the meaning of Section 2(2) of the C.P.C and provisions of Section 47 C.P.C would not be applicable to obstruct the execution of the award.

10. Assailing the impugned order dated 30/01/2019 passed by the District Judge, it has been submitted by Sri Pritish Kumar, Advocate that according to Section 36 of the Act of 1996 an award is liable to be enforced in the same manner as if it were a decree of the Court. He submits that while executing a decree, questions pertaining to objections to execution, discharge, and satisfaction of a decree have to be considered by the executing Court while executing any decree.He submits that there was no arbitration agreement, nor was there any claim filed by any of the parties and even the award does not give any reasons and consequently it is a nullity and cannot be executed. He submitted that even though no appeal was filed under Section 34 of the Act of 1996, still the objections raised by the revisionist were liable to be considered at the stage of execution and relied on the Judgment in the case of **Dharma Prathisthanam vs Madhok Construction (P) Ltd, (2005) 9 SCC 686.**

11. He further submitted that the award passed was a nullity and cannot even be termed as an award and at best it could be termed as a family settlement. Further, the award itself states that it shall be given legal shape by expert civil lawyers/Income Tax Consultant and submitted that the said award would not be legally enforceable as such. It was further submitted that the District Judge has not complied with the order passed by this Court dated 01/09/2016, in as much as he has failed to decide the objections raised by the revisionist, and he has consequently failed to exercise jurisdiction vested in him.

12. Sri Sanjay Bhasin, Senior advocate appearing on behalf of the respondents has opposed the revision. It was submitted that a bare perusal of the award would reveal that the parties had agreed to the arbitration proceedings held by Sri Anirudh Mithal and revisionist had duly participated in the said proceedings, and vehemently disputed the facts asserted by the revisionist in with regard to the validity of the award. It was further submitted that it was open to the revisionist to have challenged the validity of the award under Section 34 of the Act of 1996, but no such challenge was made by him, and the award has become final and binding as per

Section 35/36 of the Act of 1996 and is liable to be enforced as such. He further submitted that objections which could have been raised under section 34 of the Act of 1996 for the challenge of arbitration award cannot be permitted to be raised as a stage of execution. He submitted that the objections raised by the revisionist are relatable to section 16(6) of the Act of 1996 for which remedy under section 34 of Act of 1996 has been specifically prescribed and for the said objections remedy does not lie under section 47 of the C.P.C, and consequently submitted that there is no infirmity in the order passed by the District Judge Lucknow.

13. It was further stated that in the present revision, this Court in exercise of its revisional jurisdiction would only look into the aspect of the jurisdiction exercised by the District Judge and would not go into the merits of the claim and validity of the award. He further submitted, that the District Judge has rightly rejected the objections filed by the revisionist inasmuch as the executing Court would not have the same powers as provided for under Section 47 of the CPC while deciding the objections against execution of an award. It was submitted that an award attains finality as per Section 36 of the Act of 1996 and is liable to be enforced in accordance with the provisions of CPC in the same manner as if it were decree of the Court. He submitted that the distinction between an award and a decree of Court are evident and apparent and only because of deeming provision as contained in section 36 of the Act of 1996 and only for the purposes of execution the award is treated as a decree. In case objections under Section 47 of the CPC are made applicable to execution of an award, then it will run counter to the statutory scheme of the Act of 1996. In this regard he relied upon the judgment of this court in the case of **Larsen and Toubro Limited vs Maharaji Educational Trust** (Supra). It was further submitted that questions pertaining to the jurisdiction of the arbitral tribunal can be raised before the Tribunal itself as per Section 16 of the Act of 1996, and the question of jurisdiction could be raised under Section 34 as per Section 16(6) of the Act of 1996 .He concluded by stating that the District Judge has rightly appreciated the controversy in the present case and there is no the infirmity in his order rejecting the objections filed under Section 47 of the CPC.

14. I have heard the counsels for the parties and perused the record. The undisputed facts arising in the present case are that by a registered lease deed the National Council of Young Men Christian Association of India executed a lease deed in respect of property situated at 13 Rana Pratap Marg, Lucknow in favour of revisionist and his grandfather Sri Kishori Lal Agarwal. With regard to the same property deed of relinquishment was executed by Sri Motilal Agarwal declaring that the said property is the absolute and exclusive property of Sri Kishori Lal Agarwal and revisionist and it had never been acquired by the firm M/s Motilal Agarwal & Co. Subsequently an agreement was entered into between Sri Kishori Lal Agarwal and revisionist distributing the said property amongst themselves and also with regard to the development work to be undertaken by each of them. Motilal Agarwal who was the father of the revisionist, died on 31/12/2007 and disputes arose between his legal heirs with regard to the distribution of his assets as well as the property leased by National Council of Young Men Christian Association of India.

15. Subsequent facts in the present case are disputed, which relate to the submission of the dispute for arbitration, and the proceedings held by Sri Anirudh Mithal who was a friend of revisionist father. He intervened and made efforts for amicable settlement of the disputes and differences among the family members. Meetings were held between the parties where the revisionist also participated, and the final outcome was titled as a Final award dated 07/05/2008 which was outcome of arbitration between Sarojini Agarwal, Sanjay Agarwal, Pallavi Gupta and Rahul Agarwal.

16. The first issue which arises for determination is the limits and powers of this Court while deciding a revision petition, and more specifically as to whether merely the question of exercise of jurisdiction by the District Judge can be looked into, or even the validity of the award can also be judged by this Court.

17. It is pertinent to understand the context and legislative intent behind the enactment of Section 115 of the CPC. The said Section has been reproduced for reference hereunder:

"115. Revision 4 (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:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, been made in favour of the party applying for revision would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court. Explanation.-- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit or other proceeding.

18. Section 115 of the CPC, deals with the High Court's power of revision. Briefly stating, in a case which is not subject to appeal, the High Court is empowered to call for the records of the case decided by the Court below, and if the Court below has exercised a jurisdiction vested in it by law, or failed to exercise jurisdiction vested by law or acted with material irregularity, etc. in the exercise of its jurisdiction, the High Court may interfere.

19. The provision thus takes within its limited jurisdiction, the irregular exercise or non-exercise of it, or the illegal assumption of it. It is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. In other words, it is only in cases where the subordinate Court has exercised jurisdiction not vested in it by law, or has

failed to exercise jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the jurisdiction of the High Court may be properly invoked.

20. In the case of **Major S.S. Khanna v. Brig. F.J. Dillon, (1964) 4 SCR 409**, the Hon'ble Supreme Court stated that the said Section consists of two parts, first prescribes the condition in which jurisdiction of the High Court arises, i.e. there is a case decided by the subordinate Court in which no appeal lies to the Court of higher jurisdiction, second sets out the circumstances in which the jurisdiction may be exercised. If there is no question of jurisdiction, the concerned decision cannot be corrected by the High Court in the exercise of revisional powers. The relevant paragraphs of Major S.S. Khanna (Supra) have been reproduced herein:

"6. The jurisdiction of the High Court to set aside the order in exercise of the power under Section 115 of the Code of Civil Procedure is challenged by Khanna on three grounds:

(i) that the order did not amount to "a case which has been decided" within the meaning of Section 115 of the Code of Civil Procedure;

(ii) that the decree which may be passed in the suit being subject to appeal to the High Court; the power of the High Court was by the express terms of Section 115 excluded; and

(iii) that the order did not fall within any of the three clauses

(a), (b) and (c) of Section 115.

The validity of the argument turns upon the true meaning of Section 115 of the Code of Civil Procedure, which provides: "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."

21. The primary objective of Section 115 of the CPC, is to prevent subordinate Courts from acting arbitrarily, capriciously and illegally or irregularly in the exercise of their jurisdiction. It clothes the High Court with the powers to see that the proceedings of the subordinate Courts are concluded in accordance with law within the bounds of their jurisdiction and in furtherance of justice.

22. The term "jurisdiction" has not been defined in the CPC. The said term has been defined by the Hon'ble Supreme Court and various High Courts by way of judgments. The said term means "the power of a Court to hear and decide a case or to pass a certain order" and "the right or authority to apply laws and administer justice". The expression "jurisdiction" is a verbal cast of many colors, the adoptive definition of the same has to be interpreted subjectively, i.e., depending upon the nature of the facts and circumstances of each case.

23. It is a settled principle of law that the lower Courts have jurisdiction to decide the case, and in context of the provision of revision, even if the Court below decides the case wrongly, they do not exercise their jurisdiction illegally or with material irregularity.

24. This Court is of the view that there is no justification for the contention that the revisional jurisdiction is intended to authorize the High Court to interfere and correct gross and palpable errors of the subordinate Courts, so as to prevent grave injustice in non-appealable cases and that it would be difficult to formulate any standard by which the degree, or error of the subordinate Courts could be measured.

25. The revisional power, however, enables the High Court to correct, when necessary, the errors of jurisdiction committed by subordinate Courts and provides the means to an aggrieved party to obtain rectification in a non-appealable order. In other words, for the effective exercise of its superintending powers, revisional jurisdiction is conferred upon the High Court. The said principle has been reaffirmed by the Hon'ble Apex Court in the judgment of Manick Chandra Nandy v. Debdas Nandy, (1986) 1 SCC 512. The Hon'ble Court in the said judgment had observed as follows:

"5. We are constrained to observe that the approach adopted by the High Court in dealing with the two revisional applications was one not warranted by law. The High Court treated these two applications as if they were first appeals and not applications invoking its jurisdiction under Section 115 of the Code of Civil Procedure. The nature, quality and extent of appellate jurisdiction being exercised in first appeal and of revisional jurisdiction are very different. The limits of revisional jurisdiction are prescribed and its boundaries defined by Section 115 of the Code of Civil Procedure. Under that section revisional jurisdiction is to be exercised by the High Court in a case in which no appeal lies to it from the decision of a subordinate court if it appears to it that the subordinate court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction vested in it by law or has acted in the exercise of its jurisdiction illegally or with material irregularity. The exercise of revisional jurisdiction is thus confined to questions of jurisdiction.

While in a first appeal the court is free to decide all questions of law and fact which arise in the case, in the exercise of its revisional jurisdiction the High Court is not entitled to reexamine or reassess the evidence on record and substitute its own findings on facts for those of the subordinate court"

26. In the backdrop of the aforesaid enunciation of the aspect of "jurisdiction" with regard to revisions, we have been called upon to examine the order dated 30/01/2019 passed by the District Judge Lucknow. He dealt with the objections raised by the revisionist regarding that the "Final award" dated 07/05/2008 was not an arbitration award but at best a family settlement/arrangement and was a nullity in the eyes of law. The District Judge has rejected the said objections by holding that Sri Anirudh Mithal was appointed as an arbitrator by all the parties without any demur to decide the dispute which arose between the parties and the revisionist did not raise any objections whatsoever during the entire arbitration proceedings before the arbitrator. A perusal of the award dated 07/05/2008 also reveals that there was a mutual agreement between Smt Sarojini Agarwal and 3 children to consult, obtain advice and guidance in the matter of distribution of all assets, liabilities and all matters concerning to and connected or touching with the estate of late Motilal Agarwal. He has further recorded that they all had undertaken to accept without demur

whatever decision is awarded by the arbitrator. Facts were also confirmed in writing in February 2008 by Smt Sarojni Agarwal and her 3 children. The revisionist has denied the existence of any arbitration agreement. A perusal of the revision and the objections filed by the revisionist before the executing Court indicate that none of the letters as mentioned in the award were ever produced, from which it could be gathered that there was no arbitration agreement. An arbitration agreement need not be a specific document, but the agreement can be gathered from various documents, but the intention has to be unequivocally stated, which is to refer the dispute for arbitration. The revisionist has not denied the existence of the letters submitted to the arbitrator by the respective parties wherein it has been unequivocally stated that the dispute may be decided through arbitration by Sri Anirudh Mithal. Not only is there no denial with regard to submission of the dispute for arbitration, but the revisionist has not produced the letters sent by him to the arbitrator from which it could be gathered that there was no intention to refer the dispute for arbitration. Accordingly, there is no material or evidence to return a finding in favour of the revisionist or to interfere with the finding recorded by the District Judge while rejecting the objections filed by the revisionist.

27. Even the provision of section 4 of the Act of 1996 would militate against the arguments raised by the revisionist. According to Section 4 where a party who knows that any requirements under the arbitration agreement has not been complied with and yet proceed with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object. The revisionist did not raise any objections during the arbitration proceedings despite the fact that he participated in the same and consequently cannot be permitted to turn around and raise the same at such a belated stage. Even if he was of the firm belief that there is no arbitration agreement according to the exchange of letters as mentioned in the award, it was open for him to have challenged the award under Section 34 of the Act of 1996 within the time prescribed. The respondents are right in stating that even the statutory scheme of the Act of 1996 clearly states that any objection relating to jurisdiction of the arbitral tribunal can be raised before the tribunal itself, and the award can also be challenged under Section 34 of the Act of 1996. In not doing so, provisions of Section 36 of the Act of 1996 come into operation and the award is liable to be enforced as such. The judgment of the Hon'ble Supreme Court in the case of **Dharma Prathisthanam** was delivered in 2005 interpreting the provisions of Arbitration Act, 1940. The Act of 1940 was replaced by the Arbitration and Conciliation Act, 1996 wherein Section 4 provided that where any requirement under the arbitration agreement has not been complied and yet the person proceed with the arbitration without stating the objections to such non-compliance he would be deemed to have waived his right to object. Another major distinction between theArbitration Act, 1940, and the Act of 1996 is that under the Act of 1940 the Arbitral Award was required to be made a rule of the Court and a decree, but Section 36of the Arbitration Act, 1996, confers the Arbitral Award with a status of a decree to "be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court".

The law has undergone sea change by introduction of Act of 1996 and accordingly, it can safely be stated that the judgment of the Supreme Court in the case of Dharma Prathisthanam interpreting Act of 1940 is no longer good law after coming into force of Act of 1996.4

28. The other argument raised by the revisionist was with regard to the maintainability of the objections under Section 47 of the CPC filed against the application for execution of the award. In this regard it was submitted that at the stage of execution all questions relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree. It was argued that even the High Court as an interim measure had passed the order dated 01/09/2016 in the First Appeal preferred by the opposite party directing the District Judge to decide the objections under Section 47 of the CPC, and by not doing so the District Judge has committed material irregularity and had not exercised the jurisdiction vested in him.

29. The applicability of Section 47 of the CPC have been considered by this court in the case of **Larsen and Toubro Limited vs Maharaji Educational Trust 2011 (2) AWC 1682 (All)** passed in Civil Revision No. 213 of 2010 (decided on 24/09/2010) where it was held:-

"The aforesaid scheme of the Act go to show that Section 34 of the Act prescribes the ground under which arbitral award can be challenged. If no application is made underSection 34within the prescribed period of limitation or the application is refused the award becomes final underSection 35of the Act and enforceable in terms ofSection 36.Section 34of the Act enumerates specific grounds on which an application for setting aside an award can be made.

Intention of legislature is a guiding factor for interpreting the provision of a Statute and the same is to be gathered from the words used in various provisions and the scheme of the Statute. Under 1996 Act, the grounds of challenge having been specified by the legislature by enactingSection 34of the Act and finality having been attached underSection 35, the legislature obviously did not intend to either enlarge the scope of grounds of challenge or to provide another opportunity of challenge after the stage ofSection 34is over. Thus, the objection to the award on the grounds enumerated inSection 34of the Act once adjudicated cannot be allowed to be raised or re-agitated by permitting to raise objection during the execution proceedings underSection 36by pressing Section 47 CPC in service as the same would render the provisions ofSection 34and35of the Act virtually redundant.

The use of words "the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court" insection 36of the Act would not mean that the provisions of the Code of Civil procedure with regard to execution of decree would become applicable in the execution of the award.Section 36only creates a fiction that an award would be enforceable as if it were a decree of the Court within the scope of Order XXI C. P. C. This enforcement of the award under Order XXI CPC would not attract the application of Section 47 CPC simply by use of the expression "shall be enforceable as a decree" inSection 36norSection 36can be read independent of other provisions contained in the Act itself. The provisions of the Act are to be reconciled with each other.Section 36 cannot be read out of context and

independent of the scheme of the Act. Reference to another statute does not attract application of such other statute to the referring statute unless expressly provided. A reference in a statute to another statute cannot be read in a manner to invite inconsistency in the referring statute. Any such reference, if made, has to be interpreted in the context in which the reference is made so as not to make inconsistent the provisions of the referring statute itself. If it brings inconsistency, then the same is to be avoided. If Section 47 CPC is to be attracted, then the restrictions provided inSection 34of the Act and finality to arbitral award by virtue ofSection 35of the Act would be redundant.Section 36cannot be interpreted in the manner inconsistent with the provisions contained in the other part of the Act. That apart the finality of the decree under the Code is reached after the decision under Section 47 C. P. C., if raised. But the legislature in its wisdom thought it fit to incorporate the scope similar to Section 47 C. P. C. inSection 34of the Act in order to bring finality before the award becomes executable. Same procedure cannot be expected to be incorporated in a statute twice. Legislature can never be interpreted to intend repetition. At the same time, the object of the Act is directed towards speedy and hazard-free finality with a view to avoid long drawn proceeding based on technicalities. Therefore, having regard to the provisions ofSections 13,16,34and35,Section 36cannot be interpreted in a manner inconsistent with any of the provisions of the Act to attract the provisions contained in the Code in its entirety. Therefore, while considering the application filed underSection 36of the Act for the execution of an award, the Court cannot overlook the scope and ambit within which the Court is to execute the award taking aid of the provisions for execution contained in the CPC not inconsistent with the provisions contained in the 1996 Act. Therefore, in my view, Section 47 CPC cannot be attracted despite the words "in the same manner as if it were a decree of the Court" used inSection 36when the award is sought to be executed thereunder.

The matter can be viewed from another angle. Section 47 CPC provides for questions to be determined by the Court executing the decree. The said section reads as under :

"47. Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2)Omitted by the Code ofCivil Procedure (Amendment Act, 1976,S. 20(w.e.f. 1.2.1977) (3)Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I.- For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.- (a) for the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

It is, thus, clear that in order to invoke section 47 CPC, there must be a decree.Section 2(2) CPC defines the decree. For a decision or determination to be a decree, it must necessarily fall within the fore-corners of the language used in the definition.Section 2(2) CPC defines decree to mean "formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question withinSection 144, but shall not include - (a) any adjudication from which an appeal lies as an appeal from an order, or (b) any order of dismissal for default."

Explanation. _ A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

The use of words "adjudication' and "suit' used by Legislature clearly goes to show that it is only a court which can pass a decree in a suit commenced by plaint adjudicating the dispute between the parties by means of a judgment pronounced by the Court. The Hon'ble Apex Court in the case of Paramjeet Singh Patheja Vs. ICDS Ltd., AIR 2007 SC - 168 after considering the definition of decree as contained in CPC in paragraph 29 has held that "it is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree". Again in paragraph 31, it has been held that words "decision', and "Civil Court' unambiguously rule out an award by arbitrators to be a decree. In the said case, the Hon'ble Apex Court while considering the question as to whether an insolvency notice under Section 9 of the Presidency Town Insolvency Act, 1909 can be issued on the basis of an arbitration award, held that such notice cannot be issued for the reason the arbitration award is neither a decree nor an order for payment within the meaning ofSection 9(2)of the Insolvency Act and it is not rendered in a suit. Thus, the award not being covered under the definition of a decree, objection with respect to its validity can only be raised as provided underSection 34of the Act and not by taking resort to section 47 C. P. C..

*In the case of **Pramjeet Singh Patheja (supra)**, the Hon'ble Apex Court has interpreted the words "as if' used inSection 36of the Act as under:*

"The words "as if' demonstrate that award and decree or order are two different things. Legal fiction is created for limited purpose of enforcement as a decree. The fiction is not intended to make a decree for all purposes under all statutes, whether State or Central."

While comparing the provisions ofSection 15of the Arbitration Act, 1899 which also provided for enforcing the award as a decree withSection 36of the Arbitration andConciliation Act, 1996, the Hon'ble Apex Court has observed in paragraphs 56 and 57 as under :

"56.Section 15of the Arbitration Act, 1899 provides for "enforcing' the award as if it were a decree. Thus a final award, without actually being followed by the decree (as was later provided bySection 17of the Arbitration Act of 1940), could be enforced, i.e., executed in the same manner as a decree. For this limited purpose of enforcement, the provisions of CPC were made available for realizing the money awarded. However, the award remained an award and did not become a decree either as defined in the CPC and much less so far

purposes of an entirely different statute such as theInsolvency Act."

"57.Section 36of the Arbitration andConciliation Actof 1996 brings back the same situation as it existed from 1899 to 1940. Only under theArbitration Act, 1940, the award was required to be made a rule of Court i.e. required a judgment followed by a decree of court.

The issue that an award made in arbitral proceedings is not a decree within the meaning of CPC having been settled by the aforesaid pronouncement by the Hon'ble Apex Court, the provisions of Section 47 C. P. C. cannot be available to obstruct the execution of the award.

Much emphasis has been laid by the learned counsel for the applicant on the decision of the Hon'ble Apex Court in the case of ***Dharma Pratishthanam Vs. Madhok Constructions*** *(2005) 9 SCC 686 wherein it has been held that in the event of appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside in any appropriate proceedings when sought to be enforced or acted upon. However, the said case relied upon by the learned counsel for the applicant is distinguishable and will have no application in the facts of the present case. In the said case when the award was filed in the court for making rule of the Court under 1940 Act, objections were filed by the judgment-debtor underSection 30of the said Act which were dismissed on the ground that they were filed beyond the prescribed period of limitation. The intra-court appeal preferred against the said order was also dismissed by the Division Bench against which appeal by special leave was filed. The dispute being under 1940 Act, the question of interpretation ofSections 35and36of the Act and applicability of section 47 C. P. C. to the execution of an award was not under consideration before the Hon'ble Apex Court. The Hon'ble Apex Court was considering the validity of the objection filed underSection 30of 1940 Act and having found that since the appointment of Arbitrator and reference of dispute was void and as such the award was also void and the fact that application was filed beyond the period of limitation was not of much significance and delay was liable to be condoned. The same can be inferred from the following observations made in paragraph 32 of the judgment :*

"In the present case, we find that far from submitting to the jurisdiction of the arbitrator and conceding to the appointment of and reference to the arbitrator Shri Swami Dayal, the appellant did raise an objection to the invalidity of the entire proceedings beginning from the appointment till the giving of the award though the objection was belated. In ordinary course, we would have after setting aside the impugned judgements of the High Court remanded the matter back for hearing and decision afresh by the learned single Judge of the High Court so as to record a finding if the award is a nullity and if so then set aside the same without regard to the fact that the objection petition underSection 30of the Act filed by the appellant was beyond the period of limitation prescribed byArticle 119 (b)of theLimitation Act, 1963. However, in the facts and circumstances of the case, we consider such a course to follow as a futile exercise resulting in needless waste of public time. On the admitted and undisputed facts, we are satisfied, as already indicated hereinabove, that the impugned award is a nullity and hence liable to be set aside and that is what we declare and also do hereby, obviating the need for remand."

In the present case, the situation is quite different. The applicant invokingsection 34of the Act filed their objection challenging the validity of the award which were dismissed as barred by limitation. The judgment came to be affirmed by the Hon'ble Apex Court on dismissal of the special leave petition. The grounds of challenge to the arbitral award which were dismissed as barred by limitation, were much before the Hon'ble Apex Court but it did not find it fit to condone the delay and to consider grounds of challenge on merit, itself or remand back the proceedings for the said purpose. Hon'ble Apex Court rather chose to affirm the orders passed by the District Judge and this Court dismissing the objection as barred by limitation. Thus, the reliance placed by the learned counsel for the applicant on the aforesaid pronouncement of the Hon'ble Apex Court is totally misfounded.

Apart from above, the extent of judicial intervention has been circumscribed bySection 5of the Act. In other words, judicial interpretation is prohibited except as provided under the Act.Section 5of the Act reads as under :

"Section 5. Extent of judicial intervention._ Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

Section 5of the Act falls under Part-I which includes within its ambitSection 2toSection 43of the Act. Thus,Sections 34and36are also included in Part-I of the Act. The judicial intervention having been limited by the legislature, the Court cannot interfere at any and every stage on a ground other than those available in the Act itself. Thus, once stage ofSection 34is over and the award becomes final underSection 35, judicial intervention in the execution of the award under Section 36 cannot be held to be permissible on any ground, whatsoever, in view of the limitation imposed by Section 5 of the Act.

Thus, having regard to the provisions of Sections 5, 12, 13, 16, 34, 35 and 36 of the Act, the irresistible conclusion is only grounds which can be pressed into service for challenge to an award is within the ambit and scope of Section 34 of the Act. Once the stage of section 34 is over and the questions that were raised or could have been raised at that stage cannot be allowed to be raised again and again by pressing into service section 47 of the Code of Civil Procedure at the time of execution of award under Section 36 of the Act."

30. Coordinate Bench of this Court considering the issue of maintainability of objections under Section 47 of the CPC for execution of an award in the case of **Sanjay Gupta Vs. Suresh Kumar Mishra, 2023 (7) ADJ 747 (LB)** has observed as under :-

"11. The aforesaid proposition of law has also been enunciated by Hon'ble the Supreme Court in Government of India v. Vedanta Limited(supra) as well as Amazon.Com NV Investment Holdings LCC(supra), which also holds that an application to enforce an award is in fact an Application under the Arbitration Act and not an Application under Order 21 of the Code. The relevant portion of the judgment is as follows:-

"77. The application under Sections 47 and 49 for enforcement of the foreign award, is a substantive petition filed under the Arbitration Act, 1996. It is a well-settled position that the Arbitration Act is a self-contained code. [Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., (2011) 8 SCC

333 : (2011) 4 SCC (Civ) 178; Kandla Export Corpn. v. OCI Corpn., (2018) 14 SCC 715 : (2018) 4 SCC (Civ) 664; Shivnath Rai Harnarain (India) Co. v. Glencore Grain Rotterdam, 2009 SCC OnLine Del 3564 : (2009) 164 DLT 197; Usha Drager (P) Ltd. v. Dragerwerk AG, 2009 SCC OnLine Del 2975 : (2010) 170 DLT 628; Sumitomo Corpn. v. CDC Financial Services (Mauritius) Ltd., (2008) 4 SCC 91; Conros Steels (P) Ltd. v. Lu Qin (Hong Kong) Co. Ltd., 2014 SCC OnLine Bom 2305 : (2015) 1 Arb LR 463 : (2015) 2 Bom CR 1] The application under Section 47 is not an application filed under any of the provisions of Order 21 CPC, 1908. The application is filed before the appropriate High Court for enforcement, which would take recourse to the provisions of Order 21 CPC only for the purposes of execution of the foreign award as a deemed decree. The bar contained in Section 5, which excludes an application filed under any of the provisions of Order 21 CPC, would not be applicable to a substantive petition filed under the Arbitration Act, 1996. Consequently, a party may file an application under Section 5 for condonation of delay, if required in the facts and circumstances of the case."

12. The same analogy has been followed by a coordinate Bench of this Court in M/s Larsen & Toubro Limited(supra) which has also been followed by another coordinate Bench in M/s Bharat Pumps and Compressors Ltd.(supra) as well as by Delhi High Court in Hindustan Zinc Ltd.(supra). Even in judgment relied upon by learned counsel for petitioner in Punjab State Civil Supplies Corporation Ltd. (supra), it has been held by Hon'ble the Supreme Court in paragraph 27.3 that all objections referred and ought to have been raised by the respondents before arbitrator or under Section 34 of the Act of 1996 cannot be allowed to be raised in execution once the award became final and attained finality as a decree of a Civil Court. The relevant paragraph of aforesaid judgment is as follows:-

"27.3. Thirdly, all the objections referred above ought to have been raised by the respondents before the arbitrator or/and the Additional District Judge under Section 34 of the Act but certainly none of them could be allowed to be raised in execution once the award became final and attained finality as decree of the civil court. In other words, having regard to the nature of objections, it is clear that such objections were not capable of being tried in execution proceedings to challenge the award. It is for the reason that they were on facts and pertained to the merits of the controversy, which stood decided by the arbitrator resulting in passing of an award. None of the objections were in relation to the jurisdiction of the court affecting the root of the very passing of the decree. If the executing court had probed these objections then it would have travelled behind the decree, which was not permissible in law. An inquiry into facts, which ought to have been done in a suit or in an appeal arising out of the suit or in proceedings under Section 34 of the Act, cannot be held in execution proceedings in relation to such award/decree."

13. Upon perusal of aforesaid judgments, the single thread running through all of them with regard to maintainability of objections under Section 47 of the Code is that such objections are not maintainable in execution proceedings for the enforcement of an arbitration award on the twin analogies that: (a) an arbitration award not having been passed by a ?court?, does not come within definition of a decree as envisaged under Section 2(2) of the Code; and (b) once the

award attains finality, objections thereto can be taken only in proceedings under Section 34 of the Act of 1996 and the same cannot be bypassed to be taken in execution proceedings for the purposes of enforcement of the award.

14. So far as aforesaid twin analogies are concerned, it is now settled law as seen herein above that award passed by the arbitrator does not come within definition of a decree in terms of Section 2(2) of the Code and therefore objections under Section 47 of the Code are clearly not maintainable in execution proceedings for the purposes of enforcement of the arbitration award. Nonetheless, the second aspect of the matter on which it has been held that application under Section 47 of the Code would not be maintainable arises in such situations where objections to the award can be taken in proceedings under Section 34 of the Act of 1996. As a natural corollary, objections which cannot be taken under Section 34 of the Act of 1996 can very well be examined and decided by the executing court if they do not touch upon the merits of the award. In case these twin conditions apply, a judgment debtor cannot be left remediless.

15. A situational aspect with regard to aforesaid proposition would be in a case such as the present one where objections have been taken by judgment debtor to the fact that by means of execution application, a relief which was never awarded is being sought. In such a situation where objection is being raised to aforesaid extent, naturally cause of action arises only upon filing of an execution application for enforcibility of award and in such circumstances there can be no occasion for the judgment debtor to raise such objections to award under Section 34 of the Act of 1996. However, in such circumstances also, a word of caution is required that such objections would be maintainable only in case they do not touch upon the merits of the award or where such objections can be taken under Section 34 of the Act of 1996. Although for the purposes of enforcibility of an arbitration award in terms of Section 36 of the Act of 1996, recourse can be taken to Order 21 of the Code of Civil Procedure, but in the circumstances delineated herein above, the execution court, in the considered opinion of this court, would have an inherent right even exercising such powers under Section 151 of the Code to examine that such objections are raised by judgment debtor which do not pertain to merits of the award or which cannot be taken under Section 34 of the Act of 1996.

16. The aforesaid proposition would find support from judgment of Hon'ble Supreme Court in Punjab State Civil Supplies Corporation Ltd.(supra) in which it has been held that it is a well-settled principle of law that the executing court has to execute the decree as it is and cannot go behind the decree but can undertake limited enquiry regarding jurisdictional issue which goes to root of the decree and has the effect of rendering the decree a nullity. Aforesaid enunciation of law although would not be completely applicable where enforcibility of an arbitration award is concerned but nonetheless the aspect that the executing court can only execute the decree as it is and cannot go behind the decree would still be applicable."

31. Analyzing the above decisions, it is now well settled that once an award is passed by the Arbitrator, any party aggrieved by the award is required to challenge the award in accordance with the procedure provided under the Act of 1996 including the issue relating to the

jurisdiction of the Arbitrator, which such issue however, should be raised before the Arbitrator under Section 16 of the Act, 1996. Therefore, a party, aggrieved by the award, not having taken any of the measures provided in the Act, 1996, is barred in law to challenge the validity or legality of the award at the execution stage when such award is put into execution underSection 36of the Act, 1996. Thus, the application filed by the opposite party under Section 47 of the Code of Civil Procedure challenging the legality and/or validity of the award on diverse grounds, was not maintainable, and thus the District Judge did not commit any illegality by rejecting the same.

32. This Court by means of order dated 01/09/2016 passed in First appeal had merely directed the District Judge to dispose of the objections pending before him. The District Judge has rejected the same as being not maintainable. The order of the High Court stands complied with by passing of the impugned order. By merely directing the District Judge to dispose of the objections, the order of this Court cannot be interpreted in a manner as if he was directed to assume jurisdiction and decide objection raised by revisionist on merits which jurisdiction was not available to him under law.Thus, the submissions advanced by Mr Pritish Kumar, learned Advocate for the revisionist, assailing the order dated 30/01/2019 rejecting the application filed by the revisionist under Section 47 of the Code of Civil Procedure, are devoid of any merit and accordingly rejected.

33. Considering the above discussion, this Court is of the considered view that the District Judge had rightly exercised his jurisdiction and rejected the objections filed by the revisionist under Section 47 of the Civil Procedure Code. This Court also affirms the view taken by the coordinate Bench in the case of **Larsen and Toubro Limited vs Maharaji Educational Trust** passed in Civil Revision No. 213 of 2010 (decided on 24/09/2010) which has subsequently been affirmed by another coordinate Bench of this court in the case of **Sanjay Gupta Vs. Suresh Kumar Mishra, 2023 (7) ADJ 747 (LB)**. The objections to the award ought to have been raised by the revisionist before the District Judge under Section 34 of Act of 1996 and could not have been allowed to be raised in execution proceedings once the award became final and attained finality as a decree of the Civil Court. Accordingly, the writ petition is bereft of merits and is **dismissed**. The interim order is vacated.

(2024) 1 ILRA 344
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.01.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Contempt Application (Civil) No. 2276 of 2022

Bhartiya Khadya Nigam Mazdoor Sangh Sangarsh Samiti ...Applicant
Versus
Mr. Ashok K.K. Meena, M.D. & Ors. ...Respondents

Counsel for the Applicant:
Syed Haseen Ahmad

Counsel for the Respondents:
Dev P:rakash Singh, Satish Kumar Misra, Shikhar Anand

Contempt Application – Recall Application Rejected – The applicant sought recall of the order dated 06.04.2023, which rejected the contempt application on merits – Held, the recall

application was essentially a review application, which is not maintainable under the Contempt of Courts Act, 1971, as it lacks provisions for review. (Paras 3, 12, 19, 20)

B. Distinction Between Infructuous and Merits-Based Dismissal – The applicant relied on *Dr. J.S. Yadav Vs Dr. Anil Kumar Upadhyay* to argue that recall is permissible – Held, the case was inapplicable as it involved a contempt petition dismissed as infructuous due to misrepresentation, whereas the present case was decided on merits after considering pleadings and arguments. (Paras 6, 9, 10, 11)

C. No Power of Review Under Contempt of Courts Act, 1971 – The respondents objected that the Contempt of Courts Act, 1971, does not provide for review or recall of orders – Held, as per *Delhi Administration Vs Gurdip Singh Uban* and *Sharwan Kumar Vs Harminder Raj Singh*, review or recall is a statutory remedy not available under the Act, and the application was an impermissible attempt to re-argue the case. (Paras 15, 16, 17, 19)

D. Misrepresentation and Fraud Not Established – The applicant argued that the order dated 06.04.2023 was based on misrepresentation and incorrect facts – Held, the order was passed after due consideration of pleadings and arguments, and no evidence of fraud or misrepresentation was shown to justify recall. (Paras 4, 11, 14)

E. Judicial Precedent on Review in Contempt Proceedings – The court relied on *Mahaveer Prasad Verma Vs Central Administrative Tribunal* and *St. Vs Baldev Raj* to affirm that the Contempt of Courts Act, 1971, impliedly excludes the power of review or recall, reinforcing that the recall application was not maintainable. (Paras 16, 18)

Recall Application Rejected.

<u>List of Cases cited:</u>

1. Dr. J.S. Yadav Vs Dr. Anil Kumar Upadhyay, Special Appeal No. 110 of 2022, decided on 27.04.2022

2. Delhi Administration Vs Gurdip Singh Uban, (2000) 7 SCC 296

3. Sharwan Kumar Vs Harminder Raj Singh, Contempt Petition No. 1591 of 2000, decided on 09.02.2016

4. Mahaveer Prasad Verma Vs Central Administrative Tribunal, 2013 (31) LCD 351

5. St. Vs Baldev Raj, 1991 SCC OnLine All 1070

6. Harbhajan Singh Vs Karam Singh, AIR 1966 SC 641

7. Vijai Bahadur Vs St. of U.P., 1988 (14) ALR 706

8. Ram Jiwan Singh Vs District Inspector of Schools, Kanpur, 1995 (26) ALR 627

9. New India Assurance Co. Ltd. Vs Smt. Bimla Devi, 1998 (33) ALR 456

10. Smt. Shivraji Vs Dy. Director of Consolidation, Allahabad, 1997 (88) RD 562

11. Patel Narshi Thakershi Vs Pradyumansinghji Arjunsinghji, AIR 1970 SC 1273

12. Dr. (Smt.) Kuntesh Gupta Vs Mgt. of Hindu Kanya Mahavidyalaya, Sitapur, 1987 (13) ALR 680

13. Laxman Purushottam Pimputkar Vs St. of Bombay, AIR 1964 SC 436

14. Patel Chunibhai Dajibha Vs Narayanrao Khanderao Jambekar, AIR 1965 SC 1457

(Delivered by Hon'ble Abdul Moin, J.)

(I.A. No. 5 of 2023 in re: Application for Recall of the Order)

1. Heard Shri Syed Haseen Ahmad, learned counsel for the applicant as well as Shri Shikhar Anand, learned counsel for all the opposite parties.

2. This is an application for recall of the order dated 06.04.2023 passed by this Court.

3. This Court, vide order dated 06.04.2023, after hearing both the counsels for the contesting parties had rejected the contempt application on the ground that no case for contempt is made out.

4. Instant application for recall has been filed on the ground that there are various documents available on record which have not been considered by this Court and that the order passed by this Court dated 06.04.2023 is passed on misrepresentation and on incorrect facts and thus the Court is vested with ample power to recall the order.

5. A preliminary objection has been raised by Shri Shikhar Anand, learned counsel for all the opposite parties that the order dated 06.04.2023 has been passed by this Court while exercising the jurisdiction of contempt in the contempt application and the order has been passed on merits and consequently the application for recall of the order dated 06.04.2023 is in fact an application for review of the order dated 06.04.2023 which would not be maintainable under Contempt of Court Act, 1971 (hereinafter referred to as "Act, 1971") and the rules made thereunder as the Act, 1971 and the rules do not provide for review of an order passed under the Act, 1971.

6. In response, Shri Syed Haseen Ahmad, learned counsel for the applicant has placed reliance on judgment and order passed by Division Bench of this Court on **27.04.2022 in Special Appeal No. 110 of 2022 in re: Dr. J.S. Yadav Vs. Dr. Anil Kumar Upadhyay and Others** to contend that the Division Bench of this Court, upon a special appeal being filed against the order whereby the contempt Court had allowed a recall application, has held that the Single Judge rightly passed the order of recall.

7. The aforesaid argument though attractive on the face of record merits outright rejection inasmuchas the perusal of the judgment and order passed by Division Bench of this Court in the case of **Dr. J.S. Yadav (supra)** would indicate that the special appeal came to be filed when the recall applications of orders dated 26.04.2012 and 28.08.2012 passed in **Contempt Case No. 716 of 2004** whereby the contempt petition had been rejected as infructuous, were allowed. The recall applications therein had been filed on the ground that there were misapprehension of fact, the contempt application had not become infructuous and that statement of the learned counsel for the contempt petition of a settlement between the petitioners and the opposite party in the contempt petition on the basis of which the contempt petition was dismissed as infructuous was only confined to two contempt petitioners and not all petitioners.

8. Further, the Division Bench of this Court in the case of **Dr. J.S. Yadav (supra)** has itself noted that the order passed by the Division Bench in the year 2001 had not been complied with and consequently the contempt petition could not have become infructuous.

9. It has also been noted by the Division Bench that the statement of the counsel, as given in the contempt petition of contempt petition having been rendered infructuous was beyond his competence and could not have been made in respect of

those contempt petitioners who had not entered into any agreement inasmuch as learned counsel for the applicants gave an impression to the contempt Court that all the contempt petitioners had settled the matter which was nothing short of a misrepresentation amounting to fraud. Thus, the Division Bench held that the contempt petition could not have been dismissed as having been rendered infructuous.

10. Considering the aforesaid, it is thus apparent that the judgment passed by Division Bench of this Court in the case of **Dr. J.S. Yadav (supra)** would have no applicability in the facts of the instant case.

11. In the instant case, it is not that the contempt application had been rejected as infructuous rather the contempt Court had gone through the pleadings on record as well as arguments raised by both the counsels for the contesting parties and thereafter found that no case of contempt was made out and the contempt application was rejected on merits.

12. There is a vast difference between contempt application being rejected as infructuous and contempt application being decided on merits- an order by which contempt application has been rejected as infructuous is liable to be recalled in case the applicant is is able to demonstrate that the contempt application has not been rendered infructuous while an order passed on merits in a contempt application cannot be recalled as no power of review is conferred under the provisions of Act, 1971 read with rules made thereunder.

13. Now, the Court proceeds to consider as to whether the contempt petition has been decided on merits i.e. after hearing all the contesting parties and upon perusal of records and whether an application for recall of the said order would be maintainable.

14. The order dated 06.04.2023 for which the application for recall has been filed, as already indicated above, is not an order by which either the contempt petition had been dismissed for default or dismissed as infructuous rather it is an order on the merits of the case. Thus, an application for recall filed by the applicant is in fact an application for review as would be apparent from a perusal of the averments made in the affidavit filed in support of the application to indicate that certain documents, etc. have not been considered by this Court.

15. The Apex Court in the case of **Delhi Administration vs. Gurdip Singh Uban and others - (2000) 7 SCC 296** has held that an application for; clarification, modification or recall, in substance, is an application for review.

16. It is settled proposition of law that a review or an appeal is a statutory remedy. In this regard, a coordinate Bench of this Court in the case of **Sharwan Kumar vs. Harminder Raj Singh (IAS)** passed in Contempt Petition No.1591 of 2000, decided on **09.02.2016** has held as under:-

"After hearing learned counsel for parties and going through the record, the first and foremost question to be considered that if the contempt petition has already been dismissed on merit then the whether the application for recall of the said order is maintainable or not ?

Answer to the said question finds place in the Division Bench judgment of this Court passed in the case of Mahaveer

Prasad Verma Vs. Central Administrative Tribunal, Lucknow and others, 2013 (31) LCD 351, in paragraph No. 4 held as under:-

"By the order dated 10.1.2012, the contempt petition filed by the petitioner, was dismissed in his absence on the ground that the petitioner respondent has not moved any application to bring on record the successor since the contemner was transferred. Tribunal noted that an application for recall of an order passed in a contempt proceeding, is not maintainable. So far as the finding of Tribunal that recall/review application is not maintainable, seems to be correct. Virtually, recalling of the order dated 10.1.2012, will amount to review of earlier decision was was passed with the finding on merit to the extent that successor officer has not been brought on record. Review/recall or appeal are the statutory remedies, vide AIR 1966 SC 641, Harbhajan Singh v. Karam Singh and others, 1988 (14) ALR 706, Vijai Bahadur Vs. State of U.P., 1995 (26) ALR 627, Ram Jiwan Singh and others Vs. The District Inspector of Schools, Kanpur and others, 1979 (5) ALR 168, 1998 (33) ALR 456, New India Assurance Co. Ltd. Vs. Smt. Bimla Devi and others, 1997 (88) RD 562, Smt. Shivraji and others Vs. Dy. Director of Consolidation, Allahabad and others, AIR 1970 SC 1273, Patel Narshi Thakershi and others Vs. Pradyumansinghji Arjunsinghji, 1987 (13) ALR 680, Dr. (Smt.) Kuntesh Gupta Vs. Mgt. of Hindu Kanya Mahavidyalaya, Sitapur etc., AIR 1964 SC 436, Laxman Purushottam Pimputkar Vs. The State of Bombay and others, and AIR 1965 SC 1457, Patel Chunibhai Dajibha etc. Vs. Narayanrao Khanderao Jambekar and another. Unless provided under the Act, no application for review/recall may be moved. The contempt of Courts Act, 1971 does not contain any provision for review of a judgment. Hence the impugned order dated 13.9.2012 does not seem to suffer from any impropriety or illegality""

17. Apart from above, there is no power under the Act of 1971 conferring any power of review and thus no such power can be exercised by this Court.

18. A Division Bench of this Court in the case of **State vs. Baldev Raj - 1991 SCC OnLine All 1070** has also held that the Act of 1971 impliedly excludes the power of recall or review.

19. Keeping in view the aforesaid discussion, this Court is constrained to observe that instant application for recall is nothing but an attempt to re-argue of the case on merits i.e. the recall application is in fact an application for review which is not permissible in the eye of law.

20. The recall application is thus, **rejected**.

(2024) 1 ILRA 348
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSJAIN RIZVI, J.

Capital Cases No. 8 of 2020
with
Reference No. 7 of 2020
&
Criminal Appeal U/s 372 No. 21 of 2021

Amit Yadav **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Ramesh Chandra Yadav, Sri Dileep Kumar Yadav, Sri Raj Karan Yadav, Smt. Abhilasha Singh (A.C.), Sri Gajendra Pratap (Sr. Advocate)

Counsel for the Respondent:
G.A., Sri Deepak Dubey, Sri Gyanendra Singh, Sri Aniruddha Chaturvedi, Ms. Mayuri

Criminal Law - Indian Penal Code, 1860 - Sections 302/34, 201 & 120-B - Code of Criminal Procedure, 1973 - Sections 366 & 372 - Indian Evidence Act, 1872 - Section 27 - Appellant challenged conviction and death penalty for murder of four persons, while informant appealed acquittal of co-accused. Court held: (1) Prosecution's case rested primarily on testimony of child witness (PW-2), but her presence at the crime scene was doubtful due to contradictions with PW-3's testimony and improvements in St.ments, rendering her evidence unreliable (St. of Madhya Pradesh Vs Ramesh, (2011) 4 SCC 786). (2) Alleged motive based on land dispute was not established, as it flowed from deceased to co-accused, not appellant, and lacked concrete evidence. (3) Recoveries of incriminating items (axe, blood-stained soil, Aadhar card) were unproven due to absence of independent witnesses and failure to establish recovery under Section 27, as no confessional St.ment was recorded (Boby Vs St. of Kerala, 2023 SCC OnLine SC 50). (4) Investigation was flawed, with delays in FIR registration, absence of General Diary evidence, and possibility of deliberation before reporting, casting doubt on prosecution's case. (5) Testimony of PW-2, partly tutored, lacked reliability even when segregated, and absence of motive further weakened prosecution's case. Death penalty reversed; appellant acquitted, giving benefit of doubt. Acquittal of co-accused upheld; informant's appeal rejected. (Paras 12-28)

Capital Appeal Allowed.

List of Cases cited:

1. St. of Madhya Pradesh Vs Ramesh, (2011) 4 SCC 786 (Para 20)

2. Boby Vs St. of Kerala, 2023 SCC OnLine SC 50 (Para 23)

3. Pulukuri Kotayya Vs King-Emperor, AIR 1947 PC 67 (Para 23)

4. Chandran Vs St. of Tamil Nadu (Para 23)

5. St. of Karn. Vs David Rozario (Para 23)

6. St. of Mah. Vs Damu, (2000) 6 SCC 269 (Para 23)

7. Subramanya Vs St. of Karn. (Para 23)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. Heard Sri Gajendra Pratap, learned Senior counsel assisted by Smt. Abhilasha Singh, learned amicus curiae for the appellant, Sri Aniruddha Chaturvedi, learned counsel for the informant and Sri Amit Sinha, learned AGA assisted by Ms. Mayuri for the State.

2. Capital Case No.8 of 2020 arises out of judgment of conviction and sentence passed by Additional Sessions Judge-IV/Special Judge (E.C. Act), Banda in Sessions Trial No.93 of 2018, arising out of Case Crime No.086 of 2018, under Sections 302/34, 201, 120-B IPC, Police Station Kotwali Nagar, District Banda, wherein death penalty has been imposed on the accused appellant. Records relating to the proceedings of court below have been forwarded to this Court under Section 366 Cr.P.C. for confirmation of death sentence. It is registered as Capital Reference No.7 of 2020. The appeal filed by the informant under Section 372 Cr.P.C. challenging the acquittal of accused Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav being Criminal Appeal u/s 372 Cr.P.C. No.21 of 2021 is also connected with the Capital Appeal. All three cases are heard together and are being disposed of by this common judgment.

3. A brutal incident occurred during the intervening night of 30 and 31 January, 2018 in which Mahadev, his wife Chunni and two sons Pawan and Raj Kumar were done to death. The incident was allegedly seen by the daughter of the deceased, namely Ranshi (PW-2). Ranshi came to the house of Smt. Urmila (PW-3), who happens to be her sister-in-law and informed the incident as per which the accused had brutally murdered all the four deceased. PW-3 informed such facts to her husband Munni Lal (not produced). Munni Lal in turn informed the incident to Raghunandan (PW-1), who happens to be the elder brother of deceased Mahadev. Consequently, a written report was got scribed by Munni Lal on the basis of information received from Raghunandan (Ex.Ka.1). Based upon such written report, a First Information Report came to be registered at 11.00 AM on 31.01.2018 at Police Station Kotwali Nagar, District Banda. Information of the incident was received at the Police Station at 10.15 AM and the FIR was registered under Section 302 IPC as Case Crime No.86 of 2018, Police Station Kotwali Nagar, District Banda. The FIR is against named accused Golu. It is the prosecution case that Golu is the nickname of accused appellant Amit Yadav.

4. Pursuant to the above report lodged in the matter, inquest commenced at 11.20 onwards and were concluded by the afternoon. The bodies were sealed and as per the suggestion of the inquest witnesses, the dead-bodies were sent to mortuary for conduct of postmortem. Postmortem has also been conducted on 31.1.2018 at 5.30 in the evening. As per the postmortem, all four deceased died on account of ante-mortem injuries specified hereinafter:-

Autopsy Report 1-Exhibit ka-2-A

Name of Deceased	Mahadev (male)	Age:-	40 years
Physical Examination :Average built body			
Height	164 cm		
Rigor Mortis present all over body.			
Anti Mortem Injuries:- 1) Incised wound size of 10cm x 2cm bone deep present on anterio lateral surface of right side of neck 4 cm below from right lobule. 2) Incised wound size 10cm x 0.4 cm bone deep present on anterio lateral surface of right side of neck 1 cm below from injury no 1 trachea incised esophagus incise. All the muscle and soft tissue incised.			
Eyes:	Mouth:, Nails:	Tongue and Nails:	Natural Orifices: NAD
Scalp: NAD	Skull: noted	Membranes: Pale	Brain: Pale
Orbital Nasals: NAD	Neck: Noted	Mouth, Tongue: NAD	Larynx and vocal cords: Noted
Trachea: Noted Hyoid Bone: Noted	Chest: NAD Ribs and chest wall: NAD	Pleural Cavities: NAD	Lungs: Pale
Heart: empty	Large blood vessels: right carotid vessels incised	Abdomen: NAD	Stomach: 200 gm pasty material present.
Small Intestine: gases present	Large Intestine: gases with fecal	Liver: Pale	Gall bladder: half full Urinary

	matter		bladder: 40 ml urine present
Spleen: pale	Kidney: pale	Pelvic Cavity Tissue: NAD	Pelvic Bones: NAD
Time of Death: about half of a day			
Cause of death: shock and haemorrhage as a result of anti-mortem injuries			

Autopsy Report 2-Exhibit ka-3-A

Name of Deceased	Chunni Devi (female)	Age:-	35 years
Physical Examination :Average built body			
Height	158 cm		
Rigor Mortis present all over body.			
Anti Mortem Injuries:- 1) Lacerated wound size 2.0 x 2.0 present on left side of face 0.5 cm below from left eye muscle deep. 2) Contusion size 4 x 4 cm on face just below injury no 1. 3) Incised wound size of 8.00cm x 1.00cm present on posterio lateral surface of right side of neck 4.5 cm below from right ear lobe with fractured 3rd and 4th cervical vertebra. 4) Abrasion size 3 x 1 cm present on upper part of right arm 3 cm below from lateral end of right clavicle. 5) Contusion size 2 x 1 cm present on anterio medial surface of right arm 11 cm below from lateral end of right clavicle.			
Eyes: open	Mouth:- , Nails:-	Tongue and Nails: NAD	Natural Orifices: NAD
Scalp: NAD	Skull: NAD	Membranes: Pale	Brain: NAD
Orbital Nasals: Noted	Neck: NAD	Mouth, Tongue : NAD	Larynx and vocal cords: NAD
Trachea: Noted Hyoid Bone: Noted	Chest: Noted Ribs and chest wall: NAD	Ribs: NAD	Oesophagus: NAD
Trachea and bronchial Tree: NAD	Pleural: NAD Peritoneal cavity: NAD	Pleural Cavities: NAD	Lungs: Pale
Heart: incised right carotid vessels	Large blood vessels: NAD	Abdomen: Noted	Stomach: 200 gm pasty material present.
Small Intestine: gases present	Large Intestine: gases with fecal matter	Liver: Pale	Gall bladder: Urinary bladder: 20 ml urine present
Spleen: pale	Kidney: pale	Pelvic Cavity Tissue: NAD	Pelvic Bones: NAD
Time of Death: about half of a day			
Cause of death: shock and haemorrhage as a result of anti-mortem injuries			

Autopsy Report 3-Exhibit ka-4-A

Name of Deceased	Pawan Kumar (male)	Age:-	10 years
Physical			

Examination :Average built body			
Height	139 cm		
Rigor Mortis present all over body.			
Anti Mortem Injuries:- 1) Incised wound size 6 x 1.5 cm bone deep present on back of neck at cervico vertebral junction (cervical joints) with fractured 1st cervical vertebra. 2) Abraded contusion size 6 x 3 cm present on posterio lateral surface of right side of neck 1.5 cm below from right ear lobule. 3) Abraded contusion size 3 cm x 1.5 cm present on anterior surface of upper right arm 5 cm lateral from right axilla. 4) Lacerated wound size 2.5 cm x 1.5 cm present on left side of upper lip with loss of left molar tooth. 5) Lacerated wound size 2 x 1 cm bone deep present on upper right scapular region 5 cm below from mid of right clavicle.			
Eyes: semi open	Mouth: semi open, Nails:	Tongue and Nails: NAD	Natural Orifices: NAD
Scalp: NAD	Skull: NAD	Membranes: Pale	Brain: NAD
Orbital Nasals: NAD	Neck: NAD	Mouth, Tongue : NAD	Larynx and vocal cords: NAD
Trachea: NAD Hyoid Bone: NAD	Chest: Noted Ribs and chest wall: NAD	Ribs: NAD	Oesophagus : NAD
Trachea and bronchial Tree: NAD	Pleural: NAD Peritoneal cavity: NAD	Pleural Cavities: NAD	Lungs: Pale
Heart: empty	Large blood vessels: NAD	Abdomen: Noted	Stomach: 200 gm pasty material present.
Small Intestine: gases present	Large Intestine : gases with fecal matter	Liver: Pale	Gall bladder: half full Urinary bladder: 30 ml urine present
Spleen: pale	Kidney: pale	Pelvic Cavity Tissue: NAD	Pelvic Bones: NAD
Time of Death: about half of a day			
Cause of death: shock and haemorrhage as a result of anti-mortem injuries			

Autopsy Report 4-Exhibit ka-6-A

Name of Deceased	Raj Kumar Yadav (male)	Age:-	8 years
Physical Examination :Average built body			
Height	140 cm		
Rigor Mortis present all over body.			
Anti Mortem Injuries:- 1) Incised wound size 8 x 3 cm bone deep present on postiro-lateral surface of neck of left side .5 cm below from left ear lobe obliquely placed margins regular. 2) Incised wound size 8 x 5 cm present on postiro-lateral surfce of neck 1 cm below from injury no 1 with incised 3rd and 4th cervical vertibri. 3) Abraded contusion size 5 cm x 3 cm present on right side face just below right eyes. Mud present around right side face. 4) Abraded contusion size 2 x 1 cm present on top of right shoulder.			

Eyes:	Mouth: , Nails:	Tongue and Nails: NAD	Natural Orifices: NAD
Scalp: NAD	Skull: NAD	Membranes: Pale	Brain: NAD
Orbital Nasals: NAD	Neck: Noted	Mouth, Tongue: NAD	Larynx and vocal cords: NAD
Trachea: NAD Hyoid Bone: NAD	Chest: Noted Ribs and chest wall: NAD	Ribs: NAD	Oesophagus: NAD
Trachea and bronchial Tree: NAD	Pleural: NAD Peritoneal cavity: NAD	Pleural Cavities: NAD	Lungs: Pale
Heart: empty	Large blood vessels: incised of carotid vessel	Abdomen: Noted	Stomach: 100 gm pasty material present.
Small Intestine: gases present	Large Intestine: gases with fecal matter	Liver: Pale	Gall bladder: half full Urinary bladder: 20 ml urine present
Spleen: pale	Kidney: pale	Pelvic Cavity Tissue: NAD	Pelvic Bones: NAD
Time of Death: about half of a day			
Cause of death: shock and haemorrhage as a result of anti-mortem injuries			

5. Investigation proceeded further in the matter and the accused Amit Yadav @ Golu was arrested on 6.2.2018. Two other co-accused namely Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav were also arrested on 7.2.2018 and 8.2.2018. According to the prosecution, an Aadhar card of accused Amit Yadav @ Golu was recovered from the house of the deceased vide Ex.Ka.6. Blood stained earth was also recovered from the house of the accused on 31.1.2018 vide Ex.Ka.7. A blood stained piece of mattress was also recovered from the place of occurrence vide Ex.Ka.8. Blood stain earth and plain earth were also recovered from the place of occurrence on 31.1.2018 vide Ex.Ka.9. The prosecution claims to have recovered an axe from the house of accused, on his pointing out, vide Ex.Ka.10. The blood stained cloth of the accused was allegedly hidden in the house of accused which were also recovered on his pointing out vide Ex.Ka.11.

6. It is worth noticing at the outset that all aforesaid recoveries were witnessed by Munni Lal, Chote Lal and Om Prakash, none of whom have been produced by the prosecution. There is thus no independent witness to any of the recoveries. There is no confessional statement of the accused on record pursuant to which such recovery was made nor any such statement is exhibited during the trial. Even the contents of disclosure made by the accused are not disclosed or proved.

7. Investigation ultimately concluded with submission of charge-sheet against the accused Amit Yadav @ Golu, Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav. Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav have been acquitted by the trial court vide the judgment under challenge. The acquittal is under challenge

in the appeal filed by the informant under Section 372 Cr.P.C. Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav happens to the maternal aunt and uncle of the accused Amit Yadav @ Golu.

8. The concerned Magistrate committed the case to the court of Sessions on 17.5.2018. Charges were framed against the accuseds on 19.12.2018 under Section 302 read with Section 34 IPC read with Section 201 and 120B IPC. All the accuseds denied the charges and demanded trial.

9. The prosecution in order to prove its case has produced following documentary evidence:-

Sr. No.	Name of Document	Proved by
Exh. Ka-1	Tahreer	PW-1
Exh. Ka-2	Inquest memo of Mahadev	PW-1
Exh. Ka-3	Inquest memo of Chunni Devi	PW-1
Exh. Ka-4	Inquest memo of Pawan Kumar	PW-1
Exh. Ka-5	Inquest memo of Raj Kumar	PW-1
Exh. Ka-2-A	Autopsy report of Mahadev	PW-4
Exh. Ka-3-A	Autopsy report of Chunni Devi	PW-4
Exh. Ka-4-A	Autopsy report of Pawan Kumar	PW-4
Exh. Ka-5-A	Autopsy report of Raj Kumar	PW-4
Exh. Ka-6	Recovery memo of aadhar card of Golu	PW-5
Exh. Ka-7	Recovery memo of soil from Golu house	PW-5
Exh. Ka-8	Recovery memo of mattress	PW-5
Exh. Ka-9	Recovery memo of soil from crime spot	PW-5
Exh. Ka-10	Recovery memo of murdered weapon	PW-5
Exh. Ka-11	Recovery memo of cloth of accused	PW-5
Exh. Ka-12	Site plan of crime spot	PW-5
Exh. Ka-13	Arrest memo of Amit @ Golu	PW-5
Exh. Ka-14	Arrest memo of Devi Deen	PW-6
Exh. Ka-15	Arrest memo of Deva	PW-6
Exh. Ka-16	Charge-sheet	PW-6
Exh. Ka-17	FSL Report	

10. In addition to the above documentary evidence, the prosecution has also led oral evidence of following witnesses:-

"1. Raghunandan aged 55 years (P.W.-1), elder brother of accused presented as informant of the case and witness of inquest. His chief examination was recorded on 09.05.19 and the cross examination took place on 01.08.19, 16.08.19, 21.08.19. P.W.-1 deposed before the court that deceased was his real brother and together with him, he had three brothers. He is the eldest and the deceased was the youngest. He lived in the village along with his other two brothers for the past thirty years. His house adjoins the house of deceased Mahadev. His other brother namely Sukh Nandan lived a few

houses apart. Mahadev was residing along with his wife Chunni, three sons and a daughter. On 31.01.2018 @5:30 AM his nephew Munni Lal s/o Sukh Nandan came and informed him that Golu has killed Mahadev, his wife and two sons the previous night. Ranshi, the daughter of deceased Mahadev informed about it. Ranshi told him that she had hidden herself and could not see as to who else was present along with Golu. On receiving such information PW-1 reached the house of deceased and saw the four dead bodies of Mahadev, Chunni and their two sons Pawan and Raj Kumar lying in the verandah and the room. The third son Awadh Naresh was lying wrapped in a blanket. He was scared. He got the written report scribed by his nephew Munni Lal and put his thumb impressions on it. He proved the contents of the written report which was marked as Ex.Ka.1. He also proved his signatures on the inquest memo prepared in his presence. The dead bodies were sealed and sent for autopsy. Later, after a few days Awadh Naresh told him that Deva and Devi Deen too were involved in the incident along with Golu. Mahadev had bought some land from the father of Devi Deen. Some more land was purchased again from Devi Deen. Mahadev paid the entire amount but the registry of the land was not done. The price of the land increased in between and Devi Deen was refusing to execute the registry. For this reason Golu killed Mahadev and his three family members. His statement was recorded by IO and he also got the crime spot inspected. The witness was cross-examined extensively by the defence counsels.

2. Ranshi (PW-2) aged 8 years is the daughter of deceased and was presented as eye witness of the case. Chief examination of this witness was done on 29.8.19 and the cross examination was held on 29.08.19, 19.09.19, 25.09.19. P.W.-2 deposed before the court that it's been more than a year now since her family members were done to death. On that day she was sleeping with her father and mother. She was on the same cot with her mother. Her three brothers were sleeping in the room next to her room. Pawan Kumar and Raj Kumar were on one cot while Awadh Naresh was on plank. Around midnight she woke up along with her mother on hearing the screams of her father. She saw that Golu was killing her father with an axe. Her mother ran to save her father pleading "don't kill". Golu pushed her back and killed her mother too with the axe. The witness got scared and hide herself behind a chair. Buffaloes were tied in that room and the chair was behind these buffaloes. Bulb was lighted in the room. Accused Golu then searched for her and went upstairs and later came back. Both the brothers Pawan Kumar and Raj Kumar tried to run outside out of fear. Deva and Devideen were standing outside and scolded them to go back inside the house. Golu killed both her brothers and left from the front door. She witnessed the murder of her brothers through a hole in a wall. She kept hiding there whole night. At dawn she went to Munni Lal's house which was nearby and narrated them the entire incident. She asked them to call the police. Police came to the crime spot. The villagers and police man enquired about the incident from her. She told them of entire incident. Her brother Awadh Naresh kept sleeping there and woke up in the morning on being woken up. The witness was cross examined at length. In the cross examination she stated that she did not wake up her brother Awadh Naresh as she feared scolding from him.

3. Urmila w/o Munni Lal, aged about 27 years was presented as a witness

of fact. Her testimony is relied upon as res gestae. Her examination-in-chief was held on 30.09.19 and the cross examination took place on 30.09.19, 03.10.19. P.W.-3 deposed before the court that the incident took place on 31.01.2018. It was wednesday night. Her father in law are three brothers. All the three lived separately next to each other and have their houses built. Raghunandan and Mahadev live adjacent to each other. Her house is a few steps away. She was sleeping along with her two daughters inside the house. Her husband was sleeping outside under the shed. On the day of incident Ranshi knocked the door early morning around 4 or 5 AM and told the witness that Golu has killed her parents and Deva and Devideen were standing on the door of the house. When her brothers tried to flee away they were pushed inside the house by Devideen. Golu killed them too. She hide herself behind a chair kept in the cattle room. She woke her husband and narrated the entire incident. Her husband Munni Lal went to house of Mahadev and screamed loudly. She along with villagers and others also reached on hearing screams. Police was informed. Police too reached. The dead bodies were sealed and were sent for post-mortem. She was enquired about the incident by I.O. Deceased Mahadev wanted to have the registry of the land from Devideen, which Devideen was avoiding due to rise in price of land. This was the reason behind enmity.

4. Dr Atul Verma (PW-4) Medical officer performed autopsy of all the four dead bodies. He is a formal witness and has proved the postmortem reports. P.W.-4 deposed before the court that he conducted autopsy of all the four dead bodies on 31.01.2018 at the mortuary. He proved all the post mortem reports which were marked as exhibits. The cause of all the deaths were shock and haemorrhage due to anti mortem injuries. Time of deaths was around half a day. The witness was cross examined.

5. Inspector Shahsi Kumar Pandey is the first Investigator of the case and has been presented as formal witness. P.W.-5 deposed before the court that he was the first investigator of the crime. He recorded statement of witnesses and inspected the crime spot. He prepared site plan and raided several places looking for Golu. He arrested the accused Golu and recorded his statement. He also recovered the weapon on identification of accused from his house and prepared recovery memo of it. He recovered the clothes of accused which he was wearing during the crime and sent all recovered items for forensic test to F.S.L Lucknow He proved all the formal papers prepared by him during the investigation of the case. The same were marked as exhibits. The witness was cross examined by the defence counsels.

6. Inspector Ram Niwas Yadav is the second investigator of the case and is presented as PW-6. He has deposed before the court that he conducted the part investigation of the instant case. He recorded statements of witnesses and arrested the two accused. He also recorded their statements and on finding sufficient evidences against them submitted charge sheet in court against all the three accused. He proved all the formal papers prepared by him during the investigation of the case. The same were marked as exhibits The witness was cross examined by the defence counsels."

11. Trial court evaluated the evidence placed on record by the prosecution. The circumstances appearing on record against the accused have been specifically noticed.

Broad aspects arising in the case can be categorized as under:-

"1) Motive behind the crime
2) Identity of accused
3) Inquest done prior to F.I.R
4) Injuries nature
5) Source of light
6) Non adducing Munni Lal -the tahreer scriber
7) Presence of Ranshi on the crime spot.
8) Recovery of weapon and clothes of accused Golu"

12. On the aspect of motive the evidence has been examined by the court below and a categorical finding has been returned that the prosecution case for attributing motive to the accused to commit the offence is not reliable. It has been found that the flow of motive goes from the deceased to Devi Deen @ Bhawani Deen Yadav, i.e. maternal uncle of the accused and not from the accused or his maternal uncle Devi Deen @ Bhawani Deen Yadav to the deceased Mahadev. The consideration on the aspect of motive is enumerated in para 8 to 10 of the judgment which is reproduced hereinafter:-

"8. Motive behind the crime has been explained by the prosecution witnesses The deceased had bought some property from the accused Devi Deen long back. The land was not registered. Mahadev deceased asked him for registry of the land on which he refused for the reason that the land prices increased more than ten times. This fact has come in evidence of P.W.-1 and 3. Learned defence stated that the motive is baseless Deceased is living on the disputed land which is 8 biswas from a very long time. He got his house constructed and no objection was ever done by Devi Deen. No civil suit or any kind of objection on papers ever done, nor any legal notice to vacate the land was issued by the accused. Devideen is a government servent-Lekhpal and is of well to do status. If he denies the registration of land still he is in a beneficial and dominating position. He is at no loss, whereas Mahadev is a low income class milk seller. Refusal of registry of land, will be more disadvantageous for Mahadev and he will be at a loss. Devideen never asked the decease to vacate the land. The flow of motive should go from Mahadev to Devideen and not from Devideen to Mahadev. Thus the logical reasoning behind motive is without a concrete substance. This motive also do not fit the scenario of murder. If the accused plan to kill Mahadev and family then why did he left two kids alive.

9. In such circumstance the motive sounds hypothetical. Some newspaper cuttings of 01.02.2018 are also present in record collected by 1.0 during investigation. These newspapers are not a part of evidence. However, it mentions that deceased Mahadev was having illicit relation with bhabhi of accused Golu and that became the cause of murder. Though not brought on record by witnesses probably to avoid defamation.

10. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. Wl.en facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of

morive does not break the link in connecting the accused with the crime, nor militates against the prosecution case."

13. Upon evaluation of the evidence on record no illegality or perversity could be shown in the view taken by the trial Judge. The prosecution case essentially relies upon the oral testimony of PW-1, PW-2 and PW-3 as well as recoveries made by the Investigating Officer including that of an axe. This evidence has been relied upon by the court below to hold the accused appellant guilty.

14. PW-1 is the informant and admittedly is not an eye-witness. He has been produced by the prosecution mainly to prove the written report. The manner in which this written report has come into existence is interesting and needs to be noticed. PW-1 is the elder brother of the deceased Mahadev and his family members. He admits that their relationship was not very cordial. In his examination-in-chief, PW-1 has admitted that a partition had taken place between the brothers about fifteen years back in which no share was given to PW-1 or to the other brother Sukhnandan. The deceased retained the entire property consisting of a house built on three biswa land on the premise that he is his exclusive owner. This had resulted in strained relations. A suggestion has been given that there were differences between the brothers on account of property issue. PW-1 states that the incident was reported to him by Munni Lal, who happens to be the son of other brother Sukhnandan. The written report is thus based upon the disclosure made to PW-1 by Munni Lal and, therefore, the information divulged to PW-1 is hearsay since Munni Lal has not been produced. Interestingly it is Munni Lal who is the scribe. It is not clear as to why the written report was not made by Munni Lal when the incident came to the knowledge of Munni Lal first and he was himself the scribe also. This is more so as the relations between Mahadev and PW-1 were not cordial. Except for proving the written report not much turns on the testimony of PW-1.

15. PW-2 is the sheet anchor of prosecution case. She is six years of age and is the daughter of the deceased. Her testimony has been questioned by the defence on the premise that she was herself was not present in the house and had in fact slept in the house of Munni Lal. The testimony of PW-2 has also been doubted on the ground that she was tutored since part of her testimony implicating Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav has been disbelieved by the trial court on the ground that her statement is tutored. It is, therefore, submitted that once the presence of PW-2 itself is doubtful and part of her testimony has otherwise been disbelieved by the trial court on such ground, it would not be safe to rely upon her testimony. Before adverting to this aspect of the matter, we deem it appropriate to refer to the testimony of PW-3 who is the only other witness of fact in the matter.

16. PW-3 Smt. Urmila happens to be the wife of Munni Lal and she has two daughters. She is the daughter-in-law of Sukhnandan, who happens to be the real brother of the deceased. PW-3 in her examination-in-chief stated that on the date of incident at about 4.00-5.00 AM. PW-2 knocked her door and when she opened the door she (PW-2) informed her that the accused has assaulted her parents and brothers by the axe and Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav were standing at the door. In the cross-

examination, PW-3 has admitted that she is a graduate and her two daughters Laxmi and Kirti used to play with PW-2. She has stated that on the preceding day PW-2 had come to her house to play with her daughters. She has also stated that PW-2 had her meal at her house and she slept in her house. On a question raised by the court PW-3 then came up with a version that after PW-2 had gone to sleep in her house, the mother of PW-2 (deceased Chunni) came and took PW-2 and Laxmi to her house. Later at about 11.00 PM deceased Chunni came to the house of PW-3 to return Laxmi. This part of the statement of PW-3 is a clear improvement from what was stated by her in her previous statement under Section 161 Cr.P.C. Statement of Smt. Urmila was otherwise recorded under Section 161 Cr.P.C. 3-4 days after the incident and till then no such version had been disclosed by her. PW-3 has been contradicted with her previous statement under Section 161 Cr.P.C. where there was no explanation about the fact that though her door was knocked but her husband and devar had not woken up. She has also stated that PW-2 asked her to allow her to sleep with her as she was frightened. This fact, however, was not disclosed in the statement under Section 161 Cr.P.C. PW-3 has also been contracted with her previous statement under Section 161 Cr.P.C. as per which Ranshi had come to her house and had slept there and only woke up in the morning. Her version that Ranshi came to her house at 4.00-5.00 in the morning was also an improvement. PW-3 in her statement had also stated that the light in the house of Mahadev was switched off when she came out of her house after arrival of PW-2.

17. It is in the above backdrop that the statement of PW-2 requires a careful examination. PW-2 had stated that she had gone to sleep in the night alongwith her parents. She was in the same room with her parents while her two brothers were in the other room. As per PW-2 she had gone to sleep at about 10.00-11.00 in the night after having her meals. PW-2 has not stated anything about the visit to the house of PW-3 or about her having her meal the previous night at the house of PW-3. As per PW-2 deceased Mahadev was assaulted by the accused whereupon he screamed and her mother woke up. Mother of PW-2 rushed towards her father to save her where she was also assaulted. PW-2 states that she hid herself behind a chair. She has also stated that the bulb was lighted. This apparently was to convey that there was source of light in the room. One of the argument advanced on behalf of the defence is that in the event PW-2 had been seen sleeping next to the deceased mother by the accused and in her presence both her parents were assaulted, the possibility of PW-2 hiding in same room behind a chair seems highly improbable. From the testimony of PW-2 it is apparent that accused had seen her and if that be so, it would be difficult to believe that he would spare PW-2 or allow her to hid behind a chair, particularly when his intent was to finish off the entire family. PW-2 then comes up with a version that her two brothers who were sleeping in the adjoining room tried to escape but were stopped by Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav who were standing at the gate. As per PW-2 the two brothers were sent back by Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav whereafter the accused slaughtered them. This part of the testimony of PW-2 has already been disbelieved by the trial court for the reasons that such plea was clearly a case of improvement. Although this part of the

finding is challenged in appeal under Section 372 Cr.P.C. by PW-1 but we find no error in the reasoning assigned by the trial court to disbelieve the testimony of PW-2 to implicate Smt. Deva and Devadeen. No such statement was made under Section 161 Cr.P.C. either by PW-2 or PW-3. The fact that an attempt was made to implicate other family members of accused Golu also indicates that PW-2 was tutored. PW-2 then stated that she saw the incident from the other room by peeping into a hole. In order to examine the correctness of such version, the trial Judge has taken pains to visit the place of occurrence. The trial Judge found that from the hole in the wall it was not possible to see the incident. Para 22 of the trial court judgment is relevant in this regard and is reproduced hereinafter:-

"22. The court cannot shut eyes from the fact that the witness is a child and more often children can be easily swayed away and are prone to tutoring, therefore the statement of the child witness should always be scrutinized with great care and caution. In such cases, not only the court has to search for reliable corroborative evidence either oral or documentary, as a matter of prudence, but must also feel satisfied that such a child is not playing in the hands and dictation of any family member or other person who may be in a better position to have a command and dominance over the child and who has some sinister agenda of settling scores with the other party named as accused in the commission of any crime. This precaution is necessary because child witness is amenable to tutoring and often lives in the world of make-believe. The witness Ranshi has not stated in his statement U/ 161 Cr.P.C that Deva and Devideen were present at the door and forced the kids to go inside. Nor the fact is mentioned in the tahreer. Ranshi statement was recorded same day. After the arrest of Golu this fact emerged in the case diary that Deva and Devideen too were involved in the crime. Ranshi statement was recorded only once. <u>During inspection of crime spot when I looked from the key hole where Ranshi witnessed the murder, I found that vision from the hole is limited to next room boundaries only. If someone stands outside the door in the night the possibility to see him is very less. Thus I find statement of Ranshi is filled with material improvement and it hits the base of the case. Deva and Devi Deen were present at their home after the crime. They were arrested after Golu was arrested.</u> Police raided several places in search of Golu as can be seen from the General Diary. Many police teams were searching to Golu. Golu was arrested after 6-7 days of crime and then Deva and Devideen too. <u>Had they been seen by the witness the fact would have been told to 1.0 Immediately rather than waiting for 7-8 fays. Thus this portion of Ranshi evidence is unreliable and benefit of doubt is extended on the presence of Deva and Devideen.</u> PW-1 has stated that he got to know from Awadh Naresh that Deva and Devideen too were present there. Awadh Naresh-the survived son statement were never recorded in the case diary. The reason being that he did not witnessed anything as stated by 1.0 in his cross examination. The defence witness records gives strength to the plea of learned defence That Devideen was on duty and was on supervision of fields. Also Ranshi has confirmed in her chief statement that Awadh Naresh kept sleeping tili he was awake." (emphasis supplied by us)

18. The consideration of evidence by the trial Judge, noticed above, is reasonable

and logical. We find no good ground to discard the view taken on this aspect by the trial Judge and fully endorse it. PW-2 has also stated that the accused then started looking for her but she could effectively hide her behind a chair. She has later stated that after the accused left she came out of her house leaving behind her other brother Avadh Naresh. As per PW-2 she did not woke up Avadh Naresh as she feared he would get annoyed if she woke him up. This version of PW-2 again is not very inspiring since the age of Avadh Naresh is stated to be around twelve years and, therefore, he was much elder to PW-2. The fact that having witnessed brutal murder of her two brothers and the parents the explanation that PW-2 would not woke her elder brother only because he would get annoyed seems unconvincing. PW-2 in her cross-examination specifically stated that usually food is cooked in her house at 8.00 but on that day (date of incident) she had consumed her food at 10.00-11.00 in the night. PW-2 nowhere stated that she had gone to the house of PW-3; had her food there or had gone to sleep in the house of PW-3, which goes contrary to the version of PW-3.

19. We have perused the statement of PW-2 recorded under Section 161 Cr.P.C. in which she has stated that when she came to the house of PW-3 she informed her that she is frightened and that she requested her to allow her to sleep and thereafter she had gone to sleep. This statement of PW-2 under Section 161 Cr.P.C. supports the plea that in fact PW-2 had gone to sleep in the house of PW-3. Whether this had occurred after she had consumed her food in the house of PW-3 or it occurred early in the morning, as is being stated by PW-2, is not very clear. What is, however, clear is that PW-2 had gone to sleep in the house of PW-3. This also raises a doubt about the presence of PW-2 at the place of occurrence. At this juncture, it would be relevant to note that though witnesses have been cross-examined extensively but no evidence has surfaced on record which may even indicate slightest of enmity or existence of motive for the accused to eliminate the entire family of Mahadev. The limited motive referred to in the judgment of trial court is the newspaper report which has rightly been disbelieved since there was no basis or evidence in that regard. The evidence, however, does indicate that relations between Mahadev and his brother Raghunandan were strained.

20. Learned counsel for the informant as well as learned A.G.A. have placed heavy reliance upon a judgment of Supreme Court in State of Madhya Pradesh vs. Ramesh and Anr (2011) 4 SCC 786 wherein the Supreme Court has observed as under in para 13:-

"Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from the untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness. (Vide Gagan Kanojia v. State of Punjab.)"

21. It is urged by learned A.G.A. that the part of testimony of PW-2 attributing role to Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav ought to be segregated and the remaining part in which she has implicated the accused ought to be accepted.

22. The proposition of law as is noticed in para 13 is well settled. The testimony of a child witness has to be carefully scrutinized as the possibility of her being tutored always exists. It is, however, settled that if a part of such testimony is eliminated on the ground of it being tutored yet the remaining part can be accepted if it otherwise inspires confidence. We have examined the testimony of PW-2 and even if we eliminate the part of her testimony attributing role to Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav yet the remaining part of her testimony implicating the accused does not appear to be very inspiring. The reasons in that regard are apparent. First and foremost, there is a doubt as to whether PW-2 had actually slept in her house or she had slept in the house of PW-3. The fact that PW-2 had woken up at the house of PW-3 in the morning is admitted. At what point of time she came to the house of PW-3 is not very clear. PW-3, however, is specific in stating that PW-2 had her meals in her house and she had gone to sleep in her house. The version of PW-3 that she later returned with deceased Chunni is clearly an improvement in the testimony of PW-3. It is then to be noticed that the version of PW-2 that though she was seen by the accused yet she could hide herself behind a chair is also not very inspiring. Her version of having seen the incident by peeping through the hole in the wall has also been disbelieved. The fact that all four members of the family had been done to death does indicate that the offender actually wanted to eliminate the entire family. If that be so the possibility of PW-2 having escaped from the spot even after the murderer saw her seems unlikely. It is also admitted on record that the other brother Avadh Naresh was neither harmed nor he was ever examined or produced by the prosecution which also creates a doubt on the prosecution case. When the evidence is analysed in light of the fact that there existed absolutely no motive for the accused to commit the offence, we are not persuaded to rely upon the testimony of PW-2 in order to implicate the accused appellant. We do not find the testimony of PW-2 to be so reliable, despite part of her testimony having been tutored, so as to base our conclusion entirely upon her deposition.

23. The other evidence produced by the prosecution is with regard to blood stained soil having been recovered from the house of the accused. This part of the testimony cannot be accepted for two reasons. Firstly, the recovery of soil vide Ex.Ka.7 is not proved as none of the witness of such recovery namely Munni Lal and Om Prakash have been produced. We have also examined the testimony of the Investigating Officer i.e. PW-5 in which there is no specific reference to such recovery. Our attention has also been invited to page 82 of the paper book in which the IO has categorically stated that the house of the accused was not searched on the date of incident. If the accused's house was not searched the version that soil was collected from his house becomes doubtful. The evidence on the aspect of recovery of soil, therefore, is found unreliable. So far as the recovery of axe is concerned the prosecution has produced Ex.Ka.10 as being the memo of recovery of axe. The recovery is witnessed by Chotel Lal and Munni Lal who again has not been produced. The recovery merely states that the axe had been hidden by the accused who had given it to accused Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav. There is absolutely no prosecution evidence brought on record to testify that the recovery of axe was distinctly made on the

basis of such information furnished by the accused. In the absence of any such information having been proved the recovery of axe cannot be read against the accused. Law with regard to recovery under Section 27 of Indian Evidence Act has been a subject matter of consideration in a series of judgment wherein the Supreme Court has held, in Boby vs. State of Kerala 2023 SCC OnLine SC 50, as under:-

"27. As early as 1946, the Privy Council had considered the provisions of Section 27 of the Evidence Act in the case of Pulukuri Kotayya v. King-Emperor. It will be relevant to refer to the following observations of the Privy Council in the said case:

"The second question, which involves the construction of s. 27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms. [His Lordship read ss. 25, 26 and 27 of the Evidence Act and continued :] Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. *The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and there upon so much of the information as relates distinctly to the fact thereby discovered may be proved.* The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. On this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity, would all be admissible. If this be the effect of s. 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to s. 26, added by s. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; 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. 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. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It 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. But if 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 supplied]

28. It could thus be seen that Section 27 of the Evidence Act requires 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 the said fact. The information as to past user, or the past history, of the object produced is not related to its discovery. The said view has been consistently followed by this Court in a catena of cases.

29. This Court, in the case of Chandran v. The State of Tamil Nadu5, had an occasion to consider the evidence of recovery of incriminating articles in the absence of record of the statement of accused No. 1. *In the said case also, no statement of accused No. 1 was recorded under Section 27 of the Evidence Act leading to the recovery of jewels*. The Court found that the Sessions Judge as well as the High Court had erred in holding that the jewels were recovered at the instance of accused No. 1 therein in pursuance to the confessional statement (Ex. P-27) recorded before PW-34 therein. It will be relevant to refer to the following observations of this Court in the said case:

"36. ……Thus the fact remains that no confessional statement of A-1 causing the recovery of these jewels was proved under Section 27, Evidence Act….."

30. *It is thus clear that this Court refused to rely on the recovery of jewels since no confessional statement of the accused was proved under Section 27 of the Evidence Act.*

31. It will also be relevant to refer to the following observations of this Court in the case of State of Karnataka v. David Rozario:

"5. ……This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. *The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence.* The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the

information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. *It is now well settled that recovery of an object is not discovery of a fact envisaged in the section.* Decision of the Privy Council in Pulukuri Kottaya v. Emperor [AIR 1947 PC 67 : 48 Cri LJ 533 : (1946-47) 74 IA 65] is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (See State of Maharashtra v. Damu [(2000) 6 SCC 269 : 2000 SCC (Cri) 1088 : 2000 Cri LJ 2301]……"

[Emphasis supplied]

32. A three-Judges Bench of this Court recently in the case of Subramanya v. State of Karnataka7, has observed thus:

"82. 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."

83. *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.*

84. 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."

33. This Court has elaborately considered as to how the law expects the IO to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. In the present case, leave aside the recovery panchnama being in accordance with the aforesaid requirement, there is no statement of Boby (accused No. 3/appellant herein) recorded under Section 27 of the Evidence Act. We are, therefore, of the considered view that the prosecution has failed to prove the circumstance that the dead body of the deceased was recovered at the instance of Boby (accused No. 3/appellant herein)."

(emphasis supplied)

24. So far as other recovery made by the prosecution vide Ex.Ka.1, Ex.Ka.3A, Ex.Ka.4A, Ex.Ka.5A, Ex.Ka.2A, Ex.Ka.6, Ex.Ka.7, Ex.Ka.8, Ex.Ka.9, Ex.Ka.10, Ex.Ka.11, Ex.Ka.12, Ex.Ka.17 are concerned, none of these recoveries have been proved since the witnesses of such recovery have neither testified to such recovery nor is it shown that any such recovery was made based upon the information furnished by the accused. The recovery of incriminating material, as alleged by the prosecution, is thus disbelieved.

25. So far as the recovery of Aadhar card from the spot is concerned, we find it rather amusing that an accused who would go to commit such a heinous crime would carry his aadhar card or would drop it at the place of occurrence so that the police found no difficulty in identifying him. This part of the prosecution case is thus most amusing and cannot be believed. Even otherwise witnesses of such recovery have not been produced. The possibility of such aadhar card having been placed later cannot be ruled out.

26. When we proceed to ultimately evaluate the prosecution evidence we cannot lose sight of the fact that the incident was reported to the Investigating Officer admittedly at around 5.00-6.00 in the morning. The IO categorically admits that he rushed to the spot within twenty minutes. IO has moreover stated that the incident was reported on helpline no.100. However there is no evidence produced by the prosecution on the aspect as to when such call was received; who had made this call and when the IO came on the spot. The GD of the Police Station has not been produced to show receiving of such information by the IO or his visit to the place of occurrence. Records also reveal that the trial court on 20.11.2019 specifically directed the IO to appear on the next day alongwith GD yet such GD has not been produced. We also found no reference of any steps taken by the prosecution between 6.20 AM when the Investigating Officer arrived at the place of occurrence till the information officially was given to the Police Station on 10.15 AM. What happened between 6.20 to 10.15 is not known. It is admitted to the prosecution that the IO arrived at the place of occurrence by 6.20 AM. The manner in which the written report has been got scribed by Munni Lal without producing him clearly lends support to the defence version that the IO had arrived several

hours before the information was given to the police. The possibility of deliberation and consultation having preceded the lodging of police report is a distinct possibility. We are amused at the manner in which the investigation has proceeded and material facts have been withheld. In the facts of the case, the failure on part of the prosecution to explain the genesis of the incident coupled with the strong possibility of deliberation and consultation having preceded the making of written report, followed by complete absence of motive on part of the accused persuade us to disbelieve the testimony of child witness in the facts and circumstances of the present case. Though the incident is gruesome in which four persons have lost their lives but that in itself would not persuade us to punish the accused against whom evidence is lacking and is not reliable.

27. In view of the deliberations held above, we do not subscribe to the view taken by the trial court that the prosecution has succeeded in establishing its case beyond reasonable doubt against the accused appellant. The accused appellant is clearly entitled to benefit of doubt. Reference made under Section 366 Cr.P.C. is, therefore, answered by holding that the accused appellant is not found guilty and consequently, the death penalty awarded to him stands reversed. The criminal appeal filed by the accused appellant to that extent succeeds and is allowed.

28. We find absolutely no good ground to interfere with the view taken by the trial court for acquitting the accused Smt. Deva and Sri Devi Deen @ Bhawani Deen Yadav as the findings returned by the court below to discard the testimony of PW-2 is found to be based upon correct appraisal of the evidence on record. Accordingly, the Criminal Appeal u/s 372 Cr.P.C. No.21 of 2021 filed by informant Raghunandan is rejected.

29. At the end, we record our appreciation for the able assistance rendered to the Court by Sri Gajendra Pratap, learned Senior counsel, who has acted pro bono as Amicus Curiae and Smt. Abhilasha Singh who has assisted learned Senior counsel in the present case and highlighted evidence, meticulously, for us to come to our conclusion. Smt. Abhilasha Singh will be entitled to her fees quantified at Rs.15,000/- from the High Court Legal Services Authority.

(2024) 1 ILRA 367
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Appeal No. 2109 of 2022
with
Criminal Appeal No. 2110 of 2016

Smt. Gangotri ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Prakash Chandra Srivastav

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 302/34 & 307/34 - Indian Evidence Act, 1872 - Section 32(1) - Code of Criminal Procedure, 1973 - Sections 161 & 313 - Appellants challenged conviction under Sections 302/34 and 307/34 I.P.C. for murder of Suman and attempt to murder Kamla. Court held: (1) St.ment of Kamla recorded

under Section 161 Cr.P.C. was not admissible as dying declaration under Section 32(1) of Evidence Act for charge under Section 307 I.P.C., as her death was not in issue (Indrapal Vs St. of M.P., (2001) 10 SCC 76). (2) Kamla's St.ment was inadmissible for charge under Section 302 I.P.C. regarding Suman's death, as it did not relate to cause or circumstances of Kamla's death (In re Peria Chelliah Nadar, AIR 1942 Mad 450). (3) Failure to confront appellants with Kamla's St.ment during examination under Section 313 Cr.P.C. vitiated trial, causing prejudice and violating natural justice (Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622). (4) Prosecution witnesses (PW-1, PW-2, PW-3, PW-4) did not implicate appellants; PW-4 was hostile, and no eye-witness account supported involvement. (5) No corroborative evidence or dying declaration linked appellants to the crime; conviction based on inadmissible St.ment was unsustainable (Sukhar Vs St. of U.P., (1999) 9 SCC 507). Judgment of conviction set aside; appellants acquitted. (Paras 21-57)

Criminal Appeals Allowed.

List of Cases cited:

1. Indrapal Vs St. of M.P., (2001) 10 SCC 76 (Para 32)

2. In re Peria Chelliah Nadar, AIR 1942 Mad 450 (Para 38)

3. Lukka Ulahannan Vs Travancore-Cochin St., AIR 1955 TRA-C 104 (Para 39)

4. Kunwarpal Singh Vs Emperor, AIR 1948 All 170 (Para 40)

5. Ratan Gond Vs St. of Bihar, AIR 1959 SC 18 (Para 41)

6. Gananath Pattnaik Vs St. of Orissa, (2002) 2 SCC 619 (Para 34)

7. Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622 (Para 47)

8. Sujit Biswas Vs St. of Assam, (2013) 12 SCC 406 (Para 48)

9. Asraf Ali Vs St. of Assam, (2008) 16 SCC 328 (Para 50)

10. Shivaji Sahabrao Bobade Vs St. of Mah., (1973) 2 SCC 793 (Para 53)

11. Moti Singh Vs St. of U.P., AIR 1964 SC 900 (Para 35)

12. St. of U.P. Vs Shashi Shekhar, 2004 SCC OnLine All 1822 (Para 33)

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

1. The criminal appeal No. 2109 of 2016 has been filed against the judgment and order of conviction dated 19.04.2016 passed by District Judge, Rampur in Sessions Trial No. 525 of 2013 whereby the learned District Judge, Rampur has convicted the accused appellants Smt. Gangotri Devi and Madan Lal for the offences punishable under Section 307 I.P.C. read with Section 34 I.P.C. and sentenced them to ten years rigorous imprisonment along with a fine of Rs. 5,000/-. In case of default of payment of fine, the accused appellants had to further suffer six months additional imprisonment. They were further convicted under Section 302 read with Section 34 I.P.C. and were sentenced to life imprisonment and fine of Rs. 20,000/- each. In case of default in payment of fine, the accused appellants had to further undergo additional imprisonment for a period of two years.

2. Criminal Appeal No. 2110 of 2016 was filed by the appellant Daulat Ram against the judgment and order dated 19.04.2016 passed by learned District Judge, Rampur in S.T. No. 42 of 2015 (State v. Daulat Ram) and convicted him for the offences punishable under Section 307 I.P.C. read with Section 34 I.P.C. and sentenced him for ten years rigorous

imprisonment along with a fine of Rs. 5,000/-. In the case of default, the accused appellant had to further suffer six months additional imprisonment. The appellant was also convicted under Section 302 read with Section 34 I.P.C. and was sentenced to life imprisonment with a fine of Rs. 20,000/-. In case of default in payment of fine, the accused appellant had to further undergo an additional imprisonment for a period of two years.

3. Both the Sessions Trials i.e. S.T. No. 525 of 2013 and S.T. No. 42 of 2015 arose from the Case Crime No. 217 of 2013 under Section 307, 302 I.P.C. read with Section 34 of I.P.C., Police Station Milak, District Rampur. As both the Sessions Trials arose from the same Crime number i.e. Case Crime No. 217 of 2013, they were tried together and decided by a common judgment and order dated 19.04.2016 by District Judge, Rampur.

4. The factual matrix of the case is that the informant namely Prabhu Dayal S/o Natthu Lal submitted a written complaint dated 15.05.2013 paper no. 50Ka (Ex. K-1) on which a First Information Report paper no. 52Ka (Ex. Ka-3) was registered in Case Crime No. 217 of 2013, under Section 307, 302 I.P.C. read with Section 34 I.P.C., P.S. Milak, District Rampur.

5. As per the First Information Report, the informant stated that the marriage of the informant was settled with one Kamla D/o Sher Singh. After the settlement of marriage, father of Kamla expired. It has been further stated that mother of Kamla had died earlier and in the family of Kamla there was a younger sister named Suman and one elder brother by the name of Bablu.

6. Rahul s/o Bablu and Smt. Gangotri, mother of Rahul used to quarrel with Kamla and Suman for a share in the property which had come in the share of Kamla and Suman after the death of their father. Because of this reason at about 11:00AM on 15.03.2013, Rahul s/o Gajendra @ Bablu, his mother Smt Gangotri W/o Gajendra and their relative Daulat Ram and Madan Lal started quarrel with Suman and Kamla and Madan Lal and Daulat Ram exhorted Rahul and Gangotri to kill Kamla and Suman. Upon this goading, Rahul shot Suman with a country made pistol (Tamancha) and thereafter also tried to kill Kamla. Suman died on the spot while Kamla was brought to the police station. On the spot, Harish and many other villagers were present. The scribe of the complaint was one Devesh Kumar S/o Horilal.

7. After the First Information Report was lodged, the police investigated the crime and after collecting evidence, a charge sheet paper no. 53 Ka (Ex. Ka-4) was submitted under Section 173 (2) Cr.P.C. against Smt. Gangotri and Madan Lal. A separate charge sheet (paper no. 66 Ka (Ex. Ka-17) was submitted against Daulat Ram.

8. The accused Rahul S/o Gajendra was a minor, therefore the matter proceeded against Rahul before Juvenile Justice Board, Rampur.

9. The learned Magistrate after taking cognizance and after complying with the provisions of Section 207 Cr.P.C. committed the case for trial to the Court of Sessions. On 14.09.2015, Smt. Gangotri and Madan Lal were charged under Section 307 I.P.C. for attempting to murder Kamla, under Section 302 I.P.C. and for murder of

Suman under Section 302 I.P.C. read with Section 34 I.P.C. in Sessions Trial No. 525 of 2013.

10. The learned Magistrate charged Daulat Ram under Section 307 I.P.C. for attempting to murder Kamla and under Section 302 of I.P.C. for the murder of Suman read with Section 34 I.P.C. in Sessions Trial No. 42 of 2015 on 14.09.2015.

11. During trial, statements of six persons namely Prabhu Dayal PW-1, Km. Usha PW-2, Mansi Devi PW-3, Harpal Singh @ Harish PW-4, Dr. Sanjeev PW-5 and the Investigating Officer Sunit Kumar were recorded. Statement of Pankaj Kumar, S.I. was also recorded as Court Witness no. 1.

12. The prosecution produced written complaint (Ex. Ka-1), post-mortem report (Ex. Ka-2) Chik F.I.R. (Ex. Ka-3), Charge Sheet (Ex. Ka-4), Naksha Nazri site map (Ex. Ka-5), Medical Report of Kamla (Injured) (Ex. Ka-6), Fard Mitti (Ex. Ka-7), Fard Cement (Ex. Ka-8), Fard Khokha (Ex. Ka-9), Report P.S. Milak (Ex. Ka-10), Challan lash (Ex. Ka-11), Inquest Report (Ex. Ka-12), Photo lash (Ex. Ka-13) Letter S.I. (Ex. Ka-14), Specimen Mohar (C) (Ex. Ka-15), Nakal G.D. (Ex. Ka-16), Charge Sheet (Ex. Ka-17) and death report of Kamla (Ex.-18) as documentary evidence during trial.

13. Statements of accused were also recorded under Section 313 Cr.P.C. in which they denied the incident and claimed that they had been falsely implicated.

14. Additional statement of accused were also recorded in which accused Smt. Gangotri deposed that she was not at home and had gone to hospital in connection with the illness of her husband. Accused Madan Lal has stated that he was in his village Loha which is at a distance of 15KM from the place of incidence and the accused Daulat Ram deposed that he was at his village Sigra which is 12 KM from the place of incident.

15. After considering the entire evidence, learned Sessions Judge, Rampur convicted accused appellants namely Smt. Gangotri, Madan Lal and Daulat Ram under Section 307 read with Section 34 I.P.C. for attempting to murder Kamla and also sentenced them to undergo rigorous imprisonment of ten years along with fine of Rs. 5,000/-. He also convicted the accused appellants under Section 302 I.P.C. read with Section 34 I.P.C. for murdering Suman and sentenced them with imprisonment for life with fine of Rs. 20,000/-.

16. Heard learned counsel for the appellants and learned A.G.A. for the State and perused the record.

17. Since both the appeals arise out of a common judgment dated 19.04.2016, they are being decided together.

18. Learned counsel for the appellants vehemently assailed the order of conviction and made the following submissions.

(1) The accused appellants are innocent and have not committed the alleged crime. The order of conviction is passed on conjectures and surmises.

(2) The informant Prabhu Dayal was not an eye-witness of the incident and has admitted in his statement that he had lodged the First Information Report on the

basis of information given to him by Kamla.

(3) It has also been stated in his cross-examination by PW-1 that neither the police nor the informant had any talks with Kamla as she was unconscious.

(4) Kamla was not examined as witness as she died during the pendency of the trial. It was further contended that prosecution had failed to prove the date, time and cause of death of Kamla. There was no evidence to the effect that Kamla died because of injuries sustained in the alleged incident.

(5) All the other witnesses of fact produced by the prosecution failed to prove involvement of the appellants Smt. Gangotri Devi, Madan Lal and Daulat Ram in the crime in question and rather they have stated that they had not seen the appellants committing the crime and even denied their presence at the spot.

(6) PW-2 Usha and PW-3 Mansi Devi had only given evidence against Rahul and had not seen Gangotri, Madan Lal and Daulat Ram and as such there was no eye witness account against the accused appellants.

(7) Accused Rahul who was a minor, his case was not before the trial court.

(8) PW-4 Harpal was declared hostile.

(9) The statement of Kamla was recorded by the investigating officer after ten days of the incident and there is no reason mentioned for recording the statement after such a delay of the alleged injured witness.

(10) The statement recorded under Section 161 Cr.P.C. of Kamla, who died after one year could not be relied upon as a dying declaration under Section 32(1)of the Evidence Act. The statement of Kamla recorded under Section 161 Cr.P.C. was neither signed by Kamla nor was recorded in presence of any other witness.

(11) The trial court has erred in law in treating the statement under Section 161 Cr.P.C. as dying declaration under Section 32(1) of the Evidence Act and there was no corroboration to the aforesaid statement of Kamla.

(12) Lastly it was submitted by the learned counsel for the appellants that the appellants were not confronted with the statement of Kamla recorded under Section 161 Cr.P.C. which was treated as a dying declaration at the time of recording their statement under Section 313 Cr.P.C and therefore, the same cannot be relied upon.

19. Per contra, learned A.G.A. for the State refuted the submissions made by the learned counsel for the appellants and made the following submissions:

(1) The trial court has rightly relied upon the statement of Kamla recorded under Section 161 Cr.P.C. as dying declaration.

(2) There is no impediment in convicting the accused only on the basis of dying declaration without there being any corroborative evidence.

(3) The statement of Kamla recorded under Section 161 Cr.P.C. was proved by Sunit Kumar. PW-6 (Investigating Officer) who recorded the said statement.

(4) PW-6 was an independent witness and there was no suggestion by the defence as to why PW-6 will give false evidence against the accused appellants.

(5) Not putting the question to the accused appellants with regard to the statement of deceased Kamla recorded under Section 161 Cr.P.C. during questioning the accused under Section 313 Cr.P.C. would not vitiate the trial and the

accused appellants had to establish the prejudice caused to them and lastly it was submitted that the trial court rightly passed the judgment convicting the accused appellants after considering the entire evidence and the appeal had no merits and is liable to be dismissed.

20. With the help of both the counsels, learned counsel for the appellants and learned A.G.A. for the State, we have perused the record of the case.

21. The informant Prabhu Dayal PW-1 in his examination-in-chief has stated that his marriage was settled with Kamla D/o Sher Singh and after the settlement of marriage Sher Singh died. After the death of the father of Kamla her sister Suman, brother Bablu, nephew Rahul and sister-in-law Gangotri and three small kids remained in the family. Rahul S/o Bablu and Gangotri used to quarrel with Kamla and Suman regarding his share in the land which came in the name of Kamla and Suman after the death of their father Sher Singh. He has further stated that on 15.05.2013 at about 11:00 AM, there was a fight between Rahul, Gangotri, Madan Lal and Daulat Ram with Kamla and Suman. Daulat Ram and Madan Lal exhorted to kill them, then Rahul shot Suman and thereafter Kamla and Suman ran towards the roof to save their lives. Gangotri caught Kamla's leg and thereafter Rahul shot Kamla. Suman thereafter jumped from the roof. Rahul, Gangotri, Daulat Ram and Madan Lal shot several fire shots on Suman who died on the spot. Kamla was injured and she was taken to the Milak Hospital by the informant. It has been further stated by PW-1, who had witnessed the incident that the incident was not within the knowledge of the informant. The entire sequence of events was told to the informant by Kamla. The informant got the complaint written by Devesh Kumar and after reading the same he had put his signatures. It has been further stated that the written complaint was filed by the informant in the police station. In his cross-examination, PW1 has stated that he had not witnessed the incident and had also not disclosed in the F.I.R. about direct knowledge of the incident. In fact he has stated that he was informed by Kamla. After hearing the news of murder, he first went to the Police Station Milak and informed the police that some incident had occurred in the village Bihta and at that point of time, the police personnel did not lodge the First Information Report. It has been further stated by the informant that the informant reached police station Milak at around 11: ½, 11: ¾ hours and it took him 10-15 minutes at the police station. It has been further stated that the police personnel accompanied the informant to village Bihta. At the house of Sher Singh, informant met uncle of Kamla namely Sompal but it was further stated that he did not have conversation with Sompal. When police personnel reached Sher Singh's house, Kamla was lying on the zina (stairs). It was also stated by the informant that police personnel did not have talks with Kamla and the police personnel did not ask Kamla regarding her injuries. Also no enquiry was made as to who had assaulted her. Kamla was unconscious at that point of time therefore, neither, the police personnel nor the informant had conversation with Kamla. It was further stated by the informant that in the First Information Report, he had mentioned the name of Harish as witness as there was no other witness. It was still further stated that the informant had taken the injured Kamla in a police vehicle along with two constables to the hospital. It was also stated by the

informant that when he reached the hospital at Milak, doctor said after examining the injured Kamla that there was excessive bleeding and also advised him to take her to Bareilly. Thereafter the informant got the written complaint drafted by Devesh Kumar and had given the same in the police station. It was further stated that at about 01:00 PM or some time after 01:00 PM he had taken Kamla to Bareilly and had admitted her in a Hospital. After admitting Kamla it was stated by the informant that he remained with Kamla and only after being called by the inspector came to the police station after 2-3 days. It was further stated by the informant in his cross-examination that he had gone from Bihta to hospital and had not gone to the police station along with Kamla. It was further stated that when the police had taken statement of Kamla at Bareilly, informant was not present as he was removed from there. It has also been stated that he had not mentioned in the F.I.R. that he had come along with Kamla to the police station and he states that how reverse facts had been stated in the First Information Report, he could not say. It had also been stated by the PW1 that he had not gone to the police station on the date of incident.

22. PW2 Km. Usha in her examination-in-chief has stated that on 15.05.2013 she along with her sister-in-law Mansi was at her house and his brother Harish was not there at the house and came later on after hearing the news. It was stated by PW-2 that at about 11:00AM, she heard the sound of fire and the younger daughter of master Sher Singh came to her house running and thereafter Rahul came with a Tamancha (Pistol) in his hand and shot Suman twice. It has been further stated that Gangotri Devi, Daulat Ram and Madan Lal did not come to her house nor she had seen them there.

23. PW-3 Mansi Devi in her examination-in-chief has stated that at about 11:00AM, on 15.05.2013, she was in the verandah of her house and her sister in law was reading in the verandah. It has been further stated that her husband Harish was not present in the house. It was also stated by PW-3 that she heard sounds of two fire shots from the neighbouring area. It was further stated that the younger daughter of Sher Singh Suman came running in an injured condition and fell down near the tap. Rahul came with a tamancha (pistol) in his hand and had shot Suman and thereafter had repeating the shooting and then had ran away. It has been further stated by PW-3 that Gangotri Devi, Madan Lal and Daulat Ram did not come to her house nor she had witnessed them there. It was further stated in her cross-examination that Kamla, Gangotri and Prabhu Dayal did not come with police to her house.

24. PW-4 Harpal @ Harish has stated in his examination-in-chief that on 15.05.2013, he has gone to Karkheda in connection with the work of the company and his wife Mansi and sister Usha were present in the house. It was further stated that his house is neighbouring the house of Sher Singh. The daughter of Sher Singh did not come to his house in his presence as he was not there at the time of incident. He has not seen Rahul firing on Suman. It has been further stated that he has not witnessed Gangotri Devi, Madan Lal and Daulat Ram coming to his house. PW-4 was declared hostile by the prosecution. It has been stated by the PW4 in her cross-examination that he has not heard any

dispute between Kamla and Suman with Gangotri and Rahul.

25. PW-5 Dr. Sanjeev Malik has proved the post-mortem report.

26. PW-6 Sunit Kumar retired inspector of police has stated that on the information of informant Prabhu Dayal regarding the incident dated 15.05.2013 which occurred at about 11:00AM in which her would be wife Kamla was injured and would be sister-in-law Suman was murdered by nephew of Kamla namley Rahul her mother Gangoti Devi and relatives Daulat Ram and Madan Lal. The First Information Report was registered and PW6 has investigated the crime. It was further stated that on 15.05.2013, the statement of Prabhu Dayal under Section 161 Cr.P.C. was recorded and on the instructions of the informant the spot inspection was made and Naksha Nazri was prepared which is Ex.Ka-5. It was further stated by PW-6 on 25.05.2013, he has recorded the statement of Kamla at Osker hospital, Bareilly and whatever stated by Kamla was written in diary word by word and after the completion of investigation, charge sheet was submitted by PW-6. In his cross-examination, it has been stated by PW-6 that it is incorrect that prior to lodging of F.I.R. Prabhu Dayal came to the police station and thereafter PW-6 has gone to the spot and after coming from there has lodged the F.I.R. Prabhu Dayal has not claimed to have witnessed the incident but has mentioned the incident on the information given by Kamla. It was also stated by PW-6 that on 15.05.2013 he did not met Kamla. It was also stated by PW-6 that as Kamla told Prabhu Dayal, on the basis of the same, Prabhu Dayal got the spot inspection done and PW-6 prepared Naksha Nazri. On questioning of the court, it was informed by PW-6, when he has recorded the statement, she was conscious and only her lower limbs were not functioning. It was further stated by PW-6 that dying declaration was not recorded before the Magistrate for the reason that there was no likelihood of the death of Kamla.

27. Contention of the learned counsel for the appellants is that the trial court has erroneously treated the statement of Kamla recorded by investigating officer under Section 161 Cr.P.C. to be a dying declaration. Except for the aforesaid statement, all the witnesses of fact had not supported the prosecution version. The statement recorded by the investigating officer under Section 161 Cr.P.C. in the present case, cannot be treated as dying declaration under Section 32(1) of Evidence Act. It has been further contended that there were two charges against the accused/appellants. First under Section 302 I.P.C. for causing murder of deceased Suman and the other under Section 307 I.P.C. for causing such injuries to Kamla which would amount to attempting to murder Kamla, who had died subsequently.

28. Per contra, learned A.G.A. has contended that there was no bar to treat a statement recorded by an investigating officer under Section 161 Cr.P.C. as a dying declaration, after the death of the person, who has given such statement. In the present case, after recording of statement of Kamla under Section 161 Cr.P.C. by the investigating officer, Kamla had died and she could not be produced as a witness in trial and, therefore, her statement would fall within the purview of Section 32(1) of Evidence Act, as dying declaration.

29. Before we proceed further to consider rival submissions, it would be

appropriate to look into the provisions of Section 32(1) of the Evidence Act:

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

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

(2)….., (3)……, (4)….., (5)…., (6)……, (7)….., (8)…."

30. Section 32(1) of Evidence Act renders a statement relevant which was made by a person who is dead, in cases, in which cause of his death comes into question, but its admissibility depends upon one of the two conditions, i.e. either such statement should relate to cause of his death or it should relate to any of the circumstances of transaction which resulted in the death.

31. Unless the statement of a dead person would fall within the purview of Section 32(1) of Evidence Act, there is no other provision under which the same can be admitted in evidence. In order to make statement of a dead person admissible in law, (written or verbal), the statement must be as to the cause of death or with regard to any of the circumstance of the transaction which resulted in the death, in cases, in which cause of death comes into question. In the present case, there is no dispute that after recording the statement of Kamla under Section 161 Cr.P.C., Kamla died and could not be produced as witness during trial because of her death. The appellants were charged under Section 307 I.P.C. for attempting to murder Kamla. In a charge under Section 307 I.P.C., the question of death of Kamla was not an issue for consideration. It has rightly been contended by learned counsel for the appellants that since while dealing with the charge under Section 307 I.P.C., the death of the person in question was not an issue for consideration, Section 32(1) of the Evidence Act would stand at bay and the statement recorded under Section 161 could not be considered at all. The question of the death of the person was not an issue. Rather it was the injuries which were caused to the person which were being investigated into. Except for the statement under Section 161 Cr.P.C. of Kamla, none of the prosecution witnesses had deposed as to the involvement of the appellants in the causing of such injuries to Kamla which might result in her killing.

32. Learned counsel for the appellant relied upon the judgment of Supreme Court in case of ***Indrapal v. State of M.P. reported in (2001) 10 SCC 76*** wherein it has been held that unless the statement of deceased comes within the purview of Section 32(1) of the Evidence Act, it cannot be admitted in evidence. Such statement must be regarding cause of death of the

deceased or as to any of the circumstance of the transaction which resulted in her death. Paragraph nos, 4, 5, 6 & 7 of ***Inderpal v. State of M.P. (Supra)*** are quoted as under:

"4. We will consider at first the contention as to whether there is any evidence against the appellant which can be used against him for entering upon a finding that he subjected Damyanti to cruelty as contemplated in Section 498A, IPC. PW1 - father of the deceased and PW8 - mother of the deceased have stated that Damyanti had complained to them of her plight in the house of her husband and particularly about the conduct of appellant. PW-4 - sister of the deceased and PW5 - a relative of the deceased have also spoken more or less in the same line. Exhibit P-7 and Exhibit P-8 are letters said to have been written by Damyanti. In those two letters reference has been made to her life in the house of her in-laws and in one of the letters she said that her husband had subjected her to beating.

5. Apart from the statement attributed to the deceased none of the witnesses had spoken to anything which they had seen directly. The question is whether the statements attributed to the deceased could be used as evidence in this case including the contents of Exhibits P-7 and P-8 (letters).

6. Before deciding that question we have to point out that the High Court came to a conclusion that the allegation that she committed suicide was not substantiated. A dying declaration was recorded by the Executive Magistrate in which deceased had stated that she got burns accidentally from a stove. If that be so, death could not be the result of either any harassment or any cruelty which she was subjected to. In this context we may point out that the State has not challenged the finding of the High Court that death of Damyanti was not due to commission of suicide.

7. Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P7 or Exhibit P8 and those quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. ***Even that apart, when we are dealing with an offence under Section 498A, IPC disjuncted from the offence under 306, IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned."***

33. In case of ***State of U.P. v. Shashi Shekhar and others reported in 2004 SCC OnLine ALL 1822***, the Division Bench of this Court has held that in case, the person who had made the statement before his death dies in some other incident and the cause of death was not in question in that trial, his statement would not be relevant under Section 32(1) of the Evidence Act. It will be useful to note the facts of the aforesaid case in brief. One Dr. Ved Bhushan was kidnapped and later on recovered by the police. He gave a statement at the time of recovery inculpating the accused therein but when

the matter of kidnapping went into trial, Dr. Ved Bhushan died in some other incident and could not be produced as witness. The Division Bench of this Court in paragraph no. 12 of the judgment in case of ***State of U.P. v. Shashi Shekhar (Supra)*** held as under:

"12. The statement made by Dr. Ved Bhushan under Section 161 Cr. P.C. could also not be utilised by the prosecution in its favour as his previous statement to fix up the culpability on the heads of the accused-respondents. As per Section 32(1) of the Indian Evidence Act, the statement made by a person who is dead can be used in evidence provided it relates to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in case in which the cause of that person's death comes into question. In the present case, Dr. Ved Bhushan was murdered in some other incident and cause of his death was not in question in this trial. Therefore, his statement made under Section 161 Cr.P.C. was hit by Section 162."

34. In case of ***Gananath Pattnaik v. State of Orissa*** reported in (2002) 2 SCC 619, the Apex Court has held that prosecution witness deposed prior to death that deceased woman has stated to the witness that she (the deceased) was not treated well by her husband and in-laws for non-fulfillment of balance dowry amount. Such evidence although admissible in respect of the offence under Section 304-B I.P.C. by virtue of Section 32(1) of Evidence Act but not admissible for the offence under Section 498-A of I.P.C. Paragraph no. 10 of Gananath Pattnaik v. State of Orissa (Supra) is quoted as under:

"10. Another circumstance of cruelty is with respect to taking away of the child from the deceased. To arrive at such a conclusion, the trial court has referred to the statement of PW5, who is the sister of the deceased. In her deposition recorded in the court on 4.5.1990 PW5 had stated:

"Whenever I had gone to my sister, all the times she was complaining that she is not well treated by her husband and in-laws for non-fulfilment of balance dowry amount of scooter and twin one."

and added:

"On 3.6.1987 for the last time I had been to the house of the deceased i.e. to her separate residence. Sworna, Snigdha, Sima apa, Baby Apa accompanied me to her house on that day. At that time the deceased complained before us as usual and added to that she said that she is being assaulted by the accused now-a-days. She further complained before us that the accused is taking away the child from and her, and that her mother in-law has come and some conspiracy is going against her (the deceased). She further told that "mate au banchei debenahin".

Such a statement appears to have been taken on record with the aid of Section 32 of the Indian Evidence Act at a time when the appellant was being tried for the offence under Section 304B and such statement was admissible under Clause (1) of the said section as it related to the cause of death of the deceased and the circumstances of the transaction which resulted in her death. ***Such a statement is not admissible in evidence for the offence punishable under Section 498A of the Indian Penal Code and has to be termed as being only a hearsay evidence. Section 32 is an exception to the Hearsay Rule and deals with the statements or declarations by a person, since dead, relating to the cause of his or her death or***

the circumstances leading to such death. If a statement which otherwise is covered by the Hearsay Rule does not fall within the exceptions of Section 32 of the Evidence Act, the same cannot be relied upon for finding the guilt of the accused."

35. Learned counsel for the appellant further relied upon the judgment of Apex Court in case of ***Moti Singh and another v. State of Uttar Pradesh reported in AIR 1964 SC 900***, wherein in paragraph no. 15 of the aforesaid judgment, the Apex Court has held as under:

"15. The effect of this finding is that the alleged dying declaration of Gaya Charan,, Ex. Kha 75, cannot be admissible in evidence. Clause (1) of Section 32 of the evidence Act makes a statement of a person who has died relevant only when that statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. When Gaya Charan is not proved to have died as a result of the injuries received in the incident, his statement cannot be said to be the statement as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. This is obvious and is not disputed for the respondent State."

36. In case of ***Sukhar v. State of U.P.*** reported in ***(1999) 9 SCC 507***, it has been held by Apex Court that when the prosecution did not make any attempt to establish how the deceased died or whether his death was in any way connected with the injuries sustain to him on the relevant date of occurrence, the statement given by the injured to the investigating officer is not admissible as dying declaration under Section 32 of the Evidence Act. Relevant finding in case of ***Sukhar v. State of U.P. (Supra)*** as contained in paragraph no. 2 is quoted as under:

*"2. The prosecution case in nutshell is that Nakkal appeared at the police station on the date of occurrence at 9.40 a.m. and narrated the incident as to how he was injured by the accused. The police then treated the said statement as First Information Report and started investigation. The informant was then taken to the hospital for medical examination. As per the FIR, the accused Sukhar is the nephew of Nakkal and had cultivated the land of Nakkal forcibly. When Nakkal demanded batai, Sukhar abused Nakhal and refused to give any batai. Thus,there was enmity between Nakkal and Sukhar. On the fateful day during the morning hours,while Nakkal was going on the road, Sukhar caught hold of his back and fired a pistol shot towards him. Nakkal raised an alarm on account of which Ram Kala and Pitam reached the scene of occurrence and at that point of time, Nakkal fell down and the accused made his escape. The two witnesses, Pitam and Ram Kala, brought Nakkal to the police station whereupon the police recorded the statement of Nakkal and started investigation. The said Nakkal was examined by PW 5, the Doctor who was on duty at the Primary Health Centre and gave the injury report, Exh. Ka-6. On completion of investigation, the police submitted the charge-sheet and ultimately the accused stood his trial. During trial, the prosecution witnesses, PW 1 and 2 merely stated as to what they heard from the injured at the relevant point of time and according to PW 2, the injured had told him that the assailant, Sukhar had fired upon him. I**t is to be stated that while the trial was pending the injured Nakkal died***

but the prosecution did not make any attempt to establish how he died or his death is in any way connected with the injury sustained by him on the relevant date of occurrence. Even it is not known as to when he died. The learned Sessions Judge was of the opinion that the FIR recorded by the Investigating Officer and the statement of Nakkal recorded under Section 161 of the Code of Criminal Procedure was admissible under Section 32 of the Evidence Act and relying upon the said material as well as the statement of PW 1 to the effect that the injured told him that the accused, Sukhar has fired at him, the learned Sessions Judge convicted the accused/appellant under Section 307 IPC and sentenced him to undergo rigorous imprisonment for five years. On an appeal, the High Court came to the conclusion that the FIR as well as the statement given by the injured to the Investigating Officer is not admissible as dying declaration under Section 32 of the Evidence Act and in our view, the said conclusion is unassailable. *The High Court further came to the conclusion that the statement of the injured under Section 161 of the Code of Criminal Procedure could not be held admissible in evidence under Section 33 of the Evidence Act and we do not see any infirmity with the said conclusion....."*

37. In the present case, there is nothing upon record to indicate that the injury which Kamla received during occurrence was a circumstance of a transaction which resulted in her death. We have examined the evidence for ourselves and find that there is no evidence whatsoever on record as to how and when Kamla died. The prosecution has utterly failed to lead evidence with regard to the death of Kamla. Even the date of death of Kamla was not brought in evidence. The prosecution, in the present case, did not realise that if they wanted to rely upon the statement of Kamla recorded under Section 161 Cr.P.C., then it was their duty to show by satisfactory evidence that the statement was admissible under Section 32(1) of Evidence Act. The provisions of this Section are in the nature of exceptions and the onus of establishing circumstance that would bring a statement within any of the exceptions, contemplated by Section 32 of the Evidence Act lies clearly upon that party which wishes to avail itself of the statement. In our considered opinion, the prosecution in the present case, has failed to discharge that onus. Upon the evidence as recorded, it is not possible to say that the statement in question is admissible because it come within the terms of Section 32(1) of Evidence Act, in as much as there is nothing to show that the injury to which that statement is related was the cause of death of Kamla or that the circumstance under which it was received resulted in her death. We are also of the considered opinion that since, the prosecution has failed to bring on record by leading cogent evidence as to the cause of death of deceased Kamla or as to any of the circumstance of the transaction which resulted in her death, the statement recorded under Section 161 Cr.P.C. by the investigating officer cannot be held to be admissible under Section 32(1) of Evidence Act and thus has to be ignored. The aforesaid statement under Section 161 Cr.P.C. cannot be used for upholding the conviction of the appellants under Section 307 I.P.C., specially in view of the fact that there is no other evidence led by the prosecution to prove the same as all the witnesses of fact have not supported the prosecution case and have denied the

involvement of accused-appellants in the incident.

38. So far as the charge under Section 302 I.P.C. against the appellants for committing the murder of Suman, it has been contended by learned counsel for the appellants that there is no evidence led by the prosecution to the effect that the appellants had committed the aforesaid offence. All the witnesses examined by prosecution have denied the involvement of appellants in the murder of Suman. It has been further contended by learned counsel for the appellants that the only evidence which was relied upon by the court below is the statement of Kamla recorded by the investigating officer under Section 161 Cr.P.C. which has been taken into consideration as dying declaration under Section 32 of Evidence Act. It has also been contended by learned counsel for the appellants that the statement of a deceased is admissible as dying declaration under Section 32(1) of the Evidence Act only if it relates to the cause of death of the person making the statement or to any of the circumstances relating to the death of the deceased in case, in which the cause of that person's death come into question. As per the learned counsel appearing for the appellants, the statement as recorded under Section 161 Cr.P.C. by the investigating officer can be at best considered admissible so far as the death of Kamla who made such statement but cannot be considered as a evidence relevant and admissible, so far as the death of Suman is concerned. The statement of one dead person is not a relevant fact with respect to the question about the death of another person. In this regard, learned counsel for the appellant has relied upon a judgment in case of In re ***Peria Chelliah Nadar*** reported in ***AIR (29) 1942 Madras 450***, it has been held by Madras High Court that statement of C to the village munshi recorded by him that P killed C's husband while she was with P. C committed suicide after making the statement on the same evening. In trial of P for murder of C's husband statement of C will not be admissible under Section 32 of Evidence Act. The relevant extract of In re Peria Chelliah Nadar (Supra) is quoted as under:

"…….The Village Munsif was sent for and she made a statement to him which he recorded in writing. This statement was admitted as Ex. H and in it Chellammal stated that her husband on the evening of the 13th had found her on the other side of the river with the accused Peria Chelliah Nadar, that a quarrel had ensued between the accused and her husband, and that the accused had cut her husband in the abdomen with an aruval. Chellammal the same evening committed suicide. The learned Sessions Judge was of opinion that her statement was admissible under Sections 32 and 35 of the Evidence Act. There can be no question that the statement was not admissible and the learned Public Prosecutor has not supported the view of the Sessions Judge. It is not admissible under Section 32, because the death of Chellammal did not come into question in the Sessions case, and it is not admissible under Section 35 because this statement recorded by the Village Munsif and attested by two witnesses is clearly not an entry in a public or official register or record within the meaning of Section 35 of the Evidence Act."

39. Per contra, learned A.G.A. has relied upon the judgment in case of ***Lukka Ulahannan v. Travancore-Cohin State*** reported in ***AIR 1955 TRA-C 104***, wherein it was held that a statement will be

admissible under Section 32 of the Evidence Act. Paragraph 9 of the Lukka Ulahannan v. Travancore-Cohin State (Supra) is quoted as under:

"9. The first point raised was as to the admissibility of Mundan's dying declaration in evidence with respect to the incident of the attack on P. W. 2. It was urged that if Mundan's statement that accused 2 stabbed P.W. 2 was eschewed from evidence, the remaining evidence against him was not sufficient to warrant his conviction. The argument as to the admissibility of the dying declaration of Mundan as against accused 2 was that under S. 32(1), Evidence Act, 1972, statements made by a deceased person were relevant only when made by him as to the cause of his death, where the cause of his death is other reasons. Counsel argued that the statement of one dead person is not a relevant fact with respect to the question about the death of another person or with respect to the causing of hurt to a third. Though some support can be found for the view in the books we are afraid it is too narrow a view to commend itself for acceptance. The balance of judicial opinion would seem to us to be against it.

Section 32(1), Evidence Act, provides: When the cause of a person's death comes into question statements made by that person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death are relevant. In our opinion, to exclude from the evidence statements made by a deceased person as to incidents which occurred during the course of the transaction which resulted in his death, statements other than those relating to the cause of his death would be to import a limitation to the words used in the section which their natural meaning does not warrant. When a limitation like that is intended, the Legislature specially provides for it."

40. The Allahabad High Court in case of ***Kunwarpal Singh and another v. Emperor-Crown reported in AIR 1948 All 170***, in paragraph no. 14 has held as under:

"14. It may be said at once that no case with respect to the murder of Megh Singh can be made out against the appellants on the material on the record. The dying declaration of Girwar Singh is not admissible in evidence with respect to the incident of the attack on Megh Singh. Section 32(1), Evidence Act, makes the statement of a person who is dead a relevant fact; when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. It follows that the-statement of one dead person is not a relevant fact with respect to the question about the death of another person."

41. The Apex Court in case of **Ratan Gond v. The State of Bihar** reported in **AIR 1959 SC 18**, in paragraph no. 7 has held as under:

"7…….. In the case before us, the statements made by Aghani do not relate to the cause of her death or to any of the circumstances relating to her death ; on the contrary, the statements relate to the death of her sister. We are, therefore, of the opinion that the statements do not come within S. 32(1) of the Evidence Act and, indeed, Mr. Dhebar appearing on behalf of the State, has conceded that S. 32(1) does not apply to the statements of Aghani."

42. In view of law laid down by this Court, Apex Court as well as Madras High Court, we are unable to agree with the view taken by Travancore High Court. Even from the bare perusal of Section 32 of Evidence Act, it is clear that a statement made by deceased as to the cause of his/her death or to any of the circumstances of the transaction which resulted in his/her death, in cases, in which cause of that person's death comes into question is relevant.

43. Thus, the statement recorded under Section 161 Cr.P.C. of Kamla will not be admissible under Section 32 of Evidence Act so far as it relates to the death of Suman, in view of the law discussed above.

44. Since in the present case, there is no other evidence led by the prosecution as to the murder of Suman by the appellants, except for the statement of Kamla recorded under Section 161 Cr.P.C., we are of the considered opinion that the prosecution has miserably failed to prove the charge under Section 302 I.P.C. against the appellants for murder of Suman.

45. Lastly, it was submitted by learned counsel for the appellants that the accused-appellants while examining under Section 313 Cr.P.C. were not confronted with the statement of Kamla recorded under Section 161 Cr.P.C. by the investigating officer and treated as dying declaration. In this regard, from the perusal of statement under Section 313 Cr.P.C. of the appellants, which is identical in case of all the three accused-appellants, we are quoting only statement of Gangotri Devi recorded under Section 313 Cr.P.C. which is as under:

"बयान अभियुक्त अन्तर्गत धारा 313 दं०प्र०सं०

नाम अभियुक्त-श्रीमती गंगोत्री देवी पत्नी श्री गजेन्द्र सिंह उर्फ बब्लू उम्र-38 वर्ष पेशा- आशा निवासी- ग्राम बेहटा थाना- मिलक जिला- रामपुर

अभियुक्त की उम्र के सम्बन्ध में न्यायालय का अनुमान- अभियुक्ता द्वारा बताई गयी उम्र उसे देखने से सही प्रतीत होती है।

प्रश्न-1 क्या दिनांक 15.05.2013 को समय लगभग 11.00 बजे दिन स्थान वहद ग्राम- बेहटा, थानाक्षेत्र मिलक जिला रामपुर में आपने अपने सामान्य आशय के अग्रसरण में वादी मुकदमा प्रभुदयाल की होने वाली पत्नी कु० कमला तथा उसकी बहन कु० सुमन को जाने से मारने की नीयत से तमंचों से फायरिंग करके चोटें कारित की। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- गलत है।

प्रश्न-2 क्या उक्त तिथि, समय व स्थान पर आपने एक साथ मिलकर सामान्य आशय के अग्रसरण में वादी मुकदमा की होने वाली पत्नी की बहन कु० सुमन तमंचे से फायर करके उसकी साशय हत्या कर दी। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- गलत है।

प्रश्न-3 साक्षी पी० डब्लू०-1 प्रभुदयाल, जो वादी मुकदमा है, ने तहरीर प्रदर्श क-1 को साबित करते हुए कहा है कि दिनांक 15.05.2013 को दिन के 11.00 बजे जमीन के हिस्से के बंटवारे को लेकर राहुल, गंगोत्री,

दौलतराम व मदनलाल ने कमला व सुमन से लड़ाई की। दौलतराम व मदनलाल ने कहा कि इनका खेल खत्म कर दो, तो राहुल ने सुमन के गोली मार दी। उसके बाद कमला तथा सुमन जान बचाने के लिए भागी, तो गंगोत्री ने कमला की टांग पकड़कर गिराया। राहुल ने कमला के गोली मारी। उसके बाद सुमन छत कूद गयी। फिर राहुल, गंगोत्री व दौलतराम एवं

मदनलाल ने सुमन को घेरकर सुमन के कई फायर मारे। सुमन मौके पर खत्म हो गयी तथा कमला घायल हो गयी। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- गलत है। हमें जानकारी नही है।

प्रश्न-4 साक्षी पी०डब्लू-2 कु० ऊषा ने साक्ष्य दिया है कि दिनांक 15.05.13 को दिन के 11.00 बजे उसने फायर की आवाज सुनी। उसके घर में शेर सिंह की छोटी लड़की भागती हुई आ गयी। उसके पीछे राहुल हाथ में तमंचा लिये आया। राहुल ने सुमन के दो गोलियां मार दी। राहुल ने जो गोली मारी थी, वह सुमन के लगी थी। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- हमारे खिलाफ कोई बयान नही दिया है।

प्रश्न-5 साक्षी पी०डब्लू-3 श्रीमती मानसी देवी की साक्ष्य में आया है कि दिनांक

15.05.2013 को दिन के 11 बजे उसने फायर की आवाज सुनी। उसके पड़ोस में शेर सिंह का मकान है। शेर सिंह की छोटी लड़की सुमन घायल अवस्था में चिल्लाती हुई नल के पास आकर गिर गयी। उसके पीछे-पीछे राहुल हाथ में तमंचा लेकर आया। राहुल ने उसके सामने एक गोली सुमन के मारी, फिर दोबारा मारी। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- मुझे कुछ नहीं कहना है।

प्रश्न-6 आपने साक्षी पी० डब्लू०-4 हरपाल सिंह के बयान सुने। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- कुछ नही कहना है।

प्रश्न-7 साक्षी पी० डब्लू०-5 डा० संजीव मांगलिक, जिनके द्वारा अपनी साक्ष्य में मृतक सुमन का शव विच्छेदन करने का कथन करते हुए शव विच्छेदन आख्या प्रदर्श क- 2 को साबित किया है। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- मुझे जानकारी नही है।

प्रश्न-8 आपके योग्य अधिवक्ता द्वारा अभियोजन प्रपत्रों की औपचारिकता को स्वीकार किया गया है, जिन पर प्रदर्श अंकित किये गये है। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- किये हैं।

प्रश्न-9 आपके विरुद्ध मुकदमा क्यों चला?

उत्तर- रंजिशन।

प्रश्न-10 क्या आपको सफाई साक्ष्य देना है?

उत्तर- जी नहीं।

प्रश्न-11 क्या आपको कुछ और कहना है?

त्तर- झूँठा फँसाया है।

सुनकर तस्दीक किया। Recorded by me

ह० गंगोत्री देवी (सरोज यादव)

जिला एवं सत्र न्यायाधीश,

रामपुर।

31.03.2016

अतिरिक्त बयान अभियुक्त अन्तर्गत धारा 313 दं० प्र ० सं०

नाम अभियुक्त-श्रीमती गंगोत्री देवी पत्नी श्री गजेन्द्र सिंह उर्फ बब्लू उम्र-38 वर्ष पेशा- आशा निवासी- ग्राम बेहटा थाना- मिलक जिला- रामपुर

अभियुक्त की उम्र के सम्बन्ध में न्यायालय का अनुमान-

प्रश्न-1 साक्षी पी०डब्लू०-6 श्री सुनीत कुमार, जिनके द्वारा प्रस्तुत मामले की विवेचना की गयी है, की साक्ष्य में आया है कि दिनांक 15-05-2013 को विवेचना के दौरान उनके द्वारा नकल तहरीर, नकल कायमी मुकदमा रपट संख्या-28, बयान लेखक H. M. विक्रम सिंह व वादी मुकदमा मुकदमा प्रभदुयाल के धारा-161 दं०प्र०सं० के बयान अंकित किये तथा बादी की निशान देही पर नक्शा नजरी तैयार किया। साक्षी ने नक्शा नजरी प्रदर्श क-5 को साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- मैं घर पर नही थी मुझे नही पता क्या किया, क्या नहीं किया।

प्रश्न-2 साक्षी की साक्ष्य में यह आया है कि उन्होंने मौके से जनता के गवाहान मनोहर लाल व कृपाल सिंह की मौजूदगी में फर्श सीमेन्ट के टुकडे, खून आलूदा व सादा, जहां पर चुटेल कु० कमला का घायल होकर गिरना बताया गया था, डिब्बे में रखकर सर्व सोहर किया तथा फर्द तैयार की। साक्षी ने पूर्व प्रदर्श क-7 को साबित किया है। इस सम्बन्ध में आपको क्या कहना है?

उत्तर- मेरी जानकारी में नहीं है।

प्रश्न-3 साक्षी की साक्ष्य में यह भी आया है कि उसी दिन उन्होंने उक्त गवाहान के समक्ष मृतका कु० सुमन के शव पड़े होने वाले स्थान से फर्श सीमेन्ट के टुकडे सादा व खून आलूदा लिये व डिब्बों में रखकर सर्व मोहर किया। फर्द मौके पर तैयार की थी। पढ़कर सुनाकर गवाहान के हस्ताक्षर कराये थे। साक्षी ने फर्द प्रदर्श क-8 को साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- मेरी जानकारी में नहीं है।

प्रश्न-4 साक्षी की साक्ष्य में यह भी आया है कि उसी दिन उक्त गवाहान के सामने मकान बबलू व मकान टीकाराम घटनास्थल से दो खोखा कारतूस 315 बोर कब्जे में लेकर कपड़े में रखकर सर्व मोहर किये। फर्द लिखकर पढ़कर सुनाकर हस्ताक्षर बनवाये थे। साक्षी फर्द प्रदर्श क-9 को साबित किया है। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- मुझे कुछ नहीं पता। क्या बयान लिया मैं नहीं जानती।

प्रश्न-5 साक्षी पी०डब्लू०-6 की साक्ष्य में यह भी आया है कि दिनांक 25-03-13 को घायल कु०कमला पुत्री स्व०शेर सिंह के बयान भास्कर अस्पताल, बरेली जाकर लिये। कमला ने जो बयान दिया था, वह केस डायरी में शब्द-प्रति- शब्द अंकित किये। कमला की मेडिकल

रिपोर्ट की नकल केस डायरी में अंकित की थी। दिनांक 05-06-2013 को कु०ऊषा तथा श्रीमती मानसी एवं हरीश के बयान दर्ज किये थे। इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- मुझे नहीं पता मेरी जानकारी मे नही है।

प्रश्न-6 साक्षी पी०डब्लू०-6 ने, अपनी साक्ष्य में आरोपपत्र प्रदर्श क-4 तथा प्रदर्श क-11 को साबित किया है तथा चिक संख्या 113/2013 प्रदर्श क-3एवं कायमी

जी०डी० प्रदर्श क-16 को साबित किया है। इस सम्बन्ध में आपको क्या कहना है? मुझे नहीं मालूम।

उत्तर- मुझे नही मालूम।

प्रश्न-7 क्या आपको कुछ और कहना है?

उत्तर- मै घर पर नही थी। उस दिन अस्पताल अपने पति को दिखाने गयी थी।

सुनकर तस्दीक किया। Recorded by me

ह० गंगोत्री देवी (सरोज यादव)

जिला एवं सत्र न्यायाधीश,

रामपुर।

05.04.2016

46. From the perusal of the statement quoted above, it is clear that the accused-appellants were not confronted with the statement of Kamla recorded under Section 161 Cr.P.C. by the investigating officer which was treated as dying declaration.

47. In case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra,*** reported in AIR 1984 SC 1622, it has been held by the Apex Court that if the circumstances, are not put to the accused in his statement under Section 313 Cr.P.C., they must be completely excluded from consideration because the accused did not have any chance to explain them. (para 142-144 of the judgment of Sharad Birdhichand Sarda's (Supra) case.

48. In case of ***Sujit Biswas Vs. State of Assam, reported in (2013) 12 SCC 406***, it has been held by the Apex Court that the very purpose of examining the accused persons under Section 313 Cr.P.C., 1973 is to meet the requirements of principles of natural justice. The accused, thus, must be given an opportunity to explain the incriminating material that has surfaced against him and in the circumstances which are not put to the accused in his examination under Section 313 Cr.P.C. cannot be used against him and must be excluded from consideration.

49. In view of the law laid down by the Apex Court, we are of the opinion that the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principle of Audi Alteram Partem.

50. The Hon'ble Supreme Court in ***Asraf Ali v. State of Assam reported in (2008) 16 SCC 328*** has made following observations in paragraph no. 21 & 22 of the judgment which is quoted as under:

"21. Section 313 of the Code casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and

separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22.The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed similar view in S. Harnam Singh v. The State (AIR 1976 Supreme Court 2140), while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non- indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

51. Section 313 Cr.P.C., 1973 as amended by Act no. 5 of 2009, Section 22 (w.e.f. 31.12.2009) is quoted as under :-

313. Power to examine the accused.- (1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section."

52. The forerunner of the said provision in the Old Code was Section 342 therein. It was worded thus :-

342.(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for

the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1).”

53. Per contra, learned A.G.A. has relied upon the judgment of the Apex Court in case of ***Shivaji Sahabrao Bobade Vs. State of Maharashtra reported in (1973) 2 SCC 793***, which considered the fall out of the omission to put the accused, a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused’s attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognized, that where there is a perfunctory examination under Section 313 of the Cr.P.C., 1973, the matter is capable of being remitted to the trail court, with the direction to retry from the stage at which the prosecution was closed.

54. The trial court though recoded the statement of the accused-appellants under Section 313 Cr.P.C., but has omitted to put the statement of Kamla recorded under Section 161 Cr.P.C. by investigating officer. The trial court while convicting the accused mainly relied upon the statement of Kamla recorded under Section 161 Cr.P.C. treating the same as dying declaration. It is really a matter of concern that the trial court did not frame any question specifically putting the incriminating material against the accused-appellants. A very important circumstance was thus lost. Apparently, the accused-appellants were not given opportunity to explain the same. Recording of statement under Section 313 Cr.P.C. is not an empty formality during the trial. Section 313 Cr.P.C. prescribes the procedure to safeguard the interest of the accused. Obviously, in the absence of confronting the accused-appellants with the statement of Kamla recorded under Section 161 Cr.P.C., prejudice is caused to the accused-appellants.

55. We may note that considering the importance of statement under Section 313 of Cr.P.C., sub-clause (5) has been added in Section 313 by amendment which permits the court to take help of prosecution and defence in preparing relevant questions which are to be put to the accused. One of the reasons for such amendment was to see that Court should not miss putting any incriminating circumstance to the accused while recording his statement.

56. In the result, the finding of guilt based on the statement of Kamla recorded under Section 161 Cr.P.C. for the reasons recorded above would not sustain.

57. To summarise, we hold that there was no evidence, whatsoever led by the prosecution to hold accused-appellants guilty. All the prosecution witnesses of fact had denied involvement of accused appellants in the aforesaid crime and had also denied their presence. The only

material available with the trial court was the statement of Kamla recorded under Section 161 Cr.P.C. by the investigating officer prior to her death which was being treated as dying declaration by the trial court. In view of discussion made above, the same could not be relied upon against the appellants. Further, with regard to the charge under Section 302 I.P.C. for committing murder of Suman, the aforesaid statement of Kamla under Section 161 Cr.P.C. definitely cannot be relied upon as the same does not relate to the death of Kamla but in fact related to the death of Suman and was outside the purview of Section 32 of Evidence Act. Consequently, the appeal deserves to be allowed. The impugned judgment and order of conviction is set aside.

In view of that following order :-

(I) The appeal stands **allowed.**

(II) The judgment and order of conviction dated 19.04.2016 passed by District Judge, Rampur stands quashed and set aside.

(III) The accused-appellants, Smt. Gangotri Devi, Madan Lal and Daulat Ram are acquitted of the offence punishable under Section 302 I.P.C. and Section 307 I.P.C.

(IV) The accused be released from jail forthwith, if not required in any other offence.

(V) The amount of fine, if deposited, be refunded to the accused.

(2024) 1 ILRA 388
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.01.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Criminal Revision No. 295 of 2012

Madhukar Jetely ...Revisionist
Versus
State of U.P. & Ors. ...Respondent

Counsel for the Revisionist:
Ashok Kumer Verma, Viplav Sharma

Counsel for the Respondent:
Govt. Advocate, Arun Sinha, Siddhartha Sinha

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision -Magistrate's Power - To treat application as a complaint under Section 156(3) Cr.P.C. - to proceed to record statements under Section 200 and 202 Cr.P.C. - decide application in accordance with provisions of law. (Para - 15)

(B) Criminal Law - Code of Criminal Procedure, 1973 - Section 154(3) - Superintendent of Police has authority for registration of First Information Report - word used is '*Shall*' , Section 156(3) - Magistrate empowered under Section 190 may order an investigation - word used is '*May*' .(Para - 13,14)

Civil dispute arose between revisionist and ESIC - revisionist agreed to provide his consultancy services on a 20% payment from accused - Opposition parties failed to comply, leading to unpaid consultancy services - complaint registered under Section 156(3) Cr.P.C. - accused-opposite parties were summoned under Section 506 I.P.C. - court found that dispute is civil/contractual - can be decided by Civil Court based on evidence - revisional court opined - allegation as to the extension of threats seems to be only ornamental giving colour to the allegations of the complaint.**(Para - 9)**

HELD: -Court acted in accordance with powers vested in it by provisions of Section 156(3) Cr.P.C.. Magistrate acted with the judicious approach to convert the application moved under Section 156(3) into complaint. Magistrate's powers not challenged in first appeal against order. No illegality, irregularity, or perversity in the impugned order. **(Para - 16)**

Revision dismissed. (E-7)

List of Cases cited:

1. Inder Mohan Goswami Vs St. of Uttaranchal, (2007) 12 SCC 1

2. Dharam Pal & anr. Vs St. of Uttarakhand, 2012 (77) ACC 775

3. M.J. Scindia Vs S.C. Angre, 1988 AIR 709

4. Bakulabai Vs Gangaram, (1998) 1 SCC 537

5. S.C. Jain Vs St. of M.P. & anr., 2001 (42) A.C.C. 459

6. G.D. Sindhi & ors. Vs St. of Assam & anr., A.I.R. 1961 S.C. 986

7. Chandrika Singh Vs St. of U.P. & ors., 2007 (58) ACC 777

8. Sukhwasi Vs St. of U.P., 2007 (59) SCC 739 (Alld)

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

1. Instant criminal revision under Sections 397/401 Cr.P.C. has been preferred against the impugned judgment and order dated 27.08.2012 passed in Criminal Revision No.136 of 2012 (Sanjay Sinha and Ors. Vs. The State and Anr.) passed by the District & Sessions Judge, Lucknow by which the learned District and Sessions Judge, Lucknow has partly allowed the revision and set-aside the order of CJM by which the opposite party No. 2 to 4 were summoned under Section 506 I.P.C.

2. When the case was called up today for hearing, none appeared on behalf of the revisionist. It transpires from the order sheet dated 05.05.2023 that none was present on behalf of the revisionist on that day also.

3. Heard Mr. Arun Sinha, learned counsel for opposite parties and perused the entire material brought on record.

4. Perusal of the revision reveals that some civil dispute was pending between the revisionist and the private respondents who were empanelled with Employees State Insurance Corporation, New Delhi (hereinafter referred to as "ESIC"). The revisionist acceding to the request of the accused mutually agreed to provide his consultancy service on the payment of 20 per cent of the amount which was to be paid by accused from time to time and further to continue to pay the aforesaid 20 per cent from amount received from ESIC. Opposite party No. 2 to 4 failed to comply with the agreement and the payments due against the consultancy services of revisionist has not been paid, therefore, an application under Section 156(3) Cr.P.C. was moved by the revisionist for registration of F.I.R. against the opposite party Nos. 2 to 4. Trial Court called for report from police station concerned and finding that no case is registered in police station and considering the facts disclosed in the application moved in the application under Section 156(3) Cr.P.C. registered the application as complaint case on 12.12.2011 and after recording of statement of revisionist under Section 200 and statement of witnesses under Section 202 Cr.P.C., summoned the accused-opposite party Nos. 2 to 4 under Section 506 I.P.C. vide order dated 06.02.2012. Learned C.J.M. specifically mentioned in the his order that the dispute between the parties is civil/contractual in nature that can be decided by the Civil Court on the basis of evidence produced before it, hence, the opposite parties No. 2 to 4 were summoned only under Section 506 I.P.C.

5. Aggrieved with the order of the learned C.J.M., opposite parties No. 2 to 4 (proposed accused) filed a revision before the Court of Sessions and Sessions Court

set-aside the summoning order dated 06.02.2012. It is pertinent to mention here that summoning order dated 06.02.2012 was not challenged by the revisionist-Madhukar Jetely.

6. The present revision is filed on 03.09.2012 directly to this Court without availing the opportunity of filing revision before the Sessions Court. It is also mentioned in the revision itself that the Sessions Judge has acted illegally and with material irregularity in exercise of his jurisdiction in overlooking that while exercising powers under Section 397 Cr.P.C., the powers exercisable by the Hon'ble High Court under Section 482 Cr.P.C. in rarest of rare cases could not be exercised. It is also revealed in the second supplementary affidavit that learned CJM was not empowered to convert the application moved by him under Section 156(3) into complaint. The aforesaid order of learned CJM ex facie suffers error as the learned CJM without taking cognizance of the matter wrongfully ordered the registration of case as complaint which is not permissible and beyond his jurisdiction, accordingly, all subsequent proceedings arising therefrom are without jurisdiction and are liable to be set-aside. Therefore, the subsequent proceedings are also liable to be vitiated and deserved to be quashed.

7. In the counter affidavit, opposite party No. 2 to 4 simply controverted the factual matrix given by revisionist and submitted that the revisionist along with filing the application under Section 156(3) Cr.P.C. also moved an application to the police station-Hajratganj. Opposite party Nos. 2 to 4 filed the statement of witnesses recorded under Section 202 Cr.P.C. and submitted that there are multitudes of contradictions in the statement of witnesses and on the basis of statements, opposite parties were summoned by the Trial Court under Section 506 I.P.C only which was not sustainable in the eyes of law, therefore, learned Sessions Judge set-aside the order of Magistrate by the impugned order dated 27.08.2012.

8. So far as summoning of opposite parties under Section 506 is concerned, learned Sessions Judge has dealt with the question in detail in his impugned judgment. Learned Sessions Judge relied upon the Judgment of Hon'ble the Supreme Court in case of Inder Mohan Goswami Vs. State of Uttaranchal reported in (2007) 12 SCC 1, Dharam Pal and Anr. Vs. State of Uttarakhand reported in 2012 (77) ACC 775 and Madhavrao Jiwjirao Scindia Vs. Sambhajirao Chandrojirao Angre reported in 1988 AIR 709.

9. In **Bakulabai Vs. Gangaram** reported in **(1998) 1 SCC 537**, Hon'ble the Supreme Court has held that:

"7. The other findings of the Magistrate on the disputed question of fact were recorded after a full consideration of the evidence and should have been left undisturbed in revision. No error of law appears to have been discovered in his judgment and so the revisional courts were not justified in making a reassessment of the evidence and substitute their own views for those of the Magistrate"

Sessions Court also observed that the said dispute between the parties is of payment of consultancy fee. The dispute is purely based on contract and MoU (Memorandum of Understanding) which can be decided by the Civil Court only. The revisional court opined that the allegation as to the extension of threats seems to be only ornamental giving colour to the

allegations of the complaint. Reliance has also been placed on the note of caution issued by Hon'ble the Supreme Court that the sub-ordinate courts must ensure that criminal prosecution is not used as an instrument of harassment or for seeking private mandate with an ulterior motive to pressurize the accused. The revisional court found that bare statement regarding the extension of threat is on record, court should see whether the allegations regarding extension of threats are supported with any cogent evidence. When the notice was given by revisionist to opposite party Nos. 2 to 4, the extension of threats did not find any place in that notice and no date or time of the incident is revealed. Witness Saklain Nakvi did not support the version of complaint, hence, Sessions Court itself found that Trial Court did not consider the ingredients of Section 506 while summoning the accused in the above mentioned Section. The revisionist raised the plea during the revision in this Court without availing the opportunity in the first revisional court that learned CJM has no jurisdiction to convert his application moved under Section 156(3) Cr.P.C. into complaint. Now, it is well settled principle that court has ample opportunity to pass appropriate order on the application moved under Section 156(3) Cr.P.C.

10. It is clear from the judgment of the Supreme Court in the case **Suresh Chandra Jain v. State of Madhya Pradesh and Anr. 2001 (42) A.C.C. 459**, that a Magistrate has the authority to treat an application under Section 156(3) Cr.P.C. as a complaint. This will become clear from the reference in the said report to the case of **Gopal Das Sindhi and Ors. v. State of Assam and Anr. A.I.R. 1961 S.C. 986**, in which the following observations were made:

"If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of filing of the complaint We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if we facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and 'Take' cognizance of a cognizable offence."

11. In the case of **Chandrika Singh v. State of U.P. and Ors. 2007 (58) ACC** 777, this Court has held that a Magistrate can treat an application under Section 156(3) Cr.P.C. as a complaint. The Hon'ble Judge referred to various cases in his judgment and has come to this conclusion thereafter. It was observed as follows:

"In view of this judgment of Full Bench, the Magistrate is fully competent to pass an order to register a case and investigate on an application under Section 156(3) Cr.P.C., all the application under Section 156(3) Cr.P.C. may be treated as complaint and in the circumstance, the Magistrate shall follow the procedure as provided in Chapter XV Cr.P.C. This judgment of Full Bench has not been set

aside. Hence, in view of the Apex Court and Full Bench of this Court the Magistrate is fully competent to treat an application under Section 156(3)Cr.P.C as a complaint and in the present case the Magistrate passed an order in the circumstances of the case that it may be registered as a complaint case and proceed to record the statement under Sections 200 and 202 Cr.P.C. There appears no illegality and impropriety in the order of the Magistrate."

12. This Court in the case of **Sukhwasi Vs. State of U.P. 2007 (59) SCC 739 (Allahabad)** has held as follows:

"..... in view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to the police station for being registered and investigated. The Magistrate's order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter-XV of Cr.P.C....?

7. It will also be noticed that the law was, and has always been, that if a cognizable offence is made out, the Police are bound to register the First Information Report. In case, the Police do not register the First Information Report, there is provision under Section 154(3) Cr.P.C. to send an application to Superintendent of Police, who shall direct the registration of a First Information Report, if a cognizable offence is disclosed. There was as such, no need for an authority in this regard being given to the Magistrate. That, this has been done and such authority as given to the Magistrate indicates, that this has been done, because the Magistrate will bring to bear upon the matter a judicial and judicious approach, which will by necessarily implication be selective. That gives a clear incling to the intention of the legislature, that the Magistrate may consider the feasibility and propriety, of passing an order of registration of the First Information Report.?

13. The matter may be looked into from another angle, and that is, in Section 154(3) Cr.P.C. where the Superintendent of Police has been given the authority for registration of First Information Report, the word used is 'Shall'. Section 154(3) Cr.P.C. is as hereunder;

154. Information in cognizable cases -

(1) .?

(2) .?

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-section (1) may send the substance of such information, in writing, and by post, to the Superintend of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence shall either Investigate the case himself or direct an investigation to be made, by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer incharge of the police station in relation to that offence.

14. In Section 156(3) Cr.P.C., the word used is 'May' Section 156(3) Cr.P.C. is as follows;

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

(1) ....

(2) ....

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

15. Hence, in view of the case law cited above, it is evident that it is the powers of the Magistrate to treat the application under Section 156(3) Cr.P.C. as a complaint and to proceed to record the statement under Section 200 and 202 Cr.P.C. and decide the application in accordance with the provisions of law.

16. In the present case, court has acted in accordance with the powers vested in it by the provisions of Section 156(3) Cr.P.C., the Magistrate acted with the judicious approach to convert the application moved under Section 156(3) into complaint. Moreover, the powers of Magistrate was not challenged when the first appeal was filed by the revisionist against the impugned order dated 27.08.2012, hence, the revision has no force, there is no illegality, irregularity or perversity in the impugned order, hence revision is liable to be dismissed and is accordingly **dismissed**.

17. Let the copy of the order be sent to the court concerned for necessary information and compliance.

(2024) 1 ILRA 393
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 04.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 546 of 2022

Satish Chandra Shukla ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Ranjana Agnihotri, Satyendra Tiwari

Counsel for the Respondent:
G.A.

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision, Section 239 - Discharge, Section 468 (2)(c) - limitation for taking cognizance of an offence will be three years - no court can take cognizance of the offence after the expiry of period of limitation - for the purpose of computing the period of limitation under Section 468CrPC, the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance of the offence - Indian Penal Code, 1860 - Section 405,406 - Criminal breach of trust, Section 409 - Criminal breach of trust by Public servant, or by banker, merchant or agent.(Para - 7)

Revisionist was Secretary of Sadhan Sahkari Samiti - not a public servant - cannot be tried for an offence under section 409 I.P.C. - allegations could potentially constitute an offence under Section 405 I.P.C, defining criminal breach of trust - Court clarified that Secretary of a Sadhan Sahkari Samiti is not an agent of the Government. - Validity of an order passed by ACJ under challenge - which rejected revisionist's application for discharge under Section 239 Cr.P.C. **(Para - 2,11,16)**

HELD:-No trial for revisionist under Section 409 Cr.P.C. .No illegality in prosecution under Section 406 I.P.C. . Order rejecting application for discharge filed by revisionist set aside. Directs trial court to decide revision under Section 239 Cr.P.C afresh.(Para - 17,18)

Revision allowed. (E-7)

List of Cases cited:

1. Sarah Mathew Vs Institute of Cardio Vascular Diseases, (2014) 2 SCC 62

2. Amritlal Vs Shantilal Soni, (2022) 13 SCC 128

3. S.S. Dhanoa Vs Municipal Corporation, Delhi, 1981 3 SCC 431

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

1. Heard Sri Ratnesh Kant Agnihotri, Advocate holding brief of Ms. Ranjana Agnihotri, the learned counsel for the revisionist and Ms. Charu Singh, the learned A.G.A for the State.

2. By means of the instant revision filed under Section 397/401 Cr.P.C, the revisionist has assailed the validity of order dated 21.04.2022 passed by the Additional Civil Judge (Junior Division)/ Judicial Magistrate, Court No. 3, Unnao in Misc. Case No. 1392/2021, whereby, the revisionist's application for discharge under Section 239 Cr.P.C has been rejected.

3. Briefly stated, the facts of the case are that an F.I.R was lodged on 08.04.1994, stating that the complainants are old members of Sadhan Sahkari Samiti Ltd. They used to take loan for purchasing fertilizers, seeds and cattle from the Samiti and to repay the same. The revisionist was Secretary of Sadhan Sahkari Samiti and he had removed the entire record of the Samiti somewhere around the year 1987. Lock of the Samiti premises was broken open by the Tehsildar but even thereafter, the record was not handed over by the revisionist. Thereafter, the government had announced waiver of the loans. About a month prior to lodging of the F.I.R, the applicant had demanded passbooks of the complainants on the pretext that he would get the loan waiver entered in the passbooks. Accordingly, the complainants had handed over their passbooks to the revisionist. Thereafter, the new secretary of Sadhna Sahkari Samiti was demanding money from the complainants. Upon making inquiries from the bank, the complainants came to know that the revisionist has got entries of amount made in excess of the amounts borrowed by the complainants. The revisionist was not returning the passbooks of the complainants.

4. After investigation, a final report was submitted on 03.01.1996. However, even after submissions of the final report, the complainant was summoned and his statement was recorded on 02.06.1998 wherein he stated that the final report had wrongly been submitted. Accordingly, cognizance of the offence was taken by means of an order dated 17.08.1999.

5. The revisionist has challenged the order dated 17.08.1999 by filing application under Section 482 Cr.P.C No. 3514 of 2009, which was disposed off by means of an order dated 18.09.2009, without entering into the merits of the case, directing that the revisionist may apply for bail and it was further stated that the plea that the offence under Section 409 I.P.C is not made, out can be raised at the time of framing of charges by moving a discharge application. Thereafter, the revisionist moved an application for discharge on 23.07.2010 which has been rejected by means of the impugned order dated 21.04.2020.

6. The learned counsel for the applicant submitted that the proceedings are barred by **Section 468 Cr.P.C.,** which provides as follows:-" *Bar to taking cognizance after lapse of the period of limitation. Except as otherwise provided elsewhere in this Code, no Court, shall take cognizance of an offence of the category specified in Sub-Section (2), after the expiry of the period of limitation.*

The period of limitation shall be?

1. six months, if the offence is punishable with fine only;

2. one year, if the offence is punishable with imprisonment for a term not exceeding one year;

3. three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment."

7. As per the learned counsel for the applicant, Section 406 I.P.C provides for a maximum punishment for imprisonment up to three years and as per the provision contained in Section 468 (2)(c), the limitation for taking cognizance of an offence will be three years and no court can take cognizance of the offence after the expiry of period of limitation. The offence was allegedly committed between the years 1987 till the year 1994 and cognizance of the offence has been taken on 17.08.1999.

8. The learned A.G.A. has placed reliance of the judgment in the case of **Sarah Mathew v. Institute of Cardio Vascular Diseases**, (2014) 2 SCC 62, in which the Hon?ble Supreme Court held that ?*for the purpose of computing the period of limitation under Section 468 CrPC the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance.*

9. The judgment in **Sarah Mathew** (Sura) has been followed and reaffirmed in **Amritlal v. Shantilal Soni,** (2022) 13 SCC 128, wherein is has been stated that: -

?11. Therefore, the enunciations and declaration of law by the Constitution Bench inSarah Mathew case [Sarah Mathew v.Institute of Cardio Vascular Diseases, (2014) 2 SCC 62 : (2014) 1 SCC (Cri) 721] , do not admit of any doubt that for the purpose of computing the period of limitation under Section 468CrPC, the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance of the offence.?

10. As the F.I.R. was lodged on 08.04.1994 alleging that the applicant had removed the entire record of Sadhan Sahkari Samiti Ltd. In the year 1987, but it also alleges that the applicant had taken away the passbooks of the complainants about 1 month prior to lodging of the FIR and thereafter he got entries made in the passbooks showing borrowings made by the complainants in excess of the borrowings which they had actually made, some offence was committed about 1 month prior to lodging of the FIR and, therefore, the F.I.R. was lodged within the period prescribed by Section 468 Cr.P.C. and the proceedings cannot be quashed on the ground of the same being hit by Section 468 I.P.C.

11. The next submission of the learned counsel for the revisionist is that the revisionist was the Secretary of Sadhan Sahkari Samiti and he was not a public servant and, therefore, he cannot be tried for an offence under section 409 I.P.C.

12. Per contra, the learned A.G.A has submitted that the revisionist was acting as

an agent of the government and, therefore, he would fall within the purview of Section 409 I.P.C.

13. **Section 409 I.P.C** provides as follows:-

"Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. "

14. For making out an offence of criminal breach of trust by a public servant or by a banker, merchant or agent provided in Section 409 I.P.C, it is necessary that the accused should have been entrusted with any property or with any dominion of property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent. The only allegation against the revisionist in the F.I.R is that he was working as a Secretary of Sadhan Sahkari Samiti and members of the Sadhan Sahkari Samiti had handed over their passbooks of their bank accounts to the revisionist. The passbooks related to the bank accounts, and the revisionist is not an employee of any bank and he is not a banker. The revisionist is not even a merchant, factor, broker or attorney.

15. In **S.S. Dhanoa vs. Municipal Corporation, Delhi, 1981 3 SCC 431**, the Hon'ble Supreme Court has held that a cooperative society is not a corporation established by or under an act of the Central or State legislature and that an officer of a cooperative society would not fall within the definition of public servant as defined in Section 21 I.P.C.

16. So far as the submissions of the learned A.G.A that the revisionist is an agent is concerned, suffice it to say firstly that when Section 409 speaks of an agent, it provides that the property should have been interested to a person in the way of his business as an agent, which implies that the property should have been handed over by the principle of which the accused is an agent. There is no allegation that the revisionist was an agent of the complainants. Therefore, the offence under Section 409 will not be made out against the revisionist, who was the secretary of Sadhan Sahkari Samiti even if he be treated to be an agent of the Government. The allegations will at the most make out commission of an offence under Section 405 I.P.C, which defines criminal breach of trust and which is punishable by imprisonment for a term which may extend to three years or with fine or with both as provided in Section 406 I.P.C. It is clarified that the while deciding the aforesaid plea, this Court has not held that the Secretary of a Sadhan Sahkari Samiti is an agent of the Government.

17. In view of the forgoing discussion, I am of the view that no case is made out for trial of the revisionist for commission of an offence under Section 409 Cr.P.C. However, there is no illegality in prosecution of the revisionist for commission under Section 406 I.P.C.

18. Accordingly, the revision is ***allowed***. The order dated 21.04.2022 passed by the Additional Civil Judge (Junior Division)/ Judicial Magistrate, Court No. 3, Unnao rejecting the

application for discharge filed by the revisionist is hereby set aside and the trial court is directed to decide the revision for discharge under Section 239 Cr.P.C afresh in light of the observation made in this order.

(2024) 1 ILRA 397
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Revision No. 1436 of 2023

Chandra Prakash & Ors. ...Revisionists
Versus
State of U.P. ...Respondent

Counsel for the Revisionists:
Arun Kumar Pandey, I.K. Pandey Ist

Counsel for the Respondent:
G.A.

(अ) फौजदारी कानून - भारतीय दंड प्रक्रिया संहिता ,1973 - धारा 397/401 - आपराधिक पुनरीक्षण (Criminal Revision) , धारा 227 - उन्मोचन(Discharge), धारा 228 - आरोप विरचित करना(Framing of Charge) , भारतीय दंड संहिता, 1860 - धारा 306 - आत्माहत्या का दुष्प्रे रण (Abetment of suicide) - मामले की सत्यता मात्र तब स्पष्ट हो पायेगी जब अभियोजन अपना साक्ष्य प्रस्तुत करता है तथा साक्षियों का प्रतिपरीक्षण बचाव पक्ष द्वारा किया जाता है, धारा 313 दं०प्र०सं० के अंतर्गत अभियुक्त से उसको आरोपित करने वाले साक्ष्य के विषय में प्रश्न पूछे जाते हैं तथा अभियुक्त को बचाव में साक्ष्य देने का अवसर दिया जाता है - उक्त सभी सोपानों के पूर्ण होने के पश्चात ही विचारण पूर्ण होता है तथा न्यायालय अपनी अंतिम राय बनाते हुए निर्णय देता है। (पैरा - 10)

(ब) भारतीय दंड प्रक्रिया संहिता ,1973 - दं०प्र०सं० की धारा 227 एवं 228 में एक महीन सा अन्तर - धारा 227 दं०प्र०सं० में न्यायालय को अभियुक्त के विरुद्ध कार्यवाही करने के लिए पर्याप्त आधार न होने का संतोष अभिलेखों तथा अन्य उपलब्ध सामग्री के आधार पर निर्धारित करना होता है - धारा 228 द०प्र०सं० में न्यायालय को मात्र यह राय बनानी होती है कि ऐसी उपधारणा करने का आधार है कि अभियुक्त ने कथित अपराध किया है- यह कहना गलत होगा कि धारा 228 दं०प्र०सं० में आरोप विरचित करते समय न्यायालय को ऐसी राय बनाना आवश्यक है कि अभियुक्त निश्चय ही कथित आरोप के लिए दोषी है।(पैरा - 8)

मृतक ने एक मृत्यु पूर्व पत्र लिखकर प्रार्थीगण को अपनी मृत्यु के लिए दोषी ठहराने के तुरन्त बाद आत्महत्या कर ली - शिकायतकर्ता ने अपने बयान में उपरोक्त आरोप का समर्थन किया- उन्मोचन के लिए प्रार्थना-पत्र - पुनरीक्षणकर्ता का उन्मोचन प्रार्थना-पत्र निरस्त किया गया - वैधता को चुनौती । (पैरा - 2,3,4,11)

निर्णय : आरोपों की सत्यता धारा 227 दं०प्र०सं० के स्तर पर तय नहीं की जा सकती है तथा यह विचारण(Trial) के उपरान्त ही तय हो सकता है ।**(पैरा -11)**

पुनरीक्षण निरस्त किया जाता है। (E-7)

उद्धृत मामलों की सूची :

1. रमेश कुमार बनाम छत्तीसगढ़ राज्य , AIR 2001 सुप्रीम कोर्ट 3837

2. मारियानो एन्टो ब्रूनो बनाम पुलिस निरीक्षक (M.A. Bruno Vs I.P.) , AIR 2022 सुप्रीम कोर्ट 4994

3. अमित कपूर बनाम रमेश चन्दर, 2012 9SCC 460

4. महाराष्ट्र राज्य बनाम सोमनाथ थापा , 1996 4SCC 659

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

1. प्रार्थीगण के विद्वान अधिवक्ता श्री अरुण कुमार पाण्डेय, विद्वान अतिरिक्त

शासकीय अधिवक्ता श्री राकेश कुमार सिंह को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 397/401 दण्ड प्रक्रिया संहिता के अंतर्गत प्रस्तुत इस पुनरीक्षण प्रार्थना पत्र द्वारा पुनरीक्षणकर्ता ने विद्वान अतिरिक्त जनपद एवं सत्र न्यायाधीश / विशेष न्यायाधीश गिरोहबंद अधिनियम कक्ष संख्या 6, अयोध्या द्वारा मुकदमा अपराध संख्या 592 सन 2020 अंतर्गत धारा 306 भा०दं०सं० थाना कोतवाली जिला अयोध्या से उत्पन्न सत्र वाद संख्या 164 सन 2023 में पारित आदेश दिनांक 18.11.2023, जिसके द्वारा पुनरीक्षणकर्ता का उन्मोचन प्रार्थना-पत्र निरस्त किया गया, की वैधता को चुनौती दी है।

3. प्रकरण के तथ्य संक्षेप में, इस प्रकार हैं, दिनांक 1.9.2020 को धारा 306 व 120-B भा०दं०सं० के प्रार्थीगण सहित 5 व्यक्तियों के विरुद्ध लिखाई गई प्रथम सूचना रिपोर्ट में यह कहा गया है कि शिकायतकर्ता के पुत्र का विवाह वर्ष 2008 में प्रार्थी संख्या 1 व 2 की पुत्री- सह-अभियुक्त दीपा के साथ हुआ था। अभियुक्तगण, जो कि शिकायतकर्ता के पुत्र के ससुरालीजन हैं, उसको शारीरिक और मानसिक रूप से उत्पीड़ित करते थे तथा अभियुक्तगण की प्रताड़ना से तंग आकर शिकायतकर्ता के पुत्र ने आत्महत्या कर ली। मृतक ने एक मृत्यु पूर्व पत्र लिखा था जिसमें उसने साफ-साफ लिखा कि उसकी मृत्यु के उत्तरदायी प्रार्थीगण हैं। जिन्होंने मृतक का बहुत मानसिक शोषण किया। विवेचनोपरान्त विवेचक ने दिनांक 20.8.2021 को आरोप-पत्र प्रस्तुत किया। दिनांक 11.5.2022 को न्यायालय ने अपराध का संज्ञान लेकर अभियुक्तगण को विचारण हेतु तलब किया।

4. अपनी पत्नी से विवाद चल रहा था जिस संबंध में एक बाद भी प्रस्तुत हुआ था। धारा 227 दं०प्र०सं० से संबंधित अनेक विधि व्यवसायों का संदर्भ देते हुए विचारण न्यायालय ने यह कहा कि आरोप विरचन के स्तर पर केवल यह देखा जाना आवश्यक है कि अभियुक्तगण के विरुद्ध अभियोजन की ओर से प्रस्तुत किये गये दस्तावेज / साक्ष्य के आधार पर प्रथम दृष्टया अपराध विद्यमान है अथवा नहीं अथवा अभियुक्तगण के विरुद्ध अभियोग चलाये जाने के पर्याप्त आधार है अथवा नहीं। आरोप विरचन के स्तर पर न्यायालय के समक्ष उपलब्ध सामग्री के आधार पर मामले का गुण-दोष के आधार पर विचार किया जाना आवश्यक नहीं है, न ही अभियोजन पक्ष द्वारा प्रस्तुत साक्ष्य की विश्वसनीयता एवं पर्याप्तता की जांच किये जाने की आवश्यकता है अपितु इस स्तर पर केवल अभियुक्तगण के विरुद्ध प्रथम दृष्टया बाद ही देखा जाना आवश्यक है, जो प्रस्तुत बाद में उपलब्ध है।

5. उक्त आदेश की वैधता को चुनौती देते हुए पुनरीक्षणकर्ता के विद्वान अधिवक्ता ने माननीय उच्चतम न्यायालय द्वारा **रमेश कुमार बनाम छत्तीसगढ़ राज्य AIR 2001 सुप्रीम कोर्ट**

3837 में पारित निर्णय का आश्रय लिया। उक्त निर्णय दोषसिद्धि तथा दण्डादेश के विरुद्ध एक अपील थी, न कि उन्मोचन आदेश निरस्त किये जाने के आदेश के विरुद्ध। उक्त निर्णय में धारा 227 दं०प्र०सं० के संबंध में कोई भी सिद्धान्त प्रतिपादित नहीं किया गया है। माननीय उच्चतम न्यायालय ने अपील इस आधार पर स्वीकार की थी कि उक्त प्रकरण में ऐसा कोई भी साक्ष्य नहीं था जिससे कि यह तय किया जा सके कि अभियुक्तगण ने मृतक को आत्महत्या करने के लिए दुष्प्रेरित किया था। उक्त निर्णय मामले के विचारण के पूर्ण होने के उपरान्त तथा पक्षों का साक्ष्य लेने के उपरान्त दिया गया था तथा इस आधार पर दोषिसिद्धि तथा दण्डादेश को अपास्त किया गया कि दोषसिद्धि के लिए साक्ष्य पर्याप्त नहीं था।

6. पुनरीक्षणकर्ता के विद्वान अधिवक्ता ने माननीय उच्चतम न्यायालय द्वारा **मारियानो एन्टो ब्रूनो बनाम पुलिस निरीक्षक (Mariano Anto Bruno v. Inspector of Police.) AIR 2022 सुप्रीम कोर्ट 4994** में पारित निर्णय भी प्रस्तुत किया। यह निर्णय भी विचारण पूर्ण होने के पश्चात पारित दोषसिद्धि तथा दण्डादेश के विरुद्ध पारित एक अपील थी। माननीय उच्चतम न्यायालय ने अपील इस आधार पर स्वीकार की थी कि दोषिसिद्धि आदेश मात्र हितबद्ध साक्षियों को मौखिक साक्ष्य पर आधारित था। उक्त दोनों आदेश धारा 227 दं०प्र०सं० से संबंधित नहीं हैं और प्रस्तुत प्रकरण पर लागू नहीं होते हैं।

7. दं०प्र०सं० की धारा 227 एवं 228 इस प्रकार हैं-

227. उन्मोचन. यदि नामले के अभिलेख और उत्तके साथ दी गई दस्तावेजों पर विचार कर लेने पर, और इस निमित्त अभियुक्त और अभियोजन के निवेदन की सुनवाई कर लेने के पश्चात् न्यायाधीश यह समझता है कि अभियुक्त के विरुद्ध कार्यवाही कले के लिए पर्याप्त आधार नहीं है तो वह अभियुक्त को उन्मोचित कर देगा और ऐसा करले के अपने कारणों को लेखबद्ध कला।

228. आरोप विरचित करना (1) यदि पूर्वोक्त रूप से विचार, और सुनवाई के पश्चात् न्यायाधीश की यह राय है कि ऐसी उपधारणा कत्ले का आधार है कि अभियुक्त ने ऐसा अपराध किया है, जो-

(क) अनन्यतः सेशन न्यायालय द्वारा विचारणीय नहीं है तो वह, अभियुक्त के विरुद्ध आरोप विरचित कर सकता है और आदेश द्वारा, मानले को विचारण के लिए मुख्य न्यायिक मजिस्ट्रेट को अन्तरित कर सकता है [या कोई अन्य प्रथन वर्ग न्यायिक मजिस्ट्रेट ऐसी तारीख को जो वह ठीक समझे, अभियुक्त को, यथास्थिति, मुख्य न्यायिक मजिस्ट्रेट या प्रथम वर्ग न्यायिक मजिस्ट्रेट के समक्ष हाजिर होने का निर्देश दे सकेगा, और तब ऐता मजिस्ट्रेट] उस मानले का विचारण पुलिस रिपोर्ट पर संस्थित वारण्ट

नानों के विचारण के लिए प्रक्रिया के अनुसार करेगा;

(3) अनन्यतः उक्त न्यायालय द्वारा विचारणीय है तो वह अभियुक्त के विरुद्ध आरोप लिखित रूप में विरचित करेगा।

(2) जहां न्यायाधीश उपधारा (1) के खण्ड (ख) के अधीन कोई आरोप विरचित करता है, वहां वह आरोप अभियुक्त को पढ़कर सुनाया और समझाया जायेगा और अभियुक्त से यह पूछा जाएगा कि क्या वह उस अपराध का, जिसका आरोप लगाया गया है, दोषी होने का अभिवचन करता है या विचारण किए जाने का दावा करता है।

8. न्यायालय द्वारा धारा 227 दं०प्र०सं० के अंतर्गत उन्मोचन का प्रार्थना-पत्र तय करने तथा धारा 228 दं०प्र०सं० के अन्तर्गत आरोप विरचित करते समय दृष्टिकोण भिन्न-भिन्न होना चाहिए। माननीय उच्चतम न्यायालय ने **अमित कपूर बनाम रमेश चन्दर, 2012 9SCC 460** में इस विषय में प्रतिपादित किया कि यदि अभियुक्त धारा 227 दं०प्र०सं० के अंतर्गत उन्मोचित नहीं किया जाता तो उसके विरुद्ध धारा 228 दं०प्र०सं० में आरोप विरचित किये जाते हैं। उपरोक्त दोनों ही प्राविधानों के अंतर्गत न्यायालय को अभिलेख पर उपस्थित सामग्री को ध्यान में रखना होता है तथा पक्षों को सुनने के पश्चात न्यायालय अभियुक्त को उन्मोचित कर सकती है अथवा जहाँ न्यायालय इस मत की हो कि यह मानने के लिए पर्याप्त आधार हैं कि अभियुक्त ने अपराध कारित किया है, उसे आरोप विरचित करने चाहिए। यदि किसी अपराध के अवयव प्रकरण के तथ्यों से प्रतीत होते हो तो न्यायालय यह अवधारित करेगा कि अभियुक्त के विरुद्ध कार्यवाही चलाने का आधार है और तद्नुसार आरोप विरचित करेगा। यह अवधारणा विधिक अवधारणा नहीं है। एक अपराध के अवयवों के उपस्थित होने के संबंध में न्यायालय का संतोष होना आरोप विरचित करने के हेतु अपरिहार्य शर्त है। यह संतोष एक प्रथम दृष्टया प्रकरण से भी निचले स्तर का हो सकता है। दं०प्र०सं० की धारा 227 एवं 228 में एक महीन सा अन्तर है। धारा 227 दं०प्र०सं० में न्यायालय को अभियुक्त के विरुद्ध कार्यवाही करने के लिए पर्याप्त आधार न होने का संतोष अभिलेखों तथा अन्य उपलब्ध सामग्री के आधार पर निर्धारित करना होता है जबकि धारा 228 द०प्र०सं० में न्यायालय को मात्र यह राय बनानी होती है कि ऐसी उपधारणा करने का आधार है कि अभियुक्त ने कथित अपराध किया है। अतः यह कहना गलत होगा कि धारा 228 दं०प्र०सं० में आरोप विरचित करते समय न्यायालय को ऐसी राय बनाना आवश्यक है कि अभियुक्त निश्चय ही कथित आरोप के लिए दोषी है।

9. माननीय उच्चतम न्यायालय ने अग्रेतर कहा कि धारा 228 दं०प्र०सं० में वाक्यांश "न्यायाधीश की यह राय है कि ऐसी उपधारणा करने का आधार है कि अभियुक्त ने

ऐसा अपराध किया है।" विधायिका ने अपने विवेक का प्रयोग करके लिखा है। जब अपराध के अवयव उपस्थित हो, अपराध की अवधारणा करना धारा 228 में अंतर्निहित है तथा न्यायालय इस स्तर पर अभियोजन के कथनों पर अनावश्यक संशय करते हुए अपने क्षेत्राधिकार को इस स्तर तक नहीं बढ़ा सकता है जिससे कि अतिशय शीघ्रता से आरोपों को निरस्त किया जा सके।

10. **महाराष्ट्र राज्य बनाम सोमनाथ थापा 1996 4SCC 659** में 'अवधारित करने' की व्याख्या संभावित साक्ष्य के आधार पर विश्वास अथवा स्वीकार करने अथवा तब तक सिद्ध मानने, जब तक कि इसके विपरीत साक्ष्य न आ जाय, के रूप में की गयी। दूसरे शब्दों में, मामले की सत्यता मात्र तब स्पष्ट हो पायेगी जब अभियोजन अपना साक्ष्य प्रस्तुत करता है तथा साक्षियों का प्रतिपरीक्षण बचाव पक्ष द्वारा किया जाता है, धारा 313 दं०प्र०सं० के अंतर्गत अभियुक्त से उसको आरोपित करने वाले साक्ष्य के विषय में प्रश्न पूछे जाते हैं तथा अभियुक्त को बचाव में साक्ष्य देने का अवसर दिया जाता है। उक्त सभी सोपानों के पूर्ण होने के पश्चात ही विचारण पूर्ण होता है तथा न्यायालय अपनी अंतिम राय बनाते हुए निर्णय देता है।

11. उक्त विधिक स्थिति के आलोक में प्रस्तुत मामले के तथ्यों का परीक्षण करने पर यह प्रतीत होता है कि मृतक ने एक मृत्यु पूर्व पत्र लिखकर प्रार्थीगण को अपनी मृत्यु के लिए दोषी ठहराने के तुरन्त बाद आत्महत्या कर ली। शिकायतकर्ता ने अपने बयान में भी उपरोक्त आरोप का समर्थन किया है। आरोपों की सत्यता धारा 227 दं०प्र०सं० के स्तर पर तय नहीं की जा सकती है तथा यह विचारण के उपरान्त ही तय हो सकता है किन्तु उपरोक्त तथ्यों के आलोक में प्रार्थी को उन्मोचित किये जाने का कोई आधार नहीं है। आलोच्य आदेश दिनांक 18.11.2023, जिसके द्वारा प्रार्थी का उन्मोचन प्रार्थना-पत्र निरस्त किया गया, में कोई त्रुटि नहीं है।

12. पुनरीक्षण बलहीन है और तद्नुसार **निरस्त** किया जाता है।

(2024) 1 ILRA 401
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2024

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Misc. Writ Petition No. 17560 of 2023

Sumit & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Akhilesh Srivastava, Sri Saksham Srivastava

Counsel for the Respondents:
G.A.

A. Constitution of India, 1950-Article 226, 21-Indian Penal Code, 1860-Sections 174-A,88-Criminal Procedure Code, 1973-Sections 195 & 2(d)-Quashing of FIR-petitioners charged for the offence u/s 174-A IPC only, cognizance of which is

barred u/s 195 Crpc-Section 195 CrPC prohibits the court from taking cognizance of any offence punishable under section 172 to 188, IPC-if the court cannot take cognizance of the offence u/s 174-A IPC on the basis of police report, then lodging the FIR u/s 174-A IPC is futile and will be against the provisions of Section 195(1)(a)(i) Cr.PC-Proceedings us/s 174-A IPC can be initiated only on the basis of written complaint of the court which had initiated proceedings u/s 82 Cr.PC against the accused –Police report of cognizable offence cannot be treated as a complaint-FIR quashed.(Para 22 to 24)

B. The proceedings u/s 174-A IPC is initiated for providing punishment to the person who despite initiation of proceedings u/s 82 Crpc failed to comply with the same and despite making the same cognizable offence, it was included u/s 195 (1)(a)(i) Crpc so as to prohibit the police from making unnecessary harassement of the accused as the police had already been proceedings against him u/s 82 Crpc. Therefore the sole purpose of legislature by putting Section 174-A in the category of offence mentioned in Section 195(1)(a)(i) Crpc is to make act of accused punishable for not honouring the processs u/s 82 Crpc and also to protect the unnecessary violation of personal liberty of the accused.(Para 15)

The writ petition is allowed. (E-6)

List of cases cited:

1. Pradeep Kumar Vs St. of Punj. & anr., (2023) CRM-M-Ins 41656 (O&M)

2. Jayant & ors. Vs St. of M.P. & ors.(2020) (MANU/SC/0912)

3. Pradeep S. Wodeyar Vs St. of Kar.(2021) 0 Supreme SC 853

4. Maneesh Goomer Vs St. Crl. M.C No 4208 of 2018

5. Moti Singh Sirkarwar Vs St. of U.P & ors.(2016) (MANU/UP/2481)

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

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

2. By means of the present writ petition, the petitioners have challenged the F.I.R. dated 17.7.2023 in Case Crime No. 162 of 2023, under Section 174-A I.P.C., P.S. Lodha, District-Aligarh.

Factual Matrix

3. An F.I.R. dated 21.10.2022 in Case Crime No. 252 of 2022, under Sections 458, 380 I.P.C., P.S. Lodha, District Aligarh was lodged by one Jitendra Singh against Bachchu Singh, Ram Nivas and one unknown person. During investigation of the case, the name of the petitioners also came into picture on the basis of evidence collected. Thereafter, a charge sheet under Sections 395, 412 I.P.C., was submitted by the police on 20.2.2023 against the named accused as well as against the present petitioners. Learned Magistrate also took cognizance on the above charge sheet on 13.3.2023. Thereafter, non-bailable warrants were issued against the petitioners on 16.3.2023 and a proclamation under Section 82 Cr.P.C. was also issued on 20.5.2023 against the petitioners. Thereafter, the impugned F.I.R. under Section 174-A I.P.C. was lodged against the petitioners on 17.7.2023 at P.S. Lodha, District Aligarh.

Submission of the petitioners

4. Learned counsel for the petitioners submits that the impugned F.I.R. is barred under Section 195 Cr.P.C. as this Section

specifically provides that cognizance of any offence punishable u/s 172 to 188 I.P.C., cannot be taken by the court except on the complaint in writing of the court concerned or its officer. However, in the present case the F.I.R. has been lodged by the Investigating Officer and even charge sheet of the same cannot be termed as "complaint" as per Section 2(d) of Cr.P.C. because the same provides only for non-cognizable offences whereas Section 174-A I.P.C. is a cognizable offence.

5. In support of his contention, learned counsel for the petitioners has relied upon the judgement of Punjab and Haryana High Court delivered in ***Pradeep Kumar vs. State of Punjab and another; CRM-M-41656-2023 (O&M)***, decided on 23.8.2023. In that judgement, the Punjab and Haryana High Court observed that cognizance u/s 174-A cannot be taken except on the basis of a formal written complaint as required u/s 195 Cr.P.C.

Submission of the respondents

6. Per contra, learned A.G.A. has submitted that Section 174-A I.P.C. was introduced by way of amendment in Cr.P.C. in 2005 without making any amendment in Section 195 Cr.P.C. It is further submitted that all the offences which are mentioned u/s 195 Cr.P.C. i.e. from Section 172 to 188 I.P.C. are non-cognizable offences for which bar has been created for taking cognizance except on a complaint. However, Section 174-A I.P.C. is cognizable offence, therefore, bar prescribed in Section 195 Cr.P.C. does not apply for offence u/s 174-A I.P.C. It is lastly submitted by learned A.G.A. that had the legislature intended to include Section 174-A I.P.C in the category of cases mentioned in Section 195(1)(a) Cr.P.C., then legislature would have amended the provision of Section 195 Cr.P.C. so as to include Section 174-A I.P.C.

7. In support of his contention, learned A.G.A. has relied upon the judgement of the Apex Court in ***Jayant and others vs. State of Madhya Pradesh and others;*** Criminal Appeal No. 824-825 of 2020, decided on 3.12.2020 ***(MANU/SC/0912/2020)***; the judgement in the case of ***Pradeep S. Wodeyar vs. State of Karnataka***; Criminal Appeal Nos. 1288-1289-1290 of 2021, reported in ***2021 0 Supreme (SC) 853*** and also the judgement of Delhi High Court in ***Maneesh Goomer vs. State, Criminal M.C. No. 4208 of 2011***, decided on 4.1.2012 and judgement of Allahabad High Court in the case of ***Moti Singh Sirkarwar vs. State of U.P. and others*** in Application u/s 482 No. 31819 of 2015 ***(MANU/UP/2481/2016).***

Analysis

8. Before dealing with the contention of learned counsel for the petitioners that the F.I.R. u/s 174-A I.P.C. is barred by Section 195 Cr.P.C., it will be appropriate to discuss the legal provision, involved in the present case. Section 195 Cr.P.C. which prohibits the Court from taking cognizance of any offence punishable u/s 172 to 188 I.P.C., is being quoted below:-

***"195**. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.*

(1) No Court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

(ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub- clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

(2) Where a complaint has been made by a public servant under clause (a) of sub-section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint: Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub- section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court in situate: Provided that-

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed."

9. From perusal of Section 195(1)(a)(i) Cr.P.C., it is clear that the offences for which there is prohibition on court to take cognizance are non-cognizable offences from Section 172 to 187 I.P.C. while Section 188 I.P.C. is mentioned as cognizable offence under First Schedule of Cr.P.C. The definition of "cognizable offences" is provided u/s 2(c) Cr.P.C. which is being quoted as under:

"2(c). "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant."

10. Therefore, it is clear that in cognizable offences, police can arrest the accused without warrant. It is also clear

from perusal of Section 195 Cr.P.C. that offences, punishable u/s 172 to 188 I.P.C. are cognizable by the court only when a complaint in writing is filed by public servant concerned or his subordinate. As per Section 21 I.P.C., "public servant" includes every judge, including any person empowered by law to discharge any adjudicatory function. Therefore, the Magistrate who issues proceedings u/s 82 Cr.P.C. will be deemed to be public servant within the meaning of Section 195 Cr.P.C. The word "complaint" referred in Section 195 Cr.P.C. is defined u/s 2(d) Cr.P.C. which is being quoted below:

"2(d). " complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non- cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

11. From perusal of Section 2(d) Cr.P.C., it is clear that though the complaint does not include police report but the explanation of Section 2(d) Cr.P.C. also provides that if after investigation of a case a police report is submitted by the police officer, regarding non-cognizable offence then same shall also be deemed to be "complaint". Therefore, apart from making allegation to Magistrate for taking action against a person who has committed an offence but also the police report/charge sheet of non-cognizable offence will also be deemed to be "complaint". **From this fact, it is clear that police report of cognizable offence cannot be treated as a complaint by any stretch of imagination.**

12. Section 174-A I.P.C. was inserted after Section 174 I.P.C. though Section 44(b) of the Code of Criminal Procedure (Amendment) Act, 2005 and by Section 42(c) of this amendment Act, Section 174-A I.P.C. was also included in the First Schedule of Cr.P.C. after the entry relating to Section 174 I.P.C. Sections 42(c) and 44(b) of the Code of Criminal Procedure (Amendment) Act, 2005 are being quoted as under:-

"42(c). after the entries relating to section 174, the following entries shall be inserted,

1.	*2.*	*3.*	*4.*	*5.*	*6.*
"174A	*Failure to appear at specified place and specified time as required by a proclamation published under sub-section (1) of Section 82 of this Code*	*Imprisonment for 3 years, or with as fine, or with both*	*Cognizable*	*Non-bailable*	*Magistrate of the first class*
	In a case where declaration has been made under sub-section (4) of	*Imprisonment for 7 years and fine*	*Ditto*	*Ditto*	*Ditto"*

	section 82 of this Code pronouncing a person as proclaimed offender				

44(b). after section 174, the following section shall be inserted, namely:-

"174A. Whoever fails to appear at the specified place and the specified time as required by a proclamation published under sub-section (1) of section 82 of the Code of Criminal Procedure, 1973, shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine."

13. After insertion of Section 174-A in I.P.C. as well as in First Schedule of Cr.P.C., further amendment was also made in the year 2006 in Section 195(1)(b) Cr.P.C., but no amendment was made in Section 195(1)(a)(i) Cr.P.C. Therefore, at the time of inserting Section 174-A in I.P.C. as well as in First Schedule of Cr.P.C. after Section 174, legislature was well aware about the category of offences u/s 195(1)(a)(i) Cr.P.C. and for this reason, while making amendment in Section 195(1)(b) Cr.P.C. in 2006, Section 195(1)(a)(i) Cr.P.C. was kept untouched knowingly by the legislature. The above position clearly reveals that while inserting Section 174-A I.P.C., legislature was well aware that in Section 195(1)(a)(i) Cr.P.C., apart from Section 188 I.P.C., one more cognizable offence i.e. 174-A I.P.C. is being inserted for providing the bar of cognizance on the part of court for offences mentioned in Section 195(1)(a)(i) Cr.P.C., except on the complaint.

14. In the judgement of Punjab and Haryana High Court delivered in ***Pradeep Kumar vs. State of Punjab and another (supra)***, relied upon by the counsel for the petitioners, above mentioned analysis of this Court was also considered and it was observed in paragraph Nos. 12.12 to 12.16 as under:-

"12.12. Be that as it may, it is unmistakably evident that the omission of Section 174A from the purview of Section 195 of the Cr.P.C. cannot be treated as a mere inadvertent oversight. It gets more particularly obvious, when viewed through the lens of the deliberate simultaneous legislative action taken to amend Schedule-1. This deliberate choice to eschew any alteration in Section 195 Cr.P.C. while making concurrent changes elsewhere in the same Code suggests a level of intentionality that cannot be readily discounted.

12.13. Having opined as above, I may also hasten to add here that non-inclusion of Section 174-A of IPC into the ambit of Section 195 of Cr.P.C in its current form, does though create some incongruity/legal inconsistency. To elucidate, let us consider an illustrative scenario: Imagine an individual accused of an offense falling under Section 174-A of the IPC. Being an offense classified as cognizable, the police have the authority to arrest the accused without a warrant. However, Section 195 of the Cr.P.C. bars any Court from taking its cognizance except on the complaint in writing made by the Court/Public servant concerned. This creates an anomalous

situation where an individual who is accused under Section 174-A IPC could potentially be arrested without a warrant, yet the legal requirement for his prosecution for such an offense is by way of filing a complaint under Section 195 of the Cr.P.C.

12.14. The incongruity, if any, in the legal framework rather warrants a closer examination of legislative intent. The statutory insistence ibid, of filing of complaint by public servant/court concerned is in tune with fundamental right to personal liberty as enshrined under Article 21 of the Constitution of India. The same underscores the importance of aligning legal provisions to ensure that personal liberty of an individual is given paramount consideration,given that an individual who is declared as proclaimed person or offender, as the case may be, is a mere suspect/under trial and not yet a declared culprit. He is also equally entitled to procedural protection in exercise of his fundamental right under Article 21. Same has to be thus safeguarded. Justice has to be administered even to a suspect/under trial without any ambiguity or drawing inferences against him from legislative ambiguities. Thus the incongruity ought not to result in an asymmetry of rights and due process. Such an inconsistency underscores the critical need for clarity in legislation and ascertaining its intent through judicial interpretation in matters affecting personal liberty and justice.

12.15. Nevertheless, even if we were to entertain the notion that non-exclusion of Section 174-A of IPC from the purview of Section 195 Cr.P.C. was by an inadvertent oversight/omission in the legislation, it is crucial to recognize that any benefit arising from such an inadvertence or oversight would accrue to the advantage of the accused, rather than the prosecution. In the realm of criminal jurisprudence, matters pertaining to personal liberty hold a paramount position. Such matters pertaining to personal liberty should never be predicated upon inferences drawn against the accused from presumed intentions and/or inadvertent omissions on the part of the legislature. The sanctity of personal liberty demands nothing less than clear and categorical legislative provisions ensuring that justice is not compromised by inferences drawn against the accused from legislative ambiguity or oversights.

12.16. In conclusion, it is held that Section 195 of the Code of Criminal Procedure (CrPC), in its present form, encompasses Section 174-A of the Indian Penal Code (IPC) within its purview."

15. This Court is also of the view that proceedings u/s 174-A I.P.C. is initiated for providing punishment to the person who despite initiation of proceedings u/s 82 Cr.P.C. against him, failed to comply with the same and despite making the same as cognizable offence, it was included u/s 195(1)(a)(i) Cr.P.C. so as to prohibit the police from making unnecessary harassment of the accused as the police had already been proceeding against him u/s 82 Cr.P.C. Therefore, the sole purpose of legislature by putting Section 174-A in the category of offence mentioned in Section 195(1)(a)(i) Cr.P.C. is to make act of accused punishable for not honouring the process u/s 82 Cr.P.C. and also to protect the unnecessary violation of personal liberty of the accused because police is already free to arrest and take action against the accused person under the proceeding of Section 82 Cr.P.C. as well as pending N.B.W.

16. Though in cognizable offences police can arrest an accused without

warrant but specific exception has been carved out by inserting Section 174-A I.P.C. in Section 195(1)(a)(i) Cr.P.C., despite being a cognizable offence.

17. So far as the judgement, relied upon by learned A.G.A., passed by the Delhi High Court in ***Maneesh Goomer (supra)*** as well as judgement of Allahabad High Court in ***Moti Singh Sikarwar (supra)*** are concerned, same were based on the incorrect interpretation that all the offences, mentioned u/s 195(1)(a)(i) Cr.P.C., are non-cognizable offences ingnoring the fact that Section 188 I.P.C. is a cognizable offence. Paragraph-9 of the judgement passed by Delhi High Court in ***Maneesh Goomer (supra)*** is being quoted below:-

"9. As regards the next contention of the Petitioner that for a prosecution under Section 174-A IPC no cognizance can be taken on a charge-sheet but on a complaint under Section 195 Cr.P.C., it may be noted that Section 174-A IPC was introduced in the Code with effect from 23rd June, 2006. Section 195(1) Cr.P.C. provides that no Court shall take cognizance of offences punishable under Section 172 to 188 (both inclusive) of the IPC or of the abatement, or attempt to commit the said offences, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Section 195 Cr.P.C. has not been correspondingly amended so as to include Section 174-A IPC which was brought intp the Penal Code with effect from 23rd June, 2006. ***The Legislature was conscious of this fact and that is why though all other offences under chapter X of the Criminal Procedure Code are non- cognizable, offence punishable under Section 174-A IPC is cognizable.*** *Thus the Police officer on a complaint under Section 174-A IPC is competent to register FIR and after investigation thereon file a charge-sheet before the Court of Magistrate who can take cognizance thereon. Thus, I find no merit in the contention raised by the Learned Counsel for the Petitioner."*

18. Similarly, paragraph 21.1 of the judgement passed by Allahabad High Court in ***Moti Singh Sikarwar (supra)*** is being quoted as under:-

" 21.1. ***It is to be noted that all the offences under Section 172 to 188 I.P.C. (both inclusive) are non-cognizable and bailable, whereas Section 174-A I.P.C. which provides for punishment upto 7 years imprisonment and fine, in case the offender fails to appear at the specified place and the specified time, as required by the proclamation published under Section 82 Cr.P.C., is cognizable and non-bailable.*** *The legislature was conscious of this fact and that is why while introducing Section 174-A in the I.P.C. in the year 2006, it made no corresponding amendment in Section 195(1)(a) Cr.P.C. so as to include Section 174- I.P.C. in between all the non-cognizable offences and bailable from Sections 172 to 188 I.P.C."*

19. From perusal of aforesaid observations of Single Benches of Allahabad High Court as well as Delhi High Court, it is clear that the very basis of interpretation that Section 174-A I.P.C. being cognizable offence cannot be read as a section to be included in the category of cases mentioned in Section 195(1)(a)(i) Cr.P.C. is itself incorrect and does not lay down correct law. So far as the judgement of Apex Court in ***Jayant vs. State of Madhya Pradesh (supra)*** as well as

Pradeep S. Wodeyar (supra) are concerned, in both the judgements controversy was entirely different and the Hon'ble Apex Court did not hold that Section 174-A I.P.C. is not part of Section 195(1)(a)(i) Cr.P.C.

20. In the case of Jayant vs. State of Madhya Pradesh (supra), the issue was regarding registration of F.I.R. under Mines and Minerals Act, 1957 as well as offence u/s 379, 414 I.P.C. As there is a bar u/s 22 of Mines and Minerals Act which provides that cognizance of the offence under Mines and Minerals Act will not be taken by the Court except upon a complaint by an authorized person. Therefore, Hon'ble Apex Court observed that apart from offences under Mines and Minerals Act, offences under I.P.C. have also been invoked, therefore, bar of Section 22 of Mines and Minerals Act will not be applicable. It was further observed that after completion of investigation the Magistrate will take cognizance of the offence under I.P.C. but the cognizance of offence under Mines and Minerals Act will be taken on the basis of complaint. Paragraph 13 of the of ***Jayant vs. State of Madhya Pradesh (supra)*** is being quoted as under:-

"13. After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the MMDR Act and the Rules made thereunder vis-a-vis the Code of Criminal Procedure and the Penal Code, and the law laid down by this Court in the cases referred to hereinabove and for the reasons stated hereinabove, our conclusions are as under:

i) that the learned Magistrate can in exercise of powers under Section 156(3) of the Code order/direct the concerned In-charge/SHO of the police station to lodge/register crime case/FIR even for the offences under the MMDR Act and the Rules made thereunder and at this stage the bar under Section 22 of the MMDR Act shall not be attracted;

ii) the bar under Section 22 of the MMDR Act shall be attracted only when the learned Magistrate takes cognizance of the offences under the MMDR Act and Rules made thereunder and orders issuance of process/summons for the offences under the MMDR Act and Rules made thereunder;

iii) for commission of the offence under the IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act and Rules made thereunder; and

iv) that in respect of violation of various provisions of the MMDR Act and the Rules made thereunder, when a Magistrate passes an order under Section 156(3) of the Code and directs the concerned In-charge/SHO of the police station to register/lodge the crime case/FIR in respect of the violation of various provisions of the Act and Rules made thereunder and thereafter after investigation the concerned In-charge of the police tation/investigating officer submits a report, the same can be sent to the concerned Magistrate as well as to the concerned authorised officer as mentioned in Section 22 of the MMDR Act and thereafter the concerned authorised officer may file the complaint before the learned Magistrate along with the report submitted by the concerned investigating officer and thereafter it will be open for the learned Magistrate to take cognizance after following due procedure, issue process/summons in respect of the

violations of the various provisions of the MMDR Act and Rules made thereunder and at that stage it can be said that cognizance has been taken by the learned Magistrate.

v) in a case where the violator is permitted to compound the offences on payment of penalty as per sub-section 1 of Section 23A, considering sub-section 2 of Section 23A of the MMDR Act, there shall not be any proceedings or further proceedings against the offender in respect of the offences punishable under the MMDR Act or any rule made thereunder so compounded.However, the bar under sub-section 2 of Section 23A shall not affect any proceedings for the offences under the IPC, such as, Sections 379 and 414 IPC and the same shall be proceeded with further."

21. However, in the present case the petitioners are charged for the offence u/s 174-A I.P.C. only, cognizance of which is barred u/s 195 Cr.P.C. Therefore, the controversy in the present case is totally different from that of the judgement relied upon by learned A.G.A. Similarly, in the judgement of ***Pradeep S. Wodeyar (supra)***, relied upon by learned A.G.A., the controversy was regarding irregularity of the cognizance, therefore, controversy in that case is also different from the present one.

22. It is clearly established that Section 174-A I.P.C. was inserted by way of amendment in 2005 between Sections 172 to 188, therefore, it is clear that Section 174-A I.P.C. is part of the offences mentioned in Section 195(1)(a)(i) Cr.P.C. for which court is barred from taking cognizance except upon a complaint by the court.

23. It is also relevant to mention here that cognizable offence itself permits the police to arrest a person without warrant, therefore, registration of F.I.R. of cognizable offence itself will affect the personal liberty of a person protected by Article 21 of the Constitution of India. Therefore, if legislature had intended to invoke the provision of cognizable offence only on the basis of filing written complaint then permitting to register F.I.R. for direct offence will definitely amount to interfere/deprive the personal liberty of a person. Therefore, once Section 195(1)(a)(i) Cr.P.C prohibits the taking cognizance of the offence u/s 174-A I.P.C., except on the basis of written complaint, then permitting lodging of an F.I.R. u/s 174-A I.P.C. will amount to travesty of justice to the person concerned as the personal liberty under Article 21 of the Constitution cannot be deprived, except in accordance with law.

Conclusion

24. Therefore, if the court itself cannot take cognizance of the offence u/s 174-A I.P.C. on the basis of police report, then lodging the F.I.R. u/s 174-A I.P.C. is futile, and will be against the provision of Section 195(1)(a)(i) Cr.P.C. Therefore, proceedings u/s 174-A I.P.C. can be initiated only on the basis of written complaint of the court which had initiated proceedings u/s 82 Cr.P.c. against the accused and F.I.R. is barred by Section 195(1)(a)(i) Cr.P.C.

25. This Court also holds that judgement of Single Benches of Allahabad High Court in ***Moti Singh Sikarwar (supra)*** as well as of Delhi High Court in ***Maneesh Goomer (supra)*** have not laid down correct law regarding interpretation of Section 174-A I.P.C. read with Section 195(1)(a)(i) Cr.P.C.

Decision

26. In view of the above conclusion, the F.I.R. dated 17.7.2022, lodged by respondent No.3 in Case Crime No. 162 of 2023, under Section 174-A I.P.C., P.S. Lodha, District Aligarh, is hereby quashed. However, it is open to concerned court to file a written complaint against the petitioners u/s 174-A I.P.C. as per Section 195(1) Cr.P.C., if there is no legal impediment.

27. With the aforesaid observation, the writ petition is **allowed**.

28. A copy of this judgement be sent to all District and Sessions Judges in the State of Uttar Pradesh so as to apprise all judicial officers as well as copy to the Director, JTRI, Lucknow to sensitize the trainee judicial officers about the law laid down by this judgement.

(2024) 1 ILRA 411
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Election Petition No. 3 of 2022

Mohhamad Aslam @ Mohhamad Aslam Raeeni ...Petitioner
Versus
Shri Ram Feren @ Ram Feren Pandey ...Respondent

Counsel for the Petitioner:
In Person, Mohd. Altaf Mansoor, Tanay Chaudhary

Counsel for the Respondent:
Rajeiu Kumar Tripathi, Lalta Prasad Misra, Rajeiu Kumar Tripathi

(A) Election - Code of Civil Procedure, 1908 - Order V Rule 20 - Substituted service ,Order VII Rule 11 CPC - Rejection of plaint , The Representation of the People Act, 1951 - Section 8 - Disqualification on conviction for certain offences, Section 8-A - Disqualification on ground of corrupt practices, Section 33-A - Right to information, Section 36 - Scrutiny of nominations, Section 81 - Presentation of petitions, Section 82 - Parties to the petition, Section 83 - Contents of petition, Section 86 - Trial of election petitions, Section 117 - Security for costs , Section 125-A - Penalty for filing false affidavit, etc, The Conduct of Elections Rules, 1961 - Rule 94-A - Form of affidavit to be filed with election petition.

(B) Election petition - two stages - (i) to verify whether election petition has been filed properly - strictly following the provisions of Section 81 or 82 or 117 of the Act and without ignoring the requirements of Section 83 of the Act read with relevant provisions of C.P.C. - cause of action should be clear and complete (ii) if the election petition has been filed in compliance of aforesaid provisions of the Act and the cause of action is complete, then it will qualify to the next stage i.e. the complete trial of election petition on merits - Section 86 of the Act makes no reference to Section 83 thereof and so, prima facie, an election petition cannot be summarily dismissed under Section 86 of the Act for non-compliance with the provisions of Section 83 thereof but if the affidavit has not been filed properly or the verification thereof is defective, then the election petitioner may be given opportunity to cure the defect, as such defect cannot be held fatal to the maintainability of the election petition. **(Para - 38,48)**

(C) The Representation of the People Act, 1951 - non-compliance with the provisions of Section 83 of the Act is curable defects - yet there must be substantial compliance therewith - if there is total and complete non-compliance with the provisions of Section 83 of the Act, the petition cannot be described as an election petition and may be dismissed at the threshold. **(Para -40)**

(D) The Allahabad High Court Rules, 1952 - Chapter IV - Rules 11- Form of Affidavit ,

Rule 12 - Facts to be within the deponent's knowledge or source to be stated , Chapter XV-A - Rule 5 - Issue of notice to respondent , Rule 6 - Process fee and charges .

Maintainability of election petition - ground - non-disclosure of criminal cases - non-disclosure of complete assets in the nomination paper - inconsistent educational qualification - inconsistent age in nomination paper and other documents - High Court considering whether to dismiss an election petition that doesn't comply with Sections 81, 82, or 117 of the Act, or if Section 83 hasn't been fully complied with.**(Para - 3,34)**

HELD:-Election petition has been filed without proper verification and without the affidavit as required under the C.P.C. and Rules 11 & 12 of Chapter IV of the Allahabad High Court Rules as well as affidavit in Form-25. Election petition does not qualify first stage in as much as election petition has not been filed making compliance of the provisions of Section 83 of the Act and the cause of action is incomplete. It cannot go for trial and also it is not necessary to enter into and examine the merits of other rival contentions. **(Para - 46,49)**

Petition dismissed. (E-7)

List of Cases cited:

1. Jyoti Basu & ors. Vs Debi Ghoshal & ors., (1982) 1 SCC 691

2. Mithilesh Kumar Pandey Vs Baidyanath Yadav & ors., (1984) 2 SCC 1

3. V. Narayanaswamy Vs C.P. Thirunavukkarasu , (2000) 2 SCC 294

4. Hari Shanker Jain Vs Sonia Gandhi , (2001) 8 SCC 233

5. T. Arivandandam Vs T.V. Satyapal & anr., (1977) 4 SCC 467

6. Saritha S. Nair Vs Hibi Eden , (2020) SCC OnLine SC 1006

7. A. Manju Vs Prajwal Revanna @ Prajwal R & ors., (2022) 3 SCC 269

8. Amit Yadav Vs Kunwar Jayesh Prasad & ors., 2016 SCC OnLine All 3013

9. Umesh Challiyill Vs K.P. Rajendran , (2008) 11 SCC 740

10. G.M. Siddeshwar Vs Prasanna Kumar , (2013) 4 SCC 776

11. P.A. Mohd. Riyas Vs M.K. Raghavan & ors. , (2012) 5 SCC 511

12. Azhar Hussain Vs Rajiv Gandhi, 1986 AIR 1253

13. F.A. Sapa & ors.Vs Singora & ors., (1991) 3 SCC 375

14. C.P. John Vs Babu M. Palissery & ors., (2014) 10 SCC 547

15. G.M. Siddeshwar Vs Prasanna Kumar, (2013) 4 SCC 776

16. Sardar Harcharan Singh Brar Vs Sukh Darshan Singh, (2004) 11 SCC 196

17. R.P. Moidutty Vs P.T. Kunju Mohammad & Anr., (2000) 1 SCC 481

18. Lok Pahari Vs E.C.I & ors.(2018)

19. Brajesh Singh Vs Sunil Arora (2021)

20. Nand Kishore Garg Vs Jitendra Singh Tomar (2020)

21. P.I.F. & ors. Vs U.O.I. & Anr. (2015)

22. S.H. Singh Brar Vs Sukh Darshan Singh & ors. ,(2004) 11 SCC 196,

23. G. Mallikarjunappa & Anr. Vs S.S. Ashankarappa & ors. , (2001) 4 SCC 428

24. Ponnala Lakshmaiah Vs Kommuri Pratap Reddy & ors., (2012) 7 SCC 788

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

1. Heard Dr. L.P. Misra, assisted by Sri Rajeiu Kumar Tripathi, learned counsel

for the respondent on the objections so raised against the maintainability of the election petition and Mohd. Altaf Mansoor, assisted by Sri Tanay Chaudhary, learned counsel for the election petitioner.

2. Since learned counsel for the respondent has submitted that his application for rejection/dismissal of the election petition may be considered as an application filed under Order VII Rule 11 CPC, therefore, that application which is bearing **Civil Misc. Application/ I.A. No.2 of 2022** is being decided by means of the following order.

3. This is an election petition filed by Mohhamad Aslam alias Mohhamad Aslam Raeeni, the petitioner, through his counsel Mohd. Altaf Mansoor challenging the declaration of election dated 10.03.2022 issued by Returning Officer of 290-Shrawasti Constituency in the General Elections Uttar Pradesh- 2022 in favour of the respondent as duly elected Member of the State Legislative Assembly mainly on the ground of non-disclosure of criminal cases, non-disclosure of complete assets in the nomination paper, inconsistent educational qualification and inconsistent age in the nomination paper and other documents.

4. Notices were issued to the respondent in terms of Chapter XV-A Rule 5 & 6 of the Allahabad High Court Rules, 1952 on 21.04.2022. As per office report dated 24.05.2022, the election petitioner had made compliance of Rules 5 & 6 of the High Court Rules inasmuch as to serve notice upon the respondent. Notices through registered AD post has been issued. The notice was published in "Dainik Jagran" Hindi Newspaper. Besides, the notice has been sent through ordinary post. Hence, service of notice is sufficient in the light of Order V Rule 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") upon the respondent. On 30.05.2022, Sri Rajeiu Kumar Tripathi has filed Vakalatnama on behalf of the respondent. On 01.08.2022, an application for rejection/dismissal of the election petition has been filed by Dr. L.P. Misra alongwith Sri Rajeiu Kumar Tripathi, learned counsel for the respondent. On 17.08.2022, Mohd. Altaf Mansoor alongwith Sri Tanay Chaudhary has filed application for dismissal of the application filed by the respondent. On 01.11.2022, Dr. L.P. Misra has submitted that the application for rejection/dismissal of the election petition may be considered as application filed under Order VII Rule 11 of CPC. He has further submitted that the election petition is not maintainable inasmuch as there are some apparent defects in the election petition and those defects may be removed, if the election petitioner files any appropriate application to that effect. Mohd. Altaf Mansoor has submitted that he shall not file any application seeking cure of the defects, which have been pointed out by Dr. L.P. Misra.

5. Before adverting to the objections so raised by learned counsel for the respondent and reply thereto by learned counsel for the election petitioner, it would be pertinent to reproduce some relevant sections of the Representation of the People Act, 1951 (hereinafter referred to as "the Act" in short). Sections 8, 8-A, 33-A, 36 (6), 36 (8), 81, 82, 83, 86, 125-A of the Act and Rule 94-A of the Conduct of Elections Rules, 1961 are as under:-

"8. Disqualification on conviction for certain offences.— *[(1) A person convicted of an offence punishable under—*

(a) section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) or the Indian Penal Code (45 of 1860); or

(b) the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or

(h) section 7 (offence of contravention of the provisions of section 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or

(i) section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) or clause (a) of sub-section (2) of section 136 (offence of Fraudulently defacing or fraudulently destroying any nomination paper) of this Act; [or]

[(j) section 6 (offence of conversion of a place or worship) of the Places of Worship (Special Provisions) Act 1991], [or]

[(k) section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971);] [or]

[(l) the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or

(m) the Prevention of Corruption Act, 1988 (49 of 1988); or

(n) the Prevention of Terrorism Act, 2002 (15 of 2002),] 5 [shall be disqualified, where the convicted person is sentenced to—

(i) only fine, for a period of six years from the date of such conviction;

(ii) imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

(2) A person convicted for the contravention of—

(a) any law providing for the prevention of hoarding or profiteering; or

(b) any law relating to the adulteration of food or drugs; or

(c) any provisions of the Dowry Prohibition Act, 6 [1961 (28 of 1961);],

8 [***]

and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.

(3) A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

[(4)] Notwithstanding anything 2 [in sub-section (1), sub-section 2 and sub-section (3)] a disqualification under either sub-section shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation.—In this section—

(a) "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for—

(i) the regulation of production or manufacture of any essential commodity;

(ii) the control of price at which any essential commodity may be brought or sold; (iii) the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

(iv) the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

(b) "drug" has the meaning assigned to it in the Drugs and Cosmetics Act, 1940 (23 of 1940);

(c) "essential commodity" has the meaning assigned to it in the Essential Commodities Act, 1955 (10 of 1955);

(d) "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

***[8A. Disqualification on ground of corrupt practices.**—(1) The case of every person found guilty of a corrupt practice by an order under section 99 shall be submitted, 4 [as soon as may be within a period of three months from the date such order takes effect], by such authority as the Central Government may specify in this behalf, to the President for determination of the question as to whether such person shall be disqualified and if so, for what period:*

Provided that the period for which any person may be disqualified under this sub-section shall in no case exceed six years from the date on which the order made in relation to him under section 99 takes effect.

(2) Any person who stands disqualified under section 8A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), may, if the period of such disqualification has not expired, submit a petition to the President for the removal of such disqualification for the unexpired portion of the said period.

(3) Before giving his decision on any question mentioned in sub-section (1) or on any petition submitted under sub-section (2), the President shall obtain the opinion of the Election Commission on such question or petition and shall act according to such opinion.]

***[33A. Right to information.**—(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-*

section (1) of section 33, also furnish the information as to whether—

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence [other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8] and sentenced to imprisonment for one year or more.

(2) The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form verifying the information specified in sub-section (1).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at his office for the information of the electors relating to a constituency for which the nomination paper is delivered.]

36. Scrutiny of nominations.—

(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.

[(8) Immediately after all the nomination papers have been scrutinised and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.]

81. Presentation of petitions.*—(1) An election petition calling in question any election may be presented on one or more of the grounds specified in [sub-section (1)] of section 100 and section 101 to the 8 [High Court] by any candidate at such election or any elector 9 [within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates].*

Explanation.—In this sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

[Sub-section (2) omitted by Act 47 of 1966, sec 39 (b) (w.e.f. 14-12-1966)]

[(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.]

[82. Parties to the petition.*—A petitioner shall join as respondents to his petition—*

(a) where the petitioner, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and

(b) any other candidate against whom allegations of any corrupt practice are made in the petition.]

[83. Contents of petition.*—(1) An election petition—*

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition].

***[86. Trial of election petitions.**—(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117.*

Explanation.—An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A.

(3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent.

Explanation.—For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.]

***[125A. Penalty for filing false affidavit, etc.**—A candidate who himself or*

through his proposer, with intent to be elected in an election,—

(i) fails to furnish information relating to sub-section (1) of section 33A; or

(ii) give false information which he knows or has reason to believe to be false; or (iii) conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both.]"

[94A. Form of affidavit to be filed with election petition.*—The affidavit referred to in the proviso to sub-section (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25.]"*

6. Learned counsel for the respondent has submitted that an election petition must contain the 'concise statement of material facts' capable of giving rise to a triable issue. He has further contended that the petitioner did not disclose 'concise statement of material facts'. Further, the election petition nowhere discloses that the respondent had knowledge about pendency of case; "having knowledge of the pendency of a criminal case is sine-qua-non of any disclosure if there is any material". Neither does the election petition disclose nor state that the offences mentioned in para 44 of the election petition falls within the ambit of Section 33-A (1)(i) of the Act. Offences mentioned in para 45 of the election petition does not at all disclose that the same falls within the ambit of Section 33-A (1)(ii) of the Act.

7. Learned counsel for the respondent has further submitted that the election petition does not contain "material particulars" which are mandatory to be stated as per Section 83(1) of the Act. There is no particulars about date, time, place or the victims of offences as mentioned in paras 44 & 45 of the election petition. No material particulars regarding 'undue influence' such as name and address of person so allegedly influenced and day, date, time and place of such influence is mentioned in election petition. Further, in reply to the allegations under Section 123 of the Act of 'undue influence' through 'corrupt practices' by respondent, the "material facts" with corresponding "material particulars" are lacking in election petition.

8. Therefore, in nutshell, the submission of the respondent's counsel is that the election petition lacks concise statement of material facts and full particulars of corrupt practice have not set forth as mandated by Section 83 (1) of the Act, therefore, the same shall be a petition without cause of action. Further, there was no factual foundation laid for the alleged corrupt practice and the election petition is, therefore, liable to be dismissed. In support of his aforesaid arguments, learned counsel for the respondent has placed reliance upon the judgments of the Apex Court in re; **Jyoti Basu and Others v. Debi Ghoshal and Others** (1982) 1 SCC 691, **Mithilesh Kumar Pandey v. Baidyanath Yadav and Others**, (1984) 2 SCC 1, **V. Narayanaswamy v. C.P. Thirunavukkarasu**, (2000) 2 SCC 294 and **Hari Shanker Jain v. Sonia Gandhi**, (2001) 8 SCC 233.

9. In the case of **V. Narayanaswamy** (supra), Hon'ble Apex Court observed in para-23 as under:-

"23. *It will be thus seen that an election petition is based on the rights, which are purely the creature of a statute, and if the statute renders any particular requirement mandatory, the court cannot exercise dispensing powers to waive non-compliance. For the purpose of considering a preliminary objection as to the maintainability of the election petition the averments in the petition should be assumed to be true and the court has to find out whether these averments disclose a cause of action or a triable issue as such. Sections 81, 83(1)(c) and 86 read with Rule 94-A of the rules and Form 25 are to be read conjointly as an integral scheme. When so read if the court finds non-compliance it has to uphold the preliminary objection and has no option except to dismiss the petition. There is difference between "material facts" and "material particulars". While the failure to plead material facts is fatal to the election petition the absence of material particulars can be cured at a later stage by an appropriate amendment. "Material facts" mean the entire bundle of facts, which would constitute a complete cause of action and these must be concisely stated in the election petition, i.e., clause (a) of sub-section (1) of Section 83. Then under clause (b) of sub-section (1) of Section 83 the election petition must contain full particulars of any corrupt practice. These particulars are obviously different from material facts on which the petition is founded.* ***A petition levelling a charge of corrupt practice is required by law to be supported by an affidavit and the election petitioner is obliged to disclose his source of information in respect of the commission of corrupt practice. He must state which of the allegations are true to his knowledge and which to his belief on information received and believed by him to be true****. It is not the form of the affidavit but its substance that matters. To plead corrupt practice as contemplated by law it has to be specifically alleged that the corrupt practices were committed with the consent of the candidate and that a particular electoral right of a person was affected.* ***It cannot be left to time, chance or conjecture for the court to draw inference by adopting an involved process of reasoning. Where the alleged corrupt practice is open to two equal possible inferences the pleadings of corrupt practice must fail. Where several paragraphs of the election petition alleging corrupt practices remain unaffirmed under the verification clause as well as the affidavit, the unsworn allegation could have no legal existence and the court could not take cognizance thereof.*** *Charge of corrupt practice being quasi-criminal in nature the court must always insist on strict compliance with the provisions of law.* ***In such a case it is equally essential that the particulars of the charge of allegations are clearly and precisely stated in the petition. It is the violation of the provisions of Section 81 of the Act which can attract the application of the doctrine of substantial compliance. The defect of the type provided in Section 83 of the Act on the other hand can be dealt with under the doctrine of curability, on the principles contained in the Code of Civil Procedure. Non-compliance with the provisions of Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6 Rule 16 and Order 7 Rule 11 of the Code of Civil Procedure.*** *Where neither the verification in the petition nor the affidavit gives any*

indication of the sources of information of the petitioner as to the facts stated in the petition which are not to his knowledge and the petitioner persists that the verification is correct and the affidavit in the form prescribed does not suffer from any defect the allegations of corrupt practices cannot be inquired and tried at all. In such a case the petition has to be rejected on the threshold for non-compliance with the mandatory provisions of law as to pleadings. It is no part of the duty of the court suo motu even to direct furnishing of better particulars when objection is raised by the other side. Where the petition does not disclose any cause of action it has to be rejected. The court, however, cannot dissect the pleadings into several parts and consider whether each one of them discloses a cause of action. The petition has to be considered as a whole. There cannot be a partial rejection of the petition."

10. Replying the aforesaid contention of the learned counsel for the respondent, learned counsel for the election petitioner highlights that the respondent nowhere mentioned in his application for rejection/ dismissal of the election petition that he had no knowledge about the cases, but he has only stated that the petitioner had not claimed that respondent has knowledge. Secondly, he submits that Section 33A (1)(ii) of the Act does not provide an exhaustive list of disclosures that are required to be filled with affidavit. He further submits that Form-26 as provided under Rule 4A of the Conduct of Elections Rules, 1961 which is required to be filed along with election papers does not refer to Section 33A of the Act while seeking disclosure of pending criminal cases against the petitioner. He submits that whether offence requires to be disclosed or not, is a matter of trial and cannot be decided at this stage. Learned counsel for the petitioner has stated that cause of action has been disclosed in para-37 of the election petition.

11. On that, learned counsel for the respondent has submitted that the petitioner has not approached the Court with clean hands and the election petition contains false statements and material facts have been concealed. Case No.2262 of 2003 was not pending against the respondent at the time of filling of nomination paper inasmuch as that as early on 25.06.1996 the case against the respondent was finalised on the basis of confession, as is evident from perusal of page no.358 of the election petition itself.

12. Further, in regard to Case No.65 of 2003, learned counsel for the respondent submits that it is evident from page no.385 of the election petition that the respondent was finally sentenced to a fine of Rs.3,000/- (Rupees Three Thousand only) vide judgment and order dated 06.12.2014 , hence it cannot be said that the case was pending at the time of filling of nomination paper. So far as cases mentioned in para-45 of the election petition for which the respondent is said to be convicted, the respondent submits that the petitioner has not disclosed in the election petition that any of such cases fall within the purview of Section 33-A (1) (ii) of the Act. In support of his contention, learned counsel for the respondents has referred the judgment of the Apext Court in re; **T. Arivandandam V. T.V. Satyapal & Another**, (1977) 4 SCC 467, to state that the election petition containing false statement deserves to be dismissed at threshold.

13. In reply to the aforesaid argument of learned counsel for the respondent,

learned counsel for the petitioner has submitted that non-disclosure of criminal antecedents by candidate in itself amounts to corrupt practice under undue influence. He submits that respondent has admitted that there existed a criminal case against him and he was aware about it. Further, there is no non-disclosure as the election petition itself includes the final judgement of the conviction of the respondent in the matter. It is pertinent to mention that the very admission of the conviction in the matter would reveal that the respondent was well aware of the existence of such conviction but has willingly chosen not to disclose the same in Form-26 filed along with nomination paper.

14. Further submission of learned counsel for the respondent is that Section 83 (1) (c) of the Act requires the election petition to be signed by the petitioner and verified in the manner specified in the CPC for the verification of pleadings, but there is an absence of proper affidavit and substantial defect in the verification, therefore, the election petition cannot be proceeded on merit. Learned counsel also submits that neither the election petition alone nor the supplementary affidavit has been signed and verified by the petitioner in the manner provided for in Section 83 (1) (c) of the Act read with Order VI Rule 14 and 15(2) of CPC. The petitioner has verified contents of various paragraphs of the election petition as “partly”/ verified on basis of “perusal of record” along with word “partly” and verified on “legal advice” again with word “partly”. It is completely unascertainable that which part of such paragraphs with words "partly" has been verified on the basis of "personal knowledge" and which part of such paragraphs on the basis of "perusal of records" and which part of such paragraphs has been verified on the basis of "legal advice". Similar issue is pointed out for affidavit, that it is not in conformity with Form 25 referable to Rule 94-A of the Conduct of Election Rules, 1961. In support of his contention, reliance has also been placed upon the judgments of the Apex Court in re; **Saritha S. Nair v. Hibi Eden**, (2020) SCC OnLine SC 1006 and **A. Manju v. Prajwal Revanna alias Prajwal R and Others**, (2022) 3 SCC 269.

15. So as to strengthen his aforesaid arguments, Dr. L.P. Mishra has also cited the judgment of this Court rendered in re: ***Amit Yadav vs. Kunwar Jayesh Prasad & others, 2016 SCC OnLine All 3013***, referring paras-25, 26, 31, 34, 36, 37, 38, 39, 40, 41, 42, 43 & 44 saying that his objections in the present case are more or less similar to the aforesaid case, which read as under:-

"25. The verification of the Election Petition reads as under :

"I, Amit Yadav, the petitioner in the above election petition, do hereby verify that the contents and statements made in paragraph nos. 1, 2, 3, 4, 5 partly, 6 partly, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 partly, 23 partly, 25 partly, 26 partly, 27 partly, 28 partly, 28 partly, 29, 30, 31, 33, 34, 35 partly, 36 partly, 37, 38 partly, 40, 41, 42, 43, 44, 45 and 46 of the election petition are true to my knowledge; and those contained in paragraph nos. 27 partly, 28 partly, 32 and 39 of the election petition are true on the basis of records and those contained in paragraph nos. 6 partly, 22 partly, 23 partly, 24, 25 partly, 26, 35 partly, 36 partly and 38 partly of this election petition are true on the basis of information received by the petitioner from his agents, workers and supporters, which all I believe to be true; and nothing

material has been concealed and no part of it is false."

26. Similarly, verification of annexure no. 1, which is a dummy ballot paper, has been made by the election petitioner "as true to my knowledge on the basis of perusal of records, which all I believe to be true". Schedule I setting out the details of the ballot papers which were validly marked in favour of petitioner but are alleged to have been rejected by the returning officer has been verified as "true to my knowledge which all believe to be true." The document is in the form of a chart which contains details of table number, total number of votes in which the mark was made in front of petitioner's name, total number of votes in which the mark was made above the name of petitioner, total of column no. 3 and 4 and names of the petitioner's counting agent.

31. Learned Senior Counsel appearing for the respondent no. 1, the returned candidate pointing out the aforesaid verification contended that the same is not in accordance with the provisions of sub-rule (2) of Rule 15 of Order VI which requires that the person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true. It was further contended that the verification of annexure-1 as "true to my knowledge on the basis of perusal of records, which all I believe to be true" is not in the manner provided by sub-rule (2) of Rule 15 of Order VI. It was further submitted that verification of annexures and Schedules simultaneously as "true to my knowledge on the basis of perusal of records, which all I believe to be true" cannot be said to be in accordance with the of sub-rule (2) of Rule 15 of Order VI. Similarly, the verification of annexure-3 which is a complaint alleged to have been made by the election petitioner himself to the District Election Officer as "true to my knowledge on the basis of perusal of records, which all I believe to be true" is also not as per the provisions of the Code of Civil Procedure. He further pointed out that various paragraphs of the election petition have been verified by the election petitioner as partly true to his knowledge, partly true on the basis of record and partly on the basis perusal of record and partly on the basis of information received without specifying as to which part of the paragraph is true to the personal knowledge or based on perusal of record or on the basis of information received. He further pointed out that paragraph 5 of the election petition has been partly verified as true to my personal knowledge without specifying which part and the remaining part has not at all been verified and thus the election petition is liable to be rejected for defective verification.

34. The issue came up for consideration before the Hon'ble Apex Court in the case of F.A. Sapa v. Singora and others, After analyzing the provisions of Order VI Rule 15 C.P.C. and the provisions of the Act, 1950, in paragraphs 19 & 20, it has been held as under :

"19. That brings us to clause (c) of sub-section (1) of section 83 which provides that an election petition shall be signed by the petitioner and verified in the manner laid down by the Code for the verification of the pleadings. Under section 83 (2) any schedule or annexure to the pleading must be similarly verified. Order 6 Rule 15 is the relevant provision in the Code. Sub-rule (2) of Rule 15 says that the person verifying shall specify with reference to the numbered paragraphs of the pleading, what he verifies on his own knowledge and what he verifies upon

information received and believed to be true. The verification must be signed by the person making it and must state the date on and the place at which it was singed. The defect in the verification can be (i) of a formal natural and not very substantial (ii) one which substantially complies with the requirements and (iii) that which is material but capable of being cured. It must be remembered that the object of requiring verification of an election petition is clearly to fix the responsibility for the averments and allegations in the petition on the person signing the verification and at the same time discouraging wild and irresponsible allegations unsupported by facts. Then comes the proviso which provides that in cases where corrupt practice is alleged in the petition, the petition shall also be supported by an affidavit in the prescribed form i.e. From No. 25 prescribed by Rule 94A of the Rules. Lastly sub- section (2) of section 83 lays down that any schedule or annexure to the petition shall also be similarly signed and verified. Two question arise: (i) what is the consequence of a a defective or incomplete verification and (ii) what is the consequence of a defective affidavit? It was also said that the verification clause in regard to averments or allegations based on information ought to disclose the source of information which had not been done in this case.

It must at the outset be realised that section 86 (1) which lays down that the High court `shall' dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 does not in terms refer to section 83. It would, therefore, seem that the legislature did not view the non-compliance of the requirement of section 83 with the same gravity as in the case of section 81, 82 or 117. But it was said that a petition which does not strictly comply with the requirements of section 83 cannot be said to be an election petition within the contemplation of section 81 and hence section 86 (1) was clearly attracted. In Murrka Redhey Shyam v. Roop Singh Rathore, one of the defects pointed out was that though the verification stated that the averments made in some of the paragraphs of the petition were true to the personal knowledge of the petitioner and the averments in in some other paragraphs were verified to be true on advice and information received from legal and other sources, the petitioner did not in so may words state that the advice and information received was believed by him to be true. The Election Tribunal held that this defect was a matter which came within section 83 (1) (c) and the defect could be cured in accordance with the principles of the Code. This Court upheld this view in the following words (at p. 1549 of AIR) :

"It seems clear to us that reading the relevant sections in Part VI of the Act, it is impossible to accept the contention that a defect in verification which is to be made in the manner laid down in the Code of Civil Procedure, 1908, for the verification of pleadings as required by Cl. (c) of sub-section (1) of S. 83 is fatal to the maintainability of the petition."

It is thus clear from this decision which is binding on us that mere defect in the verification of the election petition is not fatal to the maintainability of the petition and the petition cannot be thrown out solely on that ground. As observed earlier since section 83 is not one of three provisions mentioned in Section 86 (1), ordinarily it cannot be construed as mandatory unless it is shown to an integral part of the petition under Sec. 81. "

Again in paragraph 33 of the said reports, it has been observed as under :

"33. Although we have come to the conclusion that the defect in verification is not fatal and can be cured, no attempt has been made by the election petitioners to cure the same nor has the High Court directed the petitioners to do so. By way of a sample our attention was drawn to the election petition No. 7 of 1989 which has given rise to Civil Appeal No. 179 of 1991. The said petition had 47 paragraphs besides the prayer clause. The verification clause shows that paragraphs 1, 2, 4, 5, 18, 19, 28, 35, 30, 33, 36, 38, 41 to 47 of the election petition are on knowledge whereas paragraphs 7 to 15, 20, to 24 , 26, 27, 29, 32, 34, 37, 40 and 41 are on information received and believed to be true. It will be seen from the above that paragraphs 3, 6, 16, 17, 25, 31 and 39 are not verified at all. It was submitted by counsel for the appellants that paragraph 3 contained vital allegations regarding corrupt practice and since that paragraph has not been verified at all, the appellant is likely to be handicapped at the trial. It was contended that such was the position in as many as six petitions if not more. Further some of the paragraphs, e.g., 41 are verified under both heads of the verification clause, thereby causing confusion. In the affidavit sworn in compliance of the proviso to Section 83 (1(, it is stated that particulars and details of corrupt practice are contained in paragraphs 4 to 40 of the election petition. Then the petitioner states that what he has alleged by way of corrupt practice in the election petition is correct `to the best of my knowledge and to the information received by e and believed by me to be true'. It is thus not clear which allegation of corrupt practice is based on his knowledge and which information he believes to be true. Besides when this affirmation is compared with the verification clause of the election petition, the confusion is worst confounded. Similar is the case with the verification of the annexures. There, therefore, considerable force in the submission of the learned counsel for the appellants that even if the High Court concluded that the defect in verification/affirmation was not fatal, the High Court ought to have directed the petitioners to cure the defects within the time stipulated by it so that the appellants would know the exact position before the trial and would not be taken by surprise. We think the High Court committed an error in failing to give appropriate directions in the matter. More or less similar defects are also found in the verification/affirmation clause in the other election petitions/affidavits. We would, therefore, request the High Court to issue directions to the election petitioner of each petition to remove the defects within such time as it may allow and if they or any of them fail to do so, pass appropriate consequential orders in accordance with law.

36. However, on a careful perusal of consideration in F.A. Sapa (Supra), in my opinion, the law laid down by the Hon'ble Apex Court is not confined only to such petition where corrupt practice is alleged. It also deals with the defect in the verification of the petition as required by Order 6 Rule 15 C.P.C. and the consequence thereof and it has been held that mere defect in verification of the election petition is not fatal to the maintainability of the petition and the petition cannot be thrown out solely on that ground but rather an opportunity is to be provided to the election petitioner to remove the defect failing which the consequence shall follow. This becomes clear from the observations made in the paragraph 33 of the reports :

"More or less similar defects are also found in the verification/affirmation clause in the other election petitions/affidavits. We

would, therefore, request the High Court to issue directions to the election petitioner of each petition to remove the defects within such time as it may allow and if they or any of them fail to do so, pass appropriate consequential orders in accordance with law."

37. The aforesaid view taken by me finds support from a subsequent decision of the Hon'ble Apex Court in the case of R.P. Moiduty vs. P.T. Kunju Mohammad . The said decision was rendered after considering the ratio of the decision in the case of F.A. Sapa (Supra). After considering the defect in the verification clause of the election petition which was more or less similar to the defect in verification of the pleadings in the case in hand, it was observed in paragraph 34 & 35 as under :

"34. The verification of the petition does not even satisfy the requirement of Order 6 Rule 15 CPC. The verification reads as under :

"VERIFICATION

I, R.P. Moidutty, s/o Abubakker Haji, aged 54, petitioner in the above election petition do hereby declare that the averments in paras 1 to 17 are true and made from personal knowledge and on the basis of personal enquiry I believe that all the averments made in paras 1 to 17 are true.

Signed and verified on this the 21st day of June, 1996.

sd/-
Petitioner"

38. All the averments made in paras 1 to 17 of the petition have been stated to be true to the personal knowledge of the petitioner and in the next breath the very same averments have been stated to be based on the information of the petitioner and believed by him to be true. The source of information is not disclosed. As observed by the Supreme Court in F.A. Sapa v. Singora, the object of requiring verification of an election petition is to clearly fix the responsibility for the averments and allegations in the petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts. However, the defect of verification is not fatal to the petition, it can be cured (see Murarka Radhey Shyam Rm Kumar v. Roop Singh Rathore and A.S. Subbaraj v. M. Muthiah). In the present case the defect in verification was pointed out by raising a plea in that regard in the written statement. The objection was pressed and pursued by arguing the same before the Court. However, the petitioner persisted in pursuing the petition without proper verification which the petitioner should not have been permitted to do. In our opinion, unless the defect in verification was rectified, the petition could not have been tried....."

39. After making the aforesaid observations that unless the defect in verification of the petition is not rectified it cannot go for trial, the Hon'ble Apex Court further observed that in the case where allegation of corrupt practice has been made and affidavit, as required by provisions of Section 83 of the Act, 1950, is not filed in the required form, the same could not have been enquired into and tried at all.

40. The same view has again been reiterated by the Hon'ble Apex Court in the latest decision in the case of P.A. Mohammad Riyas vs. M.K. Raghavan & others, (2012) 5 SCC 511 and holding that although Section 83 of the Act, 1950 has not been mentioned in sub-section (1) of

Section 86, in the absence of proper verification, it must be held that the provisions of Section 81 had also not been fulfilled and the cause of action for the election petition remained incomplete. In the said case before the Hon'ble Apex Court, although allegations of corrupt practice was made by the election petitioner against the returned candidate but the petition itself was not verified in the manner specified in Order VI Rule 15 of the Code as it was not accompanied by an affidavit as required by clause (4) of the said Rule. The argument advanced that since there was already an affidavit with respect to corrupt practice alleged in the petition as required by proviso to Section 83 (1) (c) of the Act, 1950 and filing of two separate affidavit; one under Order VI Rule 15(4) of the Code and other under the provisions of Section 83 (1) of the Act in respect of the same matter would render one of them otiose was rejected by the Hon'ble Apex court and it was held that the cause of action cannot be said to be complete in the absence of proper verification as contemplated in Section 83. The Hon'ble Apex Court held that the defect was curable but since opportunity to cure the defect was not availed, the judgment of the High Court dismissing the election petition was upheld and the appeal was dismissed. It may be relevant to quote the paragraph 46 & 47 of the reports, which reads as under :

"46. Mr. Venugopal's submission that, in any event, since the election petition was based entirely on allegations of corrupt practices, filing of two affidavits in respect of the selfsame matter, would render one of them redundant, is also not acceptable. As far as the decision in F.A. Sapa case is concerned, it has been clearly indicated that the petition, which did not strictly comply with the requirements of Section 83 of the 1951 Act, could not be said to be an election petition as contemplated in Section 81 and would attract dismissal under Section 86 (1) of the 1951 Act. On the other hand, the failure to comply with the proviso to Section 83 (1) of the Act rendered the election petition ineffective, as was held in Hardwari Lal case and the various other cases cited by Mr. P.P. Rao.

47. In our view, the objections taken by Mr. P. P. Rao must succeed, since in the absence of proper verification as contemplated in Section 83, it cannot be said that the cause of action was complete. The consequences of Section 86 of the 1951 Act came into play immediately in view of sub-section (1) which relates to trial of election petitions and provides that the High Court shall dismiss the election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the 1951 Act. Although Section 83 has not been mentioned in sub-section (1) of Section 81, in the absence of proper verification, it must be held that the provisions of Section 81 had also not been fulfilled and the cause of action for the election petition remained incomplete. The petitioner had the opportunity of curing the defect, but it chose not to do so."

41. Reference in this regard may also be made to another decision of the Hon'ble Apex Court in the case of Regu Mahesh v. Rajendra Pratap Bhanj Dev & another. In the said case, an application was filed by the returned candidate before the Election Tribunal under Order VI Rule 16 and under Order VII Rule 11 of the Code and Section 83 of the Act, 1950 praying for rejection of the election petition. One of the ground taken in the said application was that verification done did not confirm the requirements as laid down in the Statute. One of the reasons for dismissal of the election petition by the Tribunal was that

verification was extremely vague and it was not stated that what was the source of information, on which the pleadings were based and which part really was on the basis of personal knowledge and information was also not indicated. The Hon'ble Apex Court after noticing the provisions of Order VI Rule 15 of the Code observed that sub-rule (2) of Rule 15 prescribes, a person making a verification is required to specify by reference to the numbers of paragraphs of the pleadings what he believes on his own knowledge, and what he reveals upon information received and believed to be true. This, admittedly, was not done in the said case. After noticing the ratio of the decision of F.A. Sapa (Supra), H.D. Revana v. G. Puttaswamy Gowda and Vijay Laxmi Sadho (Dr) v. Jagdish in paragraph 12, 15 & 16, it has been held as under:

"12. It is, therefore, a settled position in law that defect in verification or an affidavit is curable. But further question is what happens when the defect is not cured. There is a gulf of difference between a curable defect and a defect continuing in the verification affidavit without any effort being made to cure the defect."

15. The case at hand has great similarity with the decision in R.P.Moidutty's case (supra). Not only defects in the verification/affidavit were pointed out, but they were pressed into service seeking dismissal of the election petition. The appellant stated in his reply that he was filing separate petition with permission for leave of the High Court for amending the verification. But that was not done and the appellant continued to stick to his stand that since corrupt practice was not alleged, there is no need for making any amendment. The importance of verification has been noted by this Court in several decisions. In Virendra Kumar Saklecha v. Jagjiwan and Ors., it was noted as under:

"The importance of setting out the source of information in affidavits came up for consideration before this Court from time to time. One of the earliest decisions is State of Bombay v Purushottam Jog Naik (AIR 1952 SC 317) where this Court endorsed the decision of the Calcutta High Court In Padmadbati Desi v. Rasik Lal Dhar (ILR) 37 Cal. 259) and held that the sources of information should be clearly disclosed. Again in Barium Chemicals Ltd. and Anr v. Company Lalw Board and Ors.. (AIR 1967 SC 295) this Court deprecated slip shod verifications in an affidavit and re-iterated the ruling of this Court in Bombay's case (supra) that verification should invariably be modeled on the lines of Order 19, Rule 3 of the Code 'Whether the Code applies in terms or not'. Again in A.K.K. Nambiar v. Union of India and Anr. (1969 (3) SCC 864), this Court said that the importance of verification is to test the genuineness and authenticity of allegations and also to make the deponent responsible for allegations. The real importance of setting out the sources of information at the time of the presentation of the petition is to give the other side notice of the contemporaneous evidence on which the election petition is based. That will give an opportunity to the other side to test the genuineness and veracity of the source of information. The other point of view is that the election petition will not be able to make any departure from the sources or grounds, if there is any embellishment of the case it will be discovered".

16. The Constitution Bench in State of Bombay v. Purushotham (AIR 1952 SC 317) noted as follows:

"The verification however states that everything was true to the best of his

information and belief. We point this out as slipshod verifications of this type might well in a given case lead to a rejection of the affidavit. Verification should invariably be modeled on the lines of Order 19, Rule 3 of the Civil Procedure Code, whether the Code applies in terms or not. And when the matter deposed to is not based on personal knowledge the source of information should be clearly disclosed. We draw attention to the remarks of Jenkins C.J. and Woodroffe, J, in Padmabati Dasi vs. Rasik Lal Dhar (37 Cal. 259) and endorse the learned Judges' observations". "

42. The law thus stand settled by the pronouncement of the Hon'ble Apex Court that in view of the provisions of Section 83 (1) (c) of the Act, 1950, an election petition is required to be verified in the manner as laid down in Order VI Rule 15 of the CPC for verification of the pleadings. Any such defect is curable. But in case the petitioner does not choose to remove the defect and persists in pursuing the petition without proper verification, such an election petition is liable to be dismissed at the threshold.

43. In the case in hand, as already noticed above, the verification clause of the election petition as well as schedule and annexures is not in accordance with the provision of Order VI Rule 15 and unless the defect in verification is rectified, the petition cannot be tried. Despite a specific objection in this regard having been pressed into service seeking dismissal of the election petition and the petitioner having contended that the defect is curable, neither any effort has been made to cure the defects nor any time has been sought for the said purpose. On the contrary, after the argument on this issue was over on 29.1.2015, hearing on issue no. 3 and 4 and the application under Order VI Rule 16 and Order VII Rule 11 continued till 31.10.2015 and also during the period the judgment was reserved, the petitioner neither made any effort to remove the defect in verification nor has made any prayer for grant of time for the purpose.

44. It is settled legal position by authoritative pronouncements that statutory requirement prescribed under the Statute relating to elections have to be strictly adhered and followed. Since election disputes are statutory proceedings unknown to common law and thus doctrine of equity does not apply to election disputes. All the technicalities prescribed under the Statute have been provided to safeguard the purity of election and the courts are under an obligation to enforce them with all rigours and not to dilute them. In view of above, on account of continuing defect in verification of the petition, the annexures and the schedule attached thereto, the petition cannot be said to be in compliance of provisions of Section 83 of the Act, 1950 and thus the cause of action remains incomplete, and the election petition is liable to be dismissed at the threshold and it is not necessary to enter into and examine the merits of other rival contentions advanced on behalf of contesting parties on two issues and applications."

(emphasis supplied)

16. The proviso to Section 83 (1) (c) of the Act requires a separate affidavit to be filed in Form 25 in support of each allegation of corrupt practice made in the election petition. Learned counsel for the respondent submits that in the instant case, the affidavit which has been filed is not at all in conformity with Form 25 referable to Rule 94-A of the Conduct of Election Rules, 1961.

17. Replying the aforesaid contention of the learned counsel for the respondent, learned counsel for the petitioner has submitted that verification of pleadings as mandated by CPC does not specifically bar the use of the word 'partly'. Further, in reply to Form 25, he submits that the Hon'ble Supreme Court in a line of judgements has already held that a defect in Form 25 is not fatal to the election petition and is curable in nature. He has placed reliance upon the judgment of the Apex Court in re; **Umesh Challiyill v. K.P. Rajendran**, (2008) 11 SCC 740, stating that election petition cannot be dismissed under Section 86 (1) of the Act at the outset on the ground of technical or cosmetic defects. He has also placed reliance upon the judgment of the Apex Court in re; **G.M. Siddeshwar v. Prasanna Kumar**, (2013) 4 SCC 776.

18. In addition to the aforesaid submissions, learned counsel for the respondent has also submitted that if there are defects in verification of pleadings and affidavits, on being pointed out, if the defects are refused to be cured, the election petition must fail and be dismissed in limine. Learned counsel has submitted that in the case of **V. Narayanaswamy (supra)**, the Apex Court in para-27 has observed as under:-

"27. ...It is not that the appellant did not have the opportunity to correct his mistake which he could have easily done in the rejoinder filed by him to the counter-affidavit of the respondent or even his reply to the miscellaneous application (OA No. 298 of 1998). ***He had every opportunity even at that stage to supply the material particulars which admittedly were lacking and also to amend the verification and to file the affidavit in the form prescribed but for reasons best known to him, he failed to do so. The existence of material facts, material particulars, correct verification and the affidavit are relevant and important when the petition is based on the allegation of corrupt practice and in the absence of those, the court has jurisdiction to dismiss the petition.*** *The High Court has undoubtedly the power to permit amendment of the petition for supply of better material particulars and also to require amendment of the verification and filing of the required affidavit but there is no duty cast on the High Court to direct suo motu the furnishing of better particulars and requiring amendment of the petition for the purpose of verification and filing of proper affidavit. In a matter of this kind the primary responsibility for furnishing full particulars of the alleged corrupt practices and to file a petition in full compliance with the provisions of law is on the petitioner. (See in this connection the Constitution Bench decision in Bhikaji Keshao Joshi v. Brijlal Nandlal Biyani [AIR 1955 SC 610 : (1955) 2 SCR 428] SCR at p. 144.)"*

19. Another judgment upon which reliance has been placed by the learned counsel for the respondent is **R.P. Moidutty** (supra), wherein the Apex Court has held in paragraph 35, which reads as under:-

"35. All the averments made in paras 1 to 17 of the petition have been stated to be true to the personal knowledge of the petitioner and in the next breath the very same averments have been stated to be based on the information of the petitioner and believed by him to be true. ***The source of information is not disclosed.*** *As observed by the Supreme Court in F.A. Sapa v. Singora [(1991) 3 SCC 375 : AIR*

1991 SC 1557] the object of requiring verification of an election petition is to clearly fix the responsibility for the averments and allegations in the petition on the person signing the verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts. However, the defect of verification is not fatal to the petition, it can be cured (see Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore [AIR 1964 SC 1545 : (1964) 3 SCR 573] and A.S. Subbaraj v. M. Muthiah [5 ELR 21]). ***In the present case the defect in verification was pointed out by raising a plea in that regard in the written statement. The objection was pressed and pursued by arguing the same before the Court. However, the petitioner persisted in pursuing the petition without proper verification which the petitioner should not have been permitted to do. In our opinion, unless the defect in verification was rectified, the petition could not have been tried.*** *For want of affidavit in the required form and also for lack of particulars, the allegations of corrupt practice could not have been enquired into and tried at all. In fact, the present one is a fit case where the petition should have been rejected at the threshold for non-compliance with the mandatory provisions of law as to pleadings."*

20. Learned counsel for the respondent has also placed reliance upon the judgments of the Apex Court in re; **P.A. Mohammed Riyas v. M.K. Raghavan and Others, (2012) 5 SCC 511 [Overruled for this point], Azhar Hussain vs Rajiv Gandhi, 1986 AIR 1253, F.A. Sapa and Others v. Singora and Others, (1991) 3 SCC 375 and C.P. John v. Babu M. Palissery and Others, (2014) 10 SCC 547.**

21. Dr. L.P. Misra, learned counsel for the respondent has stated that the objection against maintainability of election petition on the ground of defective verification was raised as back as on 01.08.2022 and despite lapse of more than a year such defects in the verification have not been removed or cured by the election petitioner. An opportunity to cure or remove the defects in verification was given to the election petitioner by this Hon'ble Court but as evident from the order dated 01.11.2022 passed by this Hon'ble Court/ Hon'ble Election Tribunal, the election petitioner declined to cure or remove the defects. The order dated 01.11.2022 is quoted below:-

Heard Dr. L.P. Misra, assisted by Sri Rajeiu Kumar Tripathi, learned counsel for the respondent on his application for rejection/ dismissal of the election petition.

Dr. L.P. Misra has taken grounds regarding maintainability of this election petition to contend that this election petition is not maintainable. He has submitted that the aforesaid application has been filed under Order VII Rule 11 of C.P.C.

Mohd. Altaf Mansoor, learned counsel for the petitioner has submitted that he shall not file any application seeking cure of the defect which has been pointed out by Dr. L.P. Misra. ....."

22. In reply to the aforesaid objections of the learned counsel for the respondent, learned counsel for the petitioner has submitted that the application for dismissal of the election petition is not duly supported by affidavit and the objections of election petition are supported by defective affidavit which was sworn prior to the preparation of the objections by the respondent which render the affidavit

invalid. Further, the Hon'ble Apex Court in re; **G.M. Siddeshwar v. Prasanna Kumar**, (2013) 4 SCC 776, has held that there should be substantial compliance with the statutory format, there is no reason to summarily dismiss an election petition on this ground. An opportunity should be given to the election petitioner to cure the defect. Notably, the election petitioner denied this opportunity stating that his affidavit is in compliance with the format. Similarily, in the case of **Saritha S. Nair** (supra), the Hon'ble Apex Court has relied upon the judgment in re; **Sardar Harcharan Singh Brar v. Sukh Darshan Singh, (2004) 11 SCC 196**, wherein the Apex Court held that an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83 (1) or Section 83 (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly "defective" affidavit, is required to be judged at the trial of an election petition but Section 86 (1) of the Act would not be attracted to such a case.

23. Learned counsel for the petitioner has stated that it is mandated by the Hon'ble Supreme Court that there should be full disclosure of the material facts by the contesting parties. The election petitioner has reiterated the following as grounds for election petition that (i) non – disclosure of criminal cases (Para 44 & 45); (ii) respondent did not disclose complete assets in the nomination paper; (iii) inconsistent educational qualification (Para 40); and (iv) inconsistent age in the nomination paper and other documents (1965 or 1979).

24. *Per contra,* Dr. L.P. Misra has stated that omission to state a single material fact would lead to an incomplete cause of action and an election petition without material facts relating to a corrupt practice is not an election petition at all and such omission would amount to non-compliance of the mandate of Section 83(1)(a) of the Act, which rendered the election petition ineffective.

25. In the case of **R.P. Moidutty v. P.T. Kunju Mohammad and Another**, (2000) 1 SCC 481, the Hon'ble Apex Court in para-17 has observed as under:-

"17. In Azhar Hussain v. Rajiv Gandhi, [1986 Supp SCC 315: (1986) 2 SCR 782] the corrupt practice alleged was referable to the returned candidate and as committed at the meetings organised during the election campaign. This Court held that dates and particulars of the meetings should be given so as to eliminate the possibility that witnesses could be procured later on for adducing evidence. In the context of the charge of corrupt practices referable to distribution of certain pamphlets, this Court held that the pleadings should have stated who had distributed the pamphlets when, where and to whom they were distributed and in whose presence. This Court further observed that no amount of evidence could cure the basic defect in the pleadings."

26. However, Mohd. Mansoor has submitted that the Criminal antecedents must be disclosed by candidate and published by the political parties. He placed reliance upon **Lok Pahari V. Election Commission of India and others** (2018) , **Brajesh Singh v. Sunil Arora** (2021) , **Nand Kishore Garg v. Jitendra Singh Tomar** (2020) and **Public Interest Foundation and others V. Union of India and Another** (2015) wherein the Apex

Court has held that non-disclosure of criminal antecendents etc. shall be considered as 'undue influence' and it shall render the final result of the returned candidate invalid.

27. Mohd. Altaf Mansoor has stated that Section 86 of the Representative of People Act provides for summary dismissal of election petitions in three eventualities i.e. non-compliance of Sections 81, 82 & 117 of the Act and it cannot be summarily dismissed for non-compliance of Section 83 of the Act.

28. Mohd. Mansoor, learned counsel for the petitioner has also submitted that the respondent has alleged that the verification of the election petition is defective as the election petitioner has verified certain paragraphs partly on the basis of personal knowledge while partly on the basis of record or partly on the basis of legal advice. Replying the aforesaid contention, Mohd. Mansoor has stated that defects pertaining to verification would fall under the domain of Section 83 (1)(c) of the Act. He has further submitted that an Election Petition cannot be dismissed for violation of Section 83 as such an eventuality is not covered under Section 86 of the Act. Further, a dismissal under Order 7 Rule XI can also not be effectuated as the scope of dismissal under Order 7 Rule XI is limited to sub-Rule (a) read with Section 83(1)(a) of the Act.

29. Further, the object of verifying pleadings is to allow the respondent to know the source of the averments made in a plaint. In the instant matter, the respondent has not filed any written statement and therefore it cannot be said that any prejudice has been caused to him due to an alleged defective verification.

30. Mohd. Mansoor has also submitted that defect under Section 83(1)(c) of the Act is not fatal to the Election Petition as it is not a ground for dismissal under Section 86 or Order 7 Rule XI (a). This position has been accepted by the Apex Court in a line of judgments such as **Sardar Harcharan Singh Brar v. Sukh Darshan Singh and Ors.; (2004) 11 SCC 196, G. Mallikarjunappa and another v. Shamanur Shiv Ashankarappa and ors.; (2001) 4 SCC 428 and Ponnala Lakshmaiah v. Kommuri Pratap Reddy and others; (2012) 7 SCC 788** and has culminated in the larger Bench decision of the Hon'ble Supreme Court in the case of **G.M. Siddeshwar v. Prasanna Kumar; (2013) 4 SCC 776**, which has settled this position of law.

31. Mohd. Mansoor, learned counsel for the petitioner has further submitted that the defect in Form-26 are not a ground for challenge under the provisions of the RP Act and, the Election Petition is barred by estoppel as no objections were raised at the stage of scrutiny regarding defects in Form-26.

32. Mohd. Altaf Mansoor, learned counsel for the petitioner has lastly submitted that the respondent has raised objection to the format of Form-25 filed along with the instant election petition alleging that it is not as per format of the 1961 Rules. In the case of ***G.M. Siddeshwar Vs. Prasanna Kumar; (2013) 4 SCC 776***, a reference was made to a larger Bench of the Hon'ble Supreme Court regarding the requirement of an affidavit in Form-25 along with the requirement of an affidavit under Order 6 Rule XV (4) of the CPC. The Hon'ble Supreme Court held that the amendment of Order 6 Rule XV of CPC cannot be read into the R.P. Act. The Hon'ble Supreme

Court while considering the issue laid down doctrine of substantial compliance has held that as long as the averments made in the election petition were on oath and the allegations vis-a-vis corrupt practice were on oath, the format of the affidavit cannot come in the way and cannot lead to a summary dismissal of the election petition. The Hon'ble Supreme Court while laying down the doctrine of substantial compliance also held that there is no requirement of filing two affidavits and even if one composite affidavit is filed along with election petition, the same would be enough. The Hon'ble Supreme Court relied on the doctrine of substantial compliance while holding that the requirement of filing an affidavit is to hold down the election petitioner to his words in case of allegations of corrupt practice so that he may not shy away from the same during the trial. It is substance of the affidavit that has to be seen by the Hon'ble Court and not the format. In the present petition, the election petitioner has filed two affidavits, one in Format-25 while the other as per the format of Chaptr 4 of the Allahabad High Court Rules. Therefore, it cannot be said that the election petitioner at any stage would shy away from the averments made in the election petition itself. The stand taken by the Hon'ble Supreme Court in the case of ***G.M. Siddeshwar*** (supra) is also reflected in a line of judgments such as ***Sardar Harcharan Singh Brar Vs. Sukh Darshan Singh and Ors (2004) 11 SCC 196 [para-14-15), G.Mallikarjunappa and another Vs. Shamanur Shiv Ashankarappa and Ors. (2001) 4 SCC 428 (paras-1, 7) and Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and others (2012) 7 SCC 788 (paras, 1, 20-22, 26, 28-31).***

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

34. Though Mohd. Altaf Mansoor has argued so many points which not only touch the points of maintainability but the merits of the election petition also, yet, to me, the main question at this stage would be as to whether the High Court can dismiss the election petition, which does not comply with the provisions of Sections 81 or Section 82 or Section 117 of the Act in view of the provisions of Section 86 of the Act or the election petition can be dismissed if the compliance of Section 83 of the Act has not been done in its letter and spirit.

35. Considering the aforesaid arguments, as per my considered opinion, if this question is decided against the election petitioner then there would be no need to go into the merits of the issue inasmuch as the merits of the issue can only be appreciated when the objections against the maintainability of petition so raised by the resplendent are rejected. Not only the above, when the aforesaid objections are to be decided first, there is no substance on the arguments of Mohd. Altaf Mansoor that written statement has yet not been filed by the respondent as it would be seen at the time of appreciation of election petition on merits.

36. This has been admitted at the Bar that so as to answer the aforesaid question, the Apex Court in re; **G.M. Siddeshwar** (supra) has given an exhaustive guidelines and the aforesaid judgment is still holding the field and the same has consistently been followed by the Apex Court and by the other High Courts of the country till date.

37. In para-2 in re; **G.M. Siddeshwar** (supra), the Apex Court has held that if there is any defect in the contents of the election petition, an opportunity must be given to the election petitioner to cure the defects. Para-2 of the aforesaid judgment reads as under:-

"2. Another question that has arisen is that if an affidavit filed in support of the allegations of corrupt practices of a returned candidate is not in the statutory Form 25 prescribed by the Conduct of Elections Rules, 1961, whether the election petition is liable to be summarily dismissed. In our opinion, as long as there is substantial compliance with the statutory form, there is no reason to summarily dismiss an election petition on this ground. However, an opportunity must be given to the election petitioner to cure the defect. Further, merely because the affidavit may be defective, it cannot be said that the petition filed is not an election petition as understood by the Representation of the People Act, 1951."

[Emphasis supplied]

38. The Apex Court has clearly held that Section 86 of the Act makes no reference to Section 83 thereof and so, prima facie, an election petition cannot be summarily dismissed under Section 86 of the Act for non-compliance with the provisions of Section 83 thereof but if the affidavit has not been filed properly or the verification thereof is defective, then the election petitioner may be given opportunity to cure the defect, as such defect cannot be held fatal to the maintainability of the election petition. Paras 37, 39, 52 & 62 of the judgment in re; **G.M. Siddeshwar** (supra) read as under:-

"37. A perusal of the affidavit furnished by Prasanna Kumar ex facie indicates that it was not in absolute compliance with the format affidavit. However, we endorse the view of the High Court that on a perusal of the affidavit, undoubtedly there was substantial compliance with the prescribed format. It is correct that the verification was also defective, but the defect is curable and cannot be held fatal to the maintainability of the election petition.

39. Undoubtedly, Section 86 of the Act makes no reference to Section 83 thereof and so, prima facie, an election petition cannot be summarily dismissed under Section 86 of the Act for non-compliance with the provisions of Section 83 thereof. This was briefly adverted to in Hardwari Lal v. Kanwal Singh [Hardwari Lal v. Kanwal Singh, (1972) 1 SCC 214] but that was in the context of dismissal of the election petition under the provisions of CPC. The contention urged in Hardwari Lal [Hardwari Lal v. Kanwal Singh, (1972) 1 SCC 214] was to the effect that since Section 83 of the Act does not find a mention in Section 86 thereof, an election petition could not be summarily dismissed for non-compliance with Section 83. A three-Judge Bench of this Court held that since an election petition is required to be tried as nearly as possible in accordance with the procedure applicable under CPC to the trial of suits, an election petition could nevertheless be dismissed if it did not disclose a cause of action.

52. The principles emerging from these decisions are that although non-compliance with the provisions of Section 83 of the Act is a curable defect, yet there must be substantial compliance with the provisions thereof. However, if there is total and complete non-compliance with the provisions of Section 83 of the Act, then the petition cannot be described as an election petition and may be dismissed at the threshold.

62. Applying these principles to the facts of the present case, it seems quite clear that the affidavit filed by Prasanna Kumar in compliance with the requirements of the proviso to Section 83(1) of the Act was not an integral part of the election petition, and no such case was set up. It also seems quite clear that the affidavit was in substantial compliance with the requirements of the law. Therefore, the High Court was quite right in coming to the conclusion that the affidavit not being in the prescribed format of Form 25 and with a defective verification were curable defects and that an opportunity ought to be granted to Prasanna Kumar to cure the defects."

[Emphasis supplied]

39. It would be pertinent to indicate here that on 01.11.2022, learned counsel for the respondent has pointed out the apparent and feasible defects in the election petition by submitting that such election petition has not been filed in compliance of Section 83 of the Act but submitted that those defects are curable in nature, therefore, the election petitioner may be given an opportunity to cure such defects by filing any appropriate application. However, learned counsel for the election petitioner has stated that he shall not be filing any application seeking cure of the defects, which have been pointed out by the learned counsel for the respondent. The aforesaid fact has been considered by this Court in its order dated 01.11.2022.

40. Therefore, at least, it is clear that some defects were pointed out by the learned counsel for the respondent and those defects have been elaborated in the application/objections filed by the learned counsel for the respondent against the maintainability of the present election petition but learned counsel for the election petitioner refused to file any application seeking cure of those defects. So, it will have to be seen as to whether those defects are fatal to the maintainability of the election petition inasmuch as the Apex Court in re; **G.M. Siddeshwar** (supra) has held that although non-compliance with the provisions of Section 83 of the Act is curable defects, yet there must be substantial compliance therewith and if there is total and complete non-compliance with the provisions of Section 83 of the Act, the petition cannot be described as an election petition and may be dismissed at the threshold.

41. It would be pertinent to reproduce the affidavit filed by the petitioner in support of the election petition, which reads as under:-

"AFFIDAVIT IN SUPPORT OF ELECTION PETITION

(In support of pleadings of the Election Petition as required under Order VI Rule 15(4) of The Code of Civil Procedure r/w Chapter XV-A of the Allahabad High Court Rules, 1952)

1, Mohhamad Aslam @ Mohhamad Aslam Raeeni, aged about 58 years, son of Mohammad Jahoor, resident of Village - Poore Khairi, Post Office Bhinga, District - Shrawasti, permanent resident of Keshav Nagar, Bhinga Dehat, Bhinga, District - Shrawasti, Religion - Muslim, Qualification - LL.B., Profession - Business, do hereby solemnly affirm and state on oath as under:-

1. That the deponent is the sole petitioner himself who is challenging the election of the returned candidate/ respondent and is fully conversant with the

facts and circumstances of the case and, as such, fully competent to swear this affidavit.;

2. That the contents of the accompanying election petition under Section 80, 80-A/81 of the Representation of People Act, 1951 and paras 5, 6 (partly), 7 (partly), 8 (partly), 9, 10 (partly), 11 (partly), 12 (partly), 13 (partly), 15, 16, 17 (partly), 18 (partly), 19 (partly), 20 (partly), 21, 22 (partly), 23 (partly), 24 (partly), 25, 26, 27 (partly), 28, 29, 30 (partly), 31 (partly), 36 (partly), 38 (partly), 39 (partly), 40 (partly), 41 (partly), 42 (partly), 43 (partly), 44 (partly), 45 (partly), 46 (partly), 47 (partly), 48 (partly), 49 (partly), 50 (partly), 51 (partly), 52 (partly), 53 (partly), 54 (partly), 55 (partly), 56 (partly), 57 (partly), 58 (partly), 59, 60 (partly), 61 & 62 of this election petition are true to my personal knowledge that those of paras 1, 2, 3, 4, 5, 6 (partly), 7 (partly), 8 (partly), 10 (partly), 12 (partly), 17 (partly), 18 (partly), 19 (partly), 20 (partly), 22 (partly), 24 (partly), 27 (partly), 30 (partly), 36 (partly), 37, 38 (partly), 40 (partly), 41 (partly), 42 (partly), 44 (partly), 45 (partly), 49 (partly), 50 (partly), 51 (partly), 52 (partly), 53 (partly), 54 (partly) & 60 (partly) of this election petition are true and based on the records received and believed to be true and paras 6 (partly), 11 (partly), 13 (partly), 14, 23 (partly), 32, 33, 34, 35, 43 (partly), 50 (partly), 56 (partly), 57 (partly) & 58 (partly) of this election petition are based on legal advice and believed to be true and all paras and pleadings are verified.

3. That the Schedule No. 1 to 17 are filed along with accompanying election petition are photocopies of their respective originals, which I believe to be true copies.

Place; Lucknow

Sd/-

Date: 18.04.2022 Deponent

<u>Verification</u>

I, the deponent above-named do hereby verify that the contents of paras 1 to 3 of this affidavit is true to my knowledge and no part of it is false and nothing material has been concealed in it, so help me God.

Place; Lucknow

Sd/-

Date: 18.04.2022 Deponent"

42. It would be pertinent to reproduce the affidavit of the election petitioner filed in Form-25 in terms of Section 83 (1) of the Act, which reads as under:-

"AFFIDAVIT IN FORM 25 IN TERMS OF SECTION 83(1) OF THE REPRESENTATION OF PEOPLE ACT, 1951 READ WITH RULE 94A OF THE CONDUCT OF ELECTION RULES, 1961.

I, Mohhamad Aslam @ Mohhamad Aslam Raeeni the petitioner in the accompanying election petition calling in question the election of Shri Ram Feran @ Ram Feran Pandey (sole respondent in the said petition) make solemn affirmation/oath and say-

(a) that the statements made in paragraphs 14 (D) of the accompanying election petition about the commission of the corrupt practice of Undue Influence and the particulars of such corrupt practice mentioned in paragraphs 49, 50, 51, 52 of the same petition and in paragraphs....N/A... of the Schedule annexed thereto are true to my knowledge;

(b) that the statements made in paragraphs 14 (D) of the said petition about the commission of the corrupt practice of Undue Influence and the particulars of such corrupt practice given

in paragraphs 49, 50, 51, 52 of the said petition and in paragraphs .....N/A..... of the Schedule annexed thereto are true to my information;

Signature of deponent
(Mohhamad Aslam @ Mohhamad Aslam Raeeni)"

43. As it has already been considered while perusing Section 83 of the Act that an election petition shall contain a concise statement of material fact on which the petitioner relies. It shall set-forth full particulars of any corrupt practice that the petitioner alleges including as full statement as possible in the names of parties alleged to have committed such corrupt practice and the date and place of commission of each such corrupt practice. It shall be singed by the petitioner and verified in the manner laid down in the C.P.C. for the verification of pleadings. It shall also be provided in the Section that where the petitioner has alleged the corrupt practice, the petition shall also be accompanied by an affidavit in a prescribed Form in support of the allegation of such corrupt practice and particulars thereof.

44. The law is trite on the point that the purpose and object of verification by specifying numbered paragraphs as to which of them are verified to be true on the basis of 'personal knowledge' or which are believed to be true on the basis of 'information from other source or sources' and which of them are believed to be true on the basis of 'legal advice' and so on, so as to enable the other side to submit the reply of those statements effectively. In absence of such specified verification, no effective reply can be given by the other side.

45. While perusing the aforesaid affidavits and its verification, it is clear that there are some paras of affidavits, which are partly true to the 'personal knowledge' of the deponent and at the same time, those paragraphs are partly true on the basis of 'records' and also those paragraphs are partly true on the basis of 'legal advice'. Further, since the corrupt practice has been made ground to challenge the election of the respondent, as such, as per clear mandate provided under the proviso to Section 83 of the Act, the election petitioner was obliged to file an affidavit in the prescribed Form in support of allegations of such corrupt practice and particulars of such corrupt practice.

46. Rule 94-A of the Conduct of Elections Rules, 1961 provides Form 25 upon which the affidavit is to be sworn and filed by the election petitioner. Perusal of Form-25 shows that paragraphs (a) & (b) are having similar contents which do not segregate to which paragraphs are affirmed/verified to be true to 'personal knowledge' and as to which paragraph affirmed/verified to be true to the 'information of the election petitioner' and such mandatory requirement, as stated above, has not been complied with by the election petitioner. Therefore, it is clear that the election petition has been filed without proper verification and without the affidavit as required under the C.P.C. and Rules 11 & 12 of Chapter IV of the Allahabad High Court Rules as well as affidavit in Form-25. This Court in re; **Amit Yadav** (supra), after considering more or less similar and identical defects has observed that unless the defects in verification of the petition are not rectified, the issue cannot go for trial. Accordingly, the election petition so filed by Sri Amit Yadav was dismissed vide order dated 12.02.2016 (supra). This Court

in re; **Amit Yadav** (supra) has held that on account of continuous defects in verification of the petition, the annexures and the scheduled attached thereto, the petition cannot be said to be in compliance of the provisions of Section 83 of the Act and thus, the cause of action remains incomplete and the election petition is liable to be dismissed at the threshold.

47. Though, learned counsel for the election petitioner has argued that the returned candidate/respondent hereto has not disclosed his criminal antecedents strictly in accordance with law while filling up his nomination paper and has also tried to demonstrate some more contents but all those arguments, material, submissions and contents may be seen if the election petition is tried on merits but when it is clear that the election petition cannot be said to be in compliance of the provisions of Section 83 of the Act and the cause of action remains incomplete, the election petition is liable to be dismissed at the threshold and it is not necessary to enter into and examine the merits of other rival contentions advanced on behalf of the election petitioner.

48. In any election petition, there are two stages; first is to verify as to whether the election petition has been filed properly, to be more precise, strictly following the provisions of Section 81 or 82 or 117 of the Act and without ignoring the requirements of Section 83 of the Act read with relevant provisions of C.P.C. and the cause of action should be clear and complete. It is trite that if any election petition does not succeed on this first part, it cannot be sent for its trial on merits. At the same time, the second stage would be if the election petition has been filed in compliance of aforesaid provisions of the Act and the cause of action is complete, then it will qualify to the next stage i.e. the complete trial of election petition on merits. If the election petition fails on its first stage, though there are some arguments of election petitioner to the effect that the returned candidate/respondent of the petition has not furnished his/ her complete detail and has not furnished his/her complete criminal antecedents, yet those submissions may not be tested on merits. In other words, to me, to try any election petition on merits, such election petition will have to qualify the first test, as observed above.

49. In view of the facts and circumstances of the instant case, I am of the considered opinion that this election petition does not qualify the first stage inasmuch as the election petition has not been filed making compliance of the provisions of Section 83 of the Act and the cause of action is incomplete. Therefore, it cannot go for trial and also it is not necessary to enter into and examine the merits of other rival contentions advanced by the learned counsel for the election petitioner.

50. Accordingly, the application for rejection/dismissal of the present election petition filed on behalf of the respondent is allowed and the instant election petition is **dismissed.**

(2024) 1 ILRA 438
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Election Petition No. 10 of 2022

Prashant Kumar Singh ...Petitioner
Versus
Hakim Lal ...Respondent

Counsel for the Petitioner:
In Person, Sri Mithilesh Kumar Rai, Sri Prashant Kumar Singh (In Person), Sri Vijay Kumar Singh, Sri Manish Goyal (Sr. Advocate), Sri Ravi Shankar Prasad (Sr. Advocate)

Counsel for the Respondent:
Sri Narendra Kumar Pandey, Sri Piyush Shukla, Ms. Divya, Sri Manish Kesarwani

(A) Election - The Representation of People Act, 1951- Section 23 - Returning officer to include assistant returning officers performing the functions of the returning officer, Section 33 - Presentation of nomination paper and requirement for a valid nomination , Section 81 - Presentation of petitions, Section 82 - Parties to the petition, Section 83 - Contents of petition , Section 86 - Trial of election petitions , Section 100 - Grounds for declaring election to be void, Section 117 - Security for costs , Section 123 - Corrupt practices, Section 125 - Promoting enmity between classes in connection with election, The Code of Civil Procedure, 1908 - Order VI Rule 14 - Pleading to be signed, Order VI Rule 16 - Striking out pleadings , Order VII rule 11(a) - Rejection of plaint where it does not disclose cause of action , Conduct of Election Rules, 1961 - Rule 4 - Nomination paper , Rule 4A - Form of affidavit to be filed at the time of delivering nomination paper , The Constitution of India, 1950 - Article 173 - Qualification for membership of the State legislature , Article 225 - Jurisdiction of existing High court , The High Court Rules, 1952 - chapter XV-A - Special Provisions relating to the trial of election petition , definition clause or Rule 2 , Rule 3 - Presentation of election petition - When a petition is filed to question the election of a returned candidate, all election laws must be interpreted strictly, and the petition must fit within relevant law provisions.(Para -56)

(B) Election - The Representation of People Act, 1951- provisions of the statute dealing with election laws that provided statutory remedy, must be strictly construed - any fraudulent practise if taken as a ground and does not give a concise material fact statement leading two equal inferences, then pleadings deserve to be dismissed - an election petition in which corrupt practise is alleged stands on a different footing from election petition which does not to carry such allegation - provisions as contained Section 83 to be mandatory and if election petition is not presented in that form then it deserves to be dismissed.(Para - 35,43)

(C) Word of phrases - distinction between facta probanda (the facts required to be proved i.e. material facts) and facta probantia (the facts by means of which they are proved i.e. particulars or evidence) - pleadings must contain only facta probanda and not facta probantia.(Para -36)

(D) Word of phrases - distinction between "material facts" and "particulars" - must not be overlooked - "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence - "Particulars", on the other hand, are details in support of material facts pleaded by the party.(Para - 54)

(E) Election - The Representation of People Act, 1951- Section 83(1)(a) - Election petition shall contain a concise statement of material facts on which petitioner relies, and which facts constitute a cause of action - Omission of a singular fact would lead to incomplete cause of action.(Para - 69)

Petition challenges election of returned candidate - for allegations of corrupt practices that led to his victory. **(Para - 9)**

HELD: - Election petition lacks concise material facts and material particulars required under Section 83 (1)(a),(b). Nomination form and affidavit are integral parts of the petition but not filed. Averments are vague and confusing, and the cause of action is not disclosed. Therefore, miscellaneous applications filed under Section

86(1) of the R.P. Act, 1951 and Order VII Rule 11(a) of the CPC are allowed. **(Para -76)**

Election Petition dismissed. (E-7)

List of Cases cited:

1. M. Karunanidhi Vs H.V. Handa & ors., AIR 1983 SC 558

2. U.S. Sasidharan Vs K. Karunakaran & anr., AIR 1990 SC 924

3. Mulayam Singh Yadav Vs Dharampal Yadav & ors., (2001) 7 SCC 98

4. Ram Sukh Vs Dinesh Aggarwal, (2009) 10 SCC 541

5. V. Narayanaswamy Vs C.P. Thirunavukkarasu, (2000) 2 SCC 294

6. Mayar (H.K.) Ltd. & ors. Vs Owners & Parties, Vessel M.V. Fortune Express & ors. (2006) 3 SCC 100

7. U. S. Sashidharan Vs. K. Karunakaran & anr. , AIR 1990 SC Page 424

8. Kanomizhi Karunanidhi Vs A. Santhana Kumar & ors. passed in S.L.P. (C) No. 28241 of 2019

9. A . Manju Vs Prajwal Revanna @ Prajwal R & ors., (2022) 3 SCC 269

10. Kantaru Rajeevaru (Sabarimala Temple Review-5J.) Vs I.Y.L.A. through Its General Secy. & ors. (2020) 2 SCC 1

11. U.O.I. Vs A .D.R. & anr. , (2002) 5 SCC 294

12. Spencer & Co. Ltd. & anr. Vs Vishwadarshan Distributors Pvt. Ltd. & ors. (1995) 1SCC 259

13. Satish Ukey Vs Devndra Gangadharrao Fadnavis & anr. (2019) 9 SCC 1

14. Madiraj Venkata Ramana Raju Vs Peddireddigari Ramachandra Reddu & ors., AIR 2018 SC 3012

15. Adesh Tyagi Vs Mahesh Sharma , 2020 SCC Online All 589

16. FA Sapa Vs Singoria ,1991 SCC 375

17. Daulatram Chauhan Vs Anand Sharma ,(1984) 2 SCC 64

18. Virendra Nath Gautam Vs Satpal Singh & ors., (2007) 3 SCC 617

19. Sahodrabai Rai Vs Ram Singh Aharwar ,(1968)3 SCR 13 (AIR 1968 SC 1)

20. K. M. Mani Vs P. J. Antony & ors., 1979 2 SCC 221

21. M.R.S.R. Kumar Vs R.S. Rathore, AIR 1964 SC 1545

22. Adesh Tyagi Vs Mahesh Sharma ,(2020) SCC Online All 589

23. T. M. Jacob Vs C. Poulose & ors., (1999) 4 SCC 274

24. Harkirat Singh Vs Amrinder Singh ,(2005) 13 SCC 511

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

1. Heard Sri Narendra Kumar Pandey, learned counsel for the respondent-returned candidate, namely, Hakim Lal.

2. The election petition questions election to the constituency 58 Handia, district of Prayagraj for the U.P. State legislative assembly. The returned candidate Mr. Hakim Lal has moved application to reject election petitioner under Section 86(1) of the Representation of People Act, 1951 (for short R.P. Act) and also under rule 11(a) of Order VII of CPC. There is another misc. application under Order VI Rule 16 CPC.

3. The election petition questions the election of returned candidate Mr. Hakim

Lal for corrupt practise at his end that led to his victory.

4. It was submitted by learned counsel appearing for the returned candidate that petitioner was eligible to contest the election of the legislative assembly of the State and earned no disqualification either under the R.P. Act,1951 or under the Constitution of India vide its Article 173. It was further submitted that affidavit that contained necessary information on a printed format prescribed for under Rule 4-a read with Section 33 of the R.P. Act, 1951, is meant for display both on the conspicuous place by returning officer, inasmuch as, uploaded on the official website of the State Election Officer. He submitted that such an information continues to be available on the official website and anybody can have easy access to the same. It was also argued that political parties are also required to publish such information regarding their respective candidates and, therefore, every information is made available in the public domain before the election is held and so nobody can be mislead as to credentials of a candidate in public election.

5. He submitted that Section 83(1) provided for an election petition to contain concise statement of material facts upon which petitioner relies and then to set-forth the material particulars of any corrupt practise that is alleged by the petitioner indicating the name of parties who committed such corrupt practise, then date and place of commission of such practise, the petition to be verified and signed by the petitioner and then proviso to Section 83(1), further required election petitioner to file an affidavit to accompany the election petition in a prescribed format in support of allegations of such corrupt practise and particulars thereof.

6. It was argued that subsection 2 of Section 83 provided that schedule or annexure appended to the petition shall also be signed by the petitioner and in the event if any of these were found to be lacking in an election petition it would deserve dismissal. He submitted that since affidavit was available in the public domain, it ought to have been filed in support of the pleadings, that would have clarified the allegations made as the pleadings, according to him, raised in the relevant paragraphs were quite vague. He also argued that since manner in which pleadings had been raised appeared to be frivolous and vexatious for want of specific and concise statement as to the corrupt practise and the Court even might strike down such pleadings.

7. Now to examine the pleadings as to ground no. 8-a and the pleadings in respect thereof made in paragraph 10 of the election petition, learned Advocate took the Court to the affidavit accompanying election petition as required as per proviso to Section 83-1 of the R.P. Act 1951.

8. Arguing in support of miscellaneous applications Sri Pandey submitted that election petition on the ground that nomination paper and affidavit on form 26 were not properly filled as per Section 33 and 33-A of the R.P.Act, itself was not maintainable for the reason that no such nomination form as filed under Section 33 nor, form 26 accompanied it. He submitted that Section 33 of the R.P. Act, 1951 referred to nomination paper to be completed and filled on prescribed format. The form was prescribed under Rule 4 of

the 1961 Rules and nomination paper was given as form 2-b. He submitted that prior to the Amending Act no. 72 of 2002 whereby Section 33-A was inserted after Section 33, further rule 4-a came to be inserted after Rule 4 under Rules 1961 and then part III-A also came to be added. He submitted that form 26 was altogether a different form prescribed for under Rule 4-a read with Section 33-A and the column that were referred to in part 'a' and part 'b' of that form had nothing to do with Section 33. In so far as information furnished by the candidate in form 26 was concerned, it was submitted that there was description of criminal antecedents. He submitted that ground though talked of criminal antecedents not having been disclosed, but this ground has not been developed in pleadings to be a "*concise statement of material facts*" and "*full particulars of corrupt practise*" so as to maintain election petition under Section 81 of the R.P. Act, 1951. It was submitted that the ground was that description of criminal antecedents had resulted in unduly influencing the voter in casting their votes in favour of the returned candidate being quite vague and misleading.

9. It was submitted that in paragraph 10, it was stated that 'part- a column 5', dealt with information of pending criminal cases and while in 5-i, the candidate had put mark "(√)". He had to argue further in detail the pending criminal case in column 5 ii and then later on it was stated in paragraph 10 that petitioner instead of referring to any first information report with details of criminal case number or year of complaint case number had merely referred to range case number and this according to the election petitioner was enough to misguide and mislead the voters inasmuch as information so far furnished was also fake one.

10. It was further submitted that statement in paragraphs were to the effect that in absence of first information report number, case number, or year number, there was no possibility to trace out the details of the case and resultantly no verification could have been done and so likewise since no registration of the case number was disclosed in column 5-ii, he found on verification from the court of ACJM-5, Prayagraj that at that time no such case was pending in the court's record diary. Thus even this fact was quite misleading, likewise other informations furnished in other sub columns of the column 5 had been claimed to be misleading.

11. Learned counsel for the returned candidate submitted that furnishing of information as zero in column 11(v) of part- b was not wrong as declaration was made by the respondent himself that three criminal cases were pending. Learned counsel for the returned candidate, therefore argued that then in the first instance if there was no pending case in the court of ACJM as is claimed by election petitioner as per verification obtained by him, mentioning of zero in respect of any criminal case would certainly not be misleading. He further submitted that if range case has been referred to in column 5-ii ka, it is because there was no first information report lodged as such by any private person but it was forest department which would register a as case referred to as a range case relating to a particular forest range.

12. Besides above, he argued that no details had been given regarding particular case number or regarding any particular

incident that election petitioner had the knowledge or regarding which he acquired the knowledge so as to suggest by way of pleading that information furnished by the petitioner was misleading and that had caused undue influence upon the voters in their free exercise of franchise in an open general election.

13. Thus, it is submitted that since paragraphs that are in support of ground no. 8-A do not contain the material particulars so as to hold there to be any specific material fact and contents of paragraph are quite vague also and so it can be safely concluded that allegations do not meet parameters of clauses a and b of sub section 1 of Section 83 of the Act, 1951.

14. On affidavit accompanying the election petition, counsel for the respondent submits that proviso to sub section 1 of Section 83, requires an affidavit of corrupt practice but the affidavit only refers to certain criminal antecedents and non closure of movable or immovable properties only and there is no reference to any 'corrupt practice' as such as has come to be referred to under section 23 of the R.P. Act, 1951. So affidavit itself is not sufficient to meet requirement of law. He would take this argument further by submitting that affidavit has been sworn on personal knowledge.

15. In so far as paragraph 10 to 19 are concerned it was submitted that what was personal knowledge about non disclosure or concealment of material fact has not been detailed out. It was submitted that personal knowledge of given case can be had so as to make a substantive allegation in support of the ground raised in the petition but that personal knowledge must be specific and concise so as to refer to a particular criminal case or criminal antecedent. It was argued that in order to support this personal knowledge, the affidavit ought to have formed part of the election petition or the affidavit as required under proviso to sub section 1 and 2 of Section 83 of the Act, 1951 but that had not been done. It was submitted, therefore, that affidavit being defective not supporting the election petition as such regarding corrupt practise, grounds taken as 8A, 8B of the election petition, the petition deserved to be dismissed.

16. It is argued that criminal antecedents or declaration of criminal antecedents by itself would not be a corrupt practise within definition as given thereof under section 123 of the Representation of People Act, 1951.

17. Summarizing the argument, following points have been pressed regarding undue influence in which grounds have been raised as ground nos. 8-A and 8-B, 8C and 8D.

i). the pleadings raised in paragraph 10 and 11 in support thereof do not contain concise statement as to the material fact that may have resulted into corrupt practise of undue influence;

ii). since allegations raised in the ground supported by pleadings vide paragraph 10 and 11 of the election petition referred to form 26 and the averments are based on personal knowledge, the said form being the basis of the information disclosed and/ or not disclosed so as to suggest suppression of material information, ought to have been annexed alongwith election petition as it also forms integral part as per sub section 2 of Section 83 and in absence of this material in support of pleadings based upon this document, election petition

was liable to be rendered is incomplete and having been supplied so also to the defendant respondent as per Section 81(3) of the R.P. Act, 1951.

iii). The objection which has been raised for non compliance of proviso to Section 83(1) of the Act, 1951 as it ought to have expressly referred to corrupt practise as defined under Section 123 of the R.P. Act, 1951 and mere words and expression suppression of material information, would not by itself be a corrupt practise inasmuch as swearing of the paragraph nos. 1,2,3,4,5 and 6 is the nature without specifying as to which part of it is based on personal knowledge and which part is based on information and so is liable to be rendered vague not within the meaning of proviso to Section 83(1) of the Representation of People Act, 1951. Such details therefore would not be sufficient within the meaning of Section 83(i)(b) of the Act, 1951.

iv). There is no disclosure of the names of the person agents or representatives from whom information has been received qua corrupt practise and, therefore, allegations are vague in the affidavit. Taking the entire pleadings together and grounds raised the averments to not lead to constitute a cause of action for vagueness and the nomination papers were wrongly and illegally accepted by the Election Officer.

18. Yet another argument has been advanced that parties relying upon the documents in support of the pleadings raised ought to have filed the same alongwith election petition, it being integral part, as per Section Section 81(i)(3) of the Representation of the People Act, 1951.

19. In support of arguments advanced by learned learned Advocate Mr. N.K.Pandey and authorities relied upon are **M. Karunanidhi v. H.V. Handa and Others, AIR 1983 SC 558, U.S. Sasidharan v. K. Karunakaran and Another, AIR 1990 SC 924, Mulayam Singh Yadav v. Dharampal Yadav and Others, (2001) 7 SCC 98, Ram Sukh v. Dinesh Aggarwal (2009) 10 SCC 541, V. Narayanaswamy v. C.P. Thirunavukkarasu (2000) 2 SCC 294 and Mayar (H.K.) Ltd. And Others v. Owners and Parties, Vessel M.V. Fortune Express and Others (2006) 3 SCC 100.**

20. Meeting the argument, learned Senior Advocate Mr. Prasad appearing for the election petitioner has argued that petition under Section 86(1) of the R.P. Act can only be dismissed if it does not comply with the provisions as contained under Sections 81 and 82 and Section 117 of the R.P. Act. He submits that non-compliance of the Section 83 cannot be a ground for a dismissal of election petition under Section 86(1). He submits that rules have been framed by the High Court in exercising the power under Section 225 of the Constitution of India to laying down the procedure for presentation and disposal of the election petition. According to him, this power has an overriding effect upon the provisions contained under Order VI Rule 14 C.P.C. He argues that chapter 15(A) Rule 3 of the High Court rules provides the election petition should be presented along with a list of documents. This according to him is a departure from the procedure prescribed under Order VI Rule 14 where documents were required to be appended with the plaint. He has argued that in the case of Kailash Vs. Nanku 2005 law suit it has been held by the Supreme Court vide paragraph 11 of the Allahabad High Court rules framed under chapter 15(A) consisting of 13 rules are special provisions relating to the trial of election petitions and

there is no conflict between the rules framed by the High Court and rules under the R.P. Act and the C.P.C. It has been argued by learned Senior Advocate that reference of the document in the paragraph by itself is sufficient and it is not necessary to file those documents also. As according to him, placing reliance upon a document, if the allegations are sufficiently made in the election petition, would be of only evidenciary value and that can be filed at a later stage when the opportunity is afforded to file evidence.

21. Taking the argument further, learned Senior Advocate Mr. Manish Goel has submitted that if the contents of a document have been detailed out in the pleadings then such document is not required to be filed along with election petition and will be only of evidenciary value. He has drawn the attention of the Court, towards paragraph 15 and 16 of the judgment in the case of **U. S. Sashidharan Vs. K. Karunakaran and anther AIR 1990 SC Page 424** wherein the legal principle has been discussed in detail and it has been held that if the contents of the document are pleaded in the election petition. Then such documents does not form an integral part of the election petition. Learned counsel for the petition submitted that in that case the Court require the audio cassette in that case form also as to form an integral part of the election petition because the audio cassette titled as Malayudi Purogathi because the contents of the audio cassette were not pleaded in the election petition. Learned Senior Advocate has also relied upon the judgment in the case of **M. Karunanidhi Vs. H.P. Handa and others** where the Supreme Court after discussing a number of judgments had already held by paragraph 34 and 35 that if the allegations as to the pamphlet could be detailed in the pleadings and held that if the proper contents have been detailed out regarding a document in the pleading part of the election petition then such a document would only be an evidence. In proof of the averments so need not be filed with the election petition.

22. It is submitted that since where clauses and the details that were filled in by the returned candidate in affidavit as per prescribed form 26 , the said affidavit was not required to be filled. In so far as the allegations regarding verification of facts as to the criminal proceedings of which range case number was given in column 5(ii)(a), a mere statement was sufficient that verification was made from the Court record registered and no such case was found to be registered. However, he would admit that there is no date given about the inspection/verification. Mr Manish Goel further submits that details of the form as filled in have already been averred in the paragraph 10 and 11 and merely because one verification was sought from the Court record was one verification was taken regarding one entry would not weaken other allegations made according to wrong information given in the affidavit. He further argues that rest of the paragraph had refer to various documents have demonstrated that they ought to have been declared as such correctly in the form, have already been filed and referred to in the schedule appended 2 in the election petition and complete set of the paper book has been served upon the returned candidate and other contesting respondents in the election petition.

23. The learned Senior Advocate Mr. Manish Goyal as well as Sri Ravi Shankar Prasad appearing for the election petitioner have also relied upon some more

authorities of the Supreme Court in the case of **Kanomizhi Karunanidhi v. A. Santhana Kumar and Others passed in Special Leave Petition (C) No. 28241 of 2019 and A . Manju v. Prajwal Revanna @ Prajwal R and Others, (2022) 3 SCC 269, Kantaru Rajeevaru (Sabarimala Temple Review-5J.) v. Indian Young Lawyers Association through Its General Secretary and Others (2020) 2 SCC 1, Union of India v. Association for Democratic Reforms and Another (2002) 5 SCC 294, Spencer & Company Ltd. And Another v. Vishwadarshan Distributors Pvt. Ltd. And Others (1995) 1SCC 259, Satish Ukey v. Devndra Gangadharrao Fadnavis and Another (2019) 9 SCC 1, Madiraj Venkata Ramana Raju v. Peddireddigari Ramachandra Reddu and Others, AIR 2018 SC 3012 and Adesh Tyagi v. Mahesh Sharma 2020 SCC Online All 589.**

24. Having heard learned counsel for the respective parties, noticing their arguments as above and authorities cited by learned Advocates and having perused the record, I find that the basic grounds upon which election petition is based, is of corrupt practice committed by returned candidate in getting elected in public election for the legislative assembly, and therefore, question that arises for consideration at this stage while I am dealing with miscellaneous applications are;

Whether the there has been concise statement of material facts regarding charge of corrupt practise and statements as to material particulars of corrupt practise and whether nomination and affidavit on form 26 would form an integral part of the election petition and not accompanying election paper, election petition would be liable to be dismissed under Section 81(1) of R.P. Act, 1951, and the second aspect that is required to be looked into; and

Whether election petition discloses a cause of action to maintain it and that the statement of facts are not so vexatious or vague so as to dismiss the petition at the very threshold under Order VII Rule 11 (a) of CPC.

25. In so far as **first point** that I need to address, relates to miscellaneous application moved by the returned candidate to reject the petition having not been presented in the form as is prescribed for that it not only lacks concise statement of material facts and material particular as to corrupt practise but is also not accompanied by document of nomination form and affidavit on form 26 which are claimed to be an integral part, and therefore, petition is liable to be rejected under Section 86(1) of the Representatives of the People Act, 1951.

26. The **second point** refers to miscellaneous application filed under Order 7 Rule 11 (a) of the CPC and Order 6 Rule 16 of the CPC to reject the petition as it does not disclose the cause of action even if it is taken in its entirety. The averments made in certain paragraphs in writ petition are alleged, to be quite vexatious and vague and deserve to be struck off.

27. Now coming to the **first point,** I need to first take into account the grounds upon which challenge to election petition has been developed in this petition. The first ground no. 8A is to the effect that material facts as to details of criminal cases that were required to be disclosed in affidavit on form-26 prescribed under the R.P. Act, were concealed and suppressed

vide Column 5(ii) (a)(b) and (c) of part A of the form and then false declaration in Column 5 (ii) (e)(g) and then further in Column 11(5) of part B of form 26 of nomination form and Clause 6(A) and such practise would constitute corrupt practise of undue influence in terms of Section 123 (2) of R.P. Act read with Section 100 (1) (b) of the R.P. Act, 1950.

28. This suppression of criminal antecedents, to the credit of the returned candidate was, it was alleged deliberately done, in order to mislead public and such non disclosure or disclosure of misleading particulars vitiated the mandate contained under Section 33-A of the R.P. Act and Clause 6(A) note 5 of Form 26 a prescribed form of affidavit.

29. Similarly vide ground 8B, it is stated that Column7(A) (ii) (iii) (iv) (v), 7 (B) (i)(iii) and Column 8(i) of nomination form were not complete qua liability towards bank loan. So there was a deliberate attempt to suppress crucial facts relating to property, income and liability towards bank and has counted to corrupt practise.

30. Similar set of allegations have been made in ground no. 10 that relate to disclosure regarding pending criminal cases and charge is that returned candidate had put (√) mark in affirmative in Column 5(ii) a-g and then details recording FIR number name of police station with address where criminal cases have been registered, were not at all disclosed and only disclosure was 'range case' number in Column 5 (ii) (a) which amounted to a fake information. Neither year, nor police station was disclosed and similarly in Column 5 (ii) (b)(c) no registration number of the case was disclosed and when he enquired from the court of ACJM vth, Prayagraj, then it was found that no such case was registered in the court's diary that was maintained to mention cases. Similarly, information was stated to be misleading in Column 5 (ii) (d). Again in column 5 (ii) (e), the disclosure of date of charge was given while the Court had taken cognizance upon the charge by summoning the returned candidate. Since there was no proper nomination paper filed giving all those particulars required, of which verification was to be done by the election officer as to whether requisite form 26 was properly filled up or not as required under Section 33A of the R.P. Act and the manner in which it was filled, it was intended to unduly influence the voter.

31. One of the grounds, therefore, is that acceptance of nomination paper of the returned candidate was against provision of Section 33 of the Act read with Rule 4 of Conduct of Election Rules, 1961.

32. Sri Pandey, since has mainly attacked on these three grounds to be not only vague confusing but lacking concise statement of material facts and also material particulars in relation to corrupt practise of non disclosure of relevant case number and confusing declaration in affidavit that makes nomination form to be defective and yet despite mentioning of these documents as item number 1 in the schedule, they were not made part of the election petition by appending them with to make election petition competent and further that affidavit that was required to be filed indicating corrupt practise as such was not as mandated, I proceed to examine these grounds and the facts stated in support thereof in the first place to answer the question raised regarding maintainability of this petition.

33. As to first point above to which ground no. 8A, 8B and 8C and paragraph nos. 10 and 1 are relevant, these grounds and paragraphs are being reproduced hereunder:

"8A Because returned candidate while delivering the nomination form in term of section 33 of the Act deliberately not disclosed and suppressed of facts regarding criminal antecedents in entirety with full details in part A Column 5 (ii) (ka) (kha) (ga) and made a false declaration in part A Column 5 (ii) (ng) (chha) as well as in Part B column 11 (5) of form 26 of nomination form which constitute a corrupt practice of undue influence in terms of section 123 (2) and covered under section 100 91)(b) of the Act, especially where the returned candidate has special knowledge of the pending cases in which the court has taken cognizance upon the charge. Deliberate attempt to suppress the criminal antecedents required to be inform as mandated by section 33 A of the Act and clause 6(ka) note 5 of form 26 would effort to misguide and keep the people/voter in dark; thus it is undue influence and its amounts to corrupt practice in terms of section 123(2) of the Act as the section 33 A of the Act and rule 4-A creates impediment upon the candidates to disclose information in free exercise of electoral right.

8B. Because returned candidate while delivered the nomination form in term of section 33 of the Act deliberately not disclosed and suppressed the material facts regarding the movable, immovable property and liability towards banks loan, the account shown in part A column 7 (a) (ii) (iii)(iv) (v) column 7 (b), (i)(iii) and column 8 (I) in entirety is incomplete and the full detail of bank accounts, property, share in joint family property and proprietorship business has been suppressed by the returned candidate which constitute corrupt practise of undue influence covered under section 100 (1)(b) of the Act, especially where the returned candidate has special knowledge of the transition. Deliberate attempt to suppress the property, income and liability of the bank required to be furnishing as mandated by section 33-A of the Act would effort to misguide and keep the people in dark,Ttus it is undue influence. The act of returned candidate amounts to corrupt practise under section 12(2), thereby covered under section 100 (i)(b) of the Act.

8C. Because returning officer improperly accepted the nomination paper of Returned Candidate against the provision of section 33 of the Act read with rule 4 of the conduct of election Rule 1961 and failed to adhere with the provision of section 36 of the Act thus the election of the returned candidate from 258 legislative assembly constituencies is required to be declared void.

10. That the returned candidate delivered his nomination from accompanying with form 26 in terms of section 33 of the Act read with Rule 4 of the conduct of election Rules 1961 on 05.02.2022. The form 26 contains in two parts; Part "A" column 1 to 4 was filled up by the returned candidate where the personal details of himself, spouse and his dependents were furnished. Part "A" column 5 deals with the information of pending criminal cases. This column further divided into two parts; first part 5(i) requires that if there is no criminal case pending against the candidate he puts the mark " " against the column 5(i) and it further says that if there is a criminal case pending against the candidate he put the mark ' ' against column 5(ii) and furnish the details of pending criminal cases in later part of column 5(ii) ka-chha. The

returned candidate put the mark ' ' against column 5 (ii) and declared that criminal case was pending against him Column 5 (ii) (ka) mandate the information of FIR number and the name of the police station with the address where the criminal case has registered. The returned candidate instead of furnishing the FIR No. or case crime no. and year or complaint case no. and year with the name and address of the police station or court filled up the column 5 (ii) (ka) as "range case no." and year to misguide the voters. In fact this was a fake information and the some sections were also not in-existence moreover the criminal or complaint case are being identified in the State of U.P. from the FIR no./case crime no. with the particular years and police station. In each police station there is separate register maintain permanently for the registration of each crime known as FIR Register and in absence of the FIR no. , date and year or case crime no. , date year or complaint case no. and year or details of court it could not be possible to trace out the detail of case. Since each police station there is separate numbers allotted to the crime and in complaint case separate no. of complaint and year has been registered by the concerned court. Therefore in absence of FIR no. year or name of the police station and its address or complaint case no. year, or details of court description the information of case could not be possible. Likewise the return candidate to misguide and keep the people /voter in dark in order to make undue influence upon them irrelevant and fake information has furnished in part A column 5(ii)(ka), likewise in column 5(ii) (kha) (ga) the return candidate id not disclose the registration of case no., year registered in court. The returned candidate further given a false declaration that criminal case is pending in the court of ACJM 5 Prayagraj while at the time of declaration i.e. 05.02.2022 no such case was found in the court record diary maintain for the functioning of court. The false declaration is made to misguide and keep people in dark. In column 5(ii) (gha) the return candidate did not describe the details of offence while against column no. 5 (ii) (ng) declared as "no" while in his case the court has taken the cognizance on filling a charge and summoned the return candidate. In column 5 (ii) (cha) mentioned that disclosure of the date of charge is not applicable while in fact the court had taken the cognizance on the charge and summoned the return candidate."

34. Upon bare reading of these above grounds as quoted above three questions basically emerge for consideration to meet first point, as follow:

a. whether there is concise statement of material facts and material particulars have been setforth as to criminal antecedents referred in paragraphs so as to a arrive at conclusion that there was to suppression or concealment of fact;

b. whether facts detailed in paragraphs amount to concise statement as to the misleading facts in the nomination paper/form so as to arrive at conclusion that these things have mislead the electorate; and

c. whether facts referred to in paragraph are concise and specific statement detailed in the nomination form and the affidavit referable to form 26 so as to reduce these documents of an evidenciary value only and not an integral part of the election petition.

35. In order to appreciate the above, one must keep in mind that election laws that provide for an opportunity to losing

candidate to question election petition is not a common law remedy and being a statutory remedy, it is always to be ensured that petition presented must conform to the requirements of election law and this is why it is stated that provisions of the statute dealing with election laws that provided statutory remedy, must be strictly construed **(FA Sapa v. Singoria) 1991 SCC 375**. Still further while election Tribunal is dealing with an election petition on the ground of corrupt practise then allegations are not only to be specific but very clear so as to form a view that if statement of fact made, if proved, it will lead to irresistible conclusion of unseating an elected candidate on such charge. Thus it is clear that any fraudulent practise if taken as a ground and does not give a concise material fact statement leading two equal inferences, then pleadings deserve to be dismissed. (**Daulatram Chauhan v. Anand Sharma (1984) 2 SCC 64.**

36. Making a distinction between material facts and particulars, speaking for the bench of C.K.Thakur, J in the case of **Virendra Nath Gautam v. Satpal Singh and Others, (2007) 3 SCC 617** have observed vide paragraph 50 thus:

"50. There is distinction between facta probanda (the facts required to be proved i.e. material facts) and facta probantia (the facts by means of which they are proved i.e. particulars or evidence). It is settled law that pleadings must contain only facta probanda and not facta probantia. The material facts on which the party relies for his claim are called facta probanda and they must be stated in the pleadings. But the facts or facts by means of which facta probanda (material facts) are proved and which are in the nature of facta probantia (particulars or evidence) need not be set out in the pleadings. They are not facts in issue, but only relevant facts required to be proved at the trial in order to establish the fact in issue."

37. Now when one refers to material facts, the Courts have also held that particulars have evidenciary value if material facts are very specific and detail out particulars which may not be then necessary for the document to accompany the election petition. In the case of **M.Karunanidhi *(supra)*** the Court had referred to its earlier judgment of the Supreme Court in the case of **Sahodrabai Rai v. Ram Singh Aharwar (1968)3 SCR 13 (AIR 1968 SC 1)** to draw conclusion as to when particular document would not require to accompany election petition, as in that case details published in the pamphlet were reproduced in the election petition itself which led to the court to conclude that pamphlet would not be an integral part of the election petition and would be only evidence of what has been averred, as a proof thereof and that is why the Court observed that *"it follows as a necessary corollary that if pamphlet had not been incorporated in the body of the election petition, decision of the Court in Sahodrabai Rai's case (supra), would have been otherwise ....."*

38. These above legal propositions regarding statement of material facts and document to accompany petition or not, as discussed above, have been repeatedly followed in various authorities of Supreme Court and this Court but it is equally clear as to what particular given in a document referable to grounds would amount to an integral part of the election petition, would depend upon case to case. So every election petition has to be examined in respect of statement of facts made and particulars of

corrupt practise referred to, so as to arrive to an answer to the question whether there is concise statement of material facts and material particulars to maintain election petition and that every document referred to therein would only be of an evidenciary value only and not an integral part thereof.

39. Now examining the grounds raised in the grounds 8A , 8B & 8C, I find that they particularly indicate to certain details given in the affidavit as prescribed on form 26 under the R.P. Act. Column 5 of the form relates to pending criminal cases and clause (i) thereof prescribes for various columns for details of pending cases. Clause ii of the form prescribes for cases in which conviction has been done. Now reverting to the grounds as quoted above, I find that in ground 8A the only concise statement, if at all to be referred to, is to the suppression of material facts regarding criminal antecedents and then a false declaration. In the column referred to hereinabove so as to develop ground of corrupt practise in terms of Section 100 (1) (b) and Section 123 (2), what are the criminal antecedents, what kind of misleading statements have been made, what kind of material particulars have been suppressed, has not been referred to at all. In paragraphs 10 and 11, the defects are cited in form 26 which is required to be furnished and which is in two part referable to information in pending criminal cases, and the cases in which it is alleged that charges have been framed. The only particular fact that occurs in paragraph 10 is with regard to 'Range Case Number' given in column number 5 (ii) (a) of the form, but again at the strength of some information obtained from the Court of ACJM- V, Prayagraj, it is alleged that no such case was mentioned in the courts' diary. It is alleged that though there is mention not in front of Column 5 (ii) (e) but Court in that case, it is alleged, had taken cognizance on filing of chargesheet and had summoned the returned candidate. This is all vague for want of date of access to court's diary, sanction letter for inspection of court's diary etc.

40. Having discussed these above details, I find that the allegations are as to the suppression of material fact and misleading / mis-statement of facts as to the some particular criminal cases pending or registered against the returned candidate and allegations are that by this act, he created confusion in mind of electorate and got them unduly influenced to vote in his favour. So all this has been stated to make out a case of corrupt practise and corrupt practise of undue influence as well, referable to Section 123(2). This cannot be said to be a concise statement of material facts for want of material particular details as to the corrupt practise. They are quite vague as to words and expression "Suppression and mis statement". These statements of facts in the ground cannot be said to be the concise statement of material facts and particulars as to the corrupt practice to meet mandatory requirement of Section 83 (1)(a) and (b).

41. In the case of Ram Sukh (supra) cited by learned counsel for the applicant, it has been clearly held vide paragraph 24 thus:

"It needs little reiteration that for the purpose of Section 100 (1) (d) (iv), it was necessary for the election petitioner to aver specifically in what manner the result of the election insofar as it concerned the first respondent was materially affected due to the said omission on the part of the Returning Officer. Unfortunately, such

averment is missing in the election petition. "

42. Whenever it comes to entertain an election petition on the charge of corrupt practise, it is to be taken as serious issue because it does not question the election but if election is held void it may lead to debarring a candidate for future election upto 6 years and, therefore, it is held that *"an election petition in which corrupt practise is alleged stands on a different footing from election petition which does not to carry such allegation. The legislature has special care to ensure that the ordinary verification will not suffice"* and the Court therefore, rightly held that the person making an allegation of corrupt practise must bear in mind seriousness of such charge, and therefore, he has to be very precise and specific in making allegations giving concise statement of material facts and then material particulars as required under Section 83(1) (a) (b). The allegations must be so clear and specific that inference of corrupt practise will irresistibly admit no doubt or question (Daulatram Chauhan v. Anand Sharma (1984) 2 SCC 64) Vide paragraph 18 the Supreme Court in the case of **K. M. Mani v P. J. Antony And Others, 1979 2 SCC 221** has observed thus:.

"23.An allegation regarding the commission of a corrupt practice at an election is a very serious matter not only for the candidate but for the public at large as it relates to the purity of the electoral process. Where therefore the allegation relates to the charge that a candidate obtained the assistance of a police officer for the purpose of addressing a meeting on the eve of the poll and exhorting those present to work for his victory, it is reasonable to expect that, wherever possible, a transcript of his speech shall be made available to the Court in support of the allegation. Besides furnishing the precise material relating to the allegation to the Court, it has the advantage of giving the respondent an opportunity of meeting a precise allegation. But it may be that this may not be possible in a given situation. In that case it will be reasonable and fair to expect that the election petitioner will produce a contemporaneous record of the points that were made in the speech, or at least its substance. But no such record has been made available in this case……..."

43. In the case of **U.S. Sasidharan** (*supra*), it was very categorically held vide paragraph 12 *" it is apparent from clauses (a) and (b) of S. 83 that an election petition shall contain a concise statement of the material facts and also set forth full particulars of any corrupt practice. These two requirements are also mandatory in nature. So, whenever there is an allegation of corrupt practice, the election petition shall contain a concise statement as, to the material fact on which the petitioner relies and also must set forth full particulars of the corrupt practice alleged by the petitioner."*

44. Thus question (a) is answered in negative and so in favour of returned candidate.

45. Now if the allegations, therefore, upon bare reading of the statement of facts and statement of particulars are found related to particular document as in this case nomination paper and affidavit do not lead to definite conclusion to form a view of such corrupt practise, it would be necessary that such document accompanied the election petition as it would be forming

an integral part thereof in such circumstances.

46. Besides the above in context of material facts/ material particulars relating to corrupt practise may be contained in a document without pleadings material facts, the Court observed: *"We have already referred to section 83 relating to the contents of an election petition. The election petition shall contain a concise statement of material facts and also set forth full particulars of any corrupt practice. The material facts or particulars relating to any corrupt practice may be contained in a document and the election petitioner, without pleading the material facts or particulars of corrupt practice, may refer to the document. When such a reference is made in the election petition, a copy of the document must be supplied inasmuch as by making a reference to the document and without pleading its contents in the election petition, the document becomes incorporated in the election petition by reference. In other words, it forms an integral part of the election petition. Section 81(3) pro- vides for giving a true copy of the election petition. When a document forms an integral part of the election petition and a copy of such document is not furnished to the respond- ent along with a copy of the election petition, the copy of the election petition will not be a true copy within the meaning of section 81(3) and, as such, the court has to dismiss the election petition under section 86(1) for non- compliance with section 81(3)."*

47. Again in the case of Mulayam Singh Yadav (supra) where video cassettes contained videograpy with regard to practise of booth capturing etc. was not filed in original and copies were meant only for the contesting respondents, it was held to be an integral part of the election petition as videography details upon not discussed and referred to in the grounds and that having not been filed, the High Court had dismissed the election petition being not presented in the form it required under Section 81 Vide paragraphs 11, 12, 13 and 14, the Court observed thus:

11. Whether or not Schedule 14 is an integral part of the election petition does not depend on whether or not the draftsman of the election petition has so averred. It has to be decided objectively, taking into account all relevant facts and circumstances. Schedule 14 is one of 25 schedules which is, as a matter of fact, part of the bound election petition. In respect of each of these schedules, except Schedule 14, it is averred that it is a part of the election petition. Each of these schedules, other than Schedule 14, mentions, verifies and contains some paper or document which can be placed between the leaves of paper that comprise that schedule and be bound with the election petition. Schedule 14 mentions and verifies a video cassette which cannot be placed between two leaves and be bound with the election petition. This is the explanation for the difference in the manner in which the averments relating to Schedule 14 and the other schedules are made in the election petition. Clearly, the video cassette mentioned and verified in Schedule 14 is as much an integral part of the election petition as the papers and documents mentioned and verified in the other schedules. Further, that the video cassette mentioned and verified in Schedule 14 is a part of the election petition and was intended to be such is evident from the affidavit of the first respondent verifying the allegations of corrupt practice made in the election petition. Therein, the first

respondent has verified the correctness of what is stated in para 83 of the election petition, which refers to Schedule 14 and which has been quoted above, and to Schedule 14 itself. Yet again, that the video cassette mentioned and verified in Schedule 14 is and was intended to be a part of the election petition is shown by the fact that 15 video cassettes which were copies of the video cassette mentioned and verified in Schedule 14 were filed in the High Court along with the election petition for being served upon the respondents thereto.

12. Ordinarily, what is shown upon the video cassette that is mentioned and verified in Schedule 14 would have been set out in the election petition and then that video cassette could have been said to be evidence of the allegations made in the election petition. As this election petition is drafted, there is no description of what is shown on this video cassette except to say that it shows booth-capturing, violence and arson. As to booth-capturing, there are particulars contained in the other schedules but even in that regard the later paragraphs of the election petition make reference to Schedule 14 so that even in regard to booth-capturing the particulars shown in the video cassette mentioned and verified in Schedule 14 are relied upon. So far as the allegations of violence and arson are concerned, there are no particulars in the election petition absent the video cassette mentioned and verified in Schedule 14.

***13**. We are, therefore, satisfied that the video cassette mentioned and verified in Schedule 14 is an integral part of the election petition and that it should have been filed in court along with copies thereof for service upon the respondents to the election petition. Whereas 15 copies thereof were filed for service upon the respondents, the video cassette itself was not filed. The election petition as filed was, therefore, not complete.*

***14.** Section 81 contemplates the presentation of an election petition that is complete and satisfies the requirements of Section 83. An election petition that is not complete must, having due regard to the imperative mandate of Section 86, be dismissed. The present election petition must, therefore, be dismissed.*

48. It is true that in the case of **A. Manju** (supra), it was stated that appropriate affidavit if not filed, it would be only a technical defect and it would not be a ground to defeat the election petition at the very threshhold and in this regard, the Constitution Bench of the Supreme Court in **Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore, AIR 1964 SC 1545** was referred to arrive at such conclusion vide paragraph 25 and 26 the Division Bench of the Supreme Court has observed thus:

***25.** We may take note of the Constitution Bench judgment of this Court in Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore [Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore, (1964) 3 SCR 573 : AIR 1964 SC 1545] which opined that the defect in verification of an affidavit cannot be a sufficient ground for dismissal of the petitioner's petition summarily and such an affidavit can be permitted to be filed later. This Constitution Bench judgment was also referred to in G.M. Siddeshwar case [G.M. Siddeshwar v. Prasanna Kumar, (2013) 4 SCC 776 : (2013) 2 SCC (Civ) 715] to come to a conclusion that non-compliance with the proviso to Section 83(1) of the RP Act was not fatal to the maintainability of an election petition and the defect could be remedied i.e. even in the absence of*

compliance, the petition would still be called an election petition. We cannot say that the High Court fell into an error while considering the election petition as a whole to come to the conclusion that the allegations of the appellant were not confined only to Section 33-A of the RP Act, but were larger in ambit as undue influence and improper acceptance of nomination of Respondent 1 were also pleaded as violation of the mandate under Sections 123 and 100 of the RP Act.

***26**. However, we are not persuaded to agree with the conclusion arrived at by the High Court that the non-submission of Form 25 would lead to the dismissal of the election petition. We say so because, in our view, the observations made in Ponnala Lakshmaiah case [Ponnala Lakshmaiah v. Kommuri Pratap Reddy, (2012) 7 SCC 788] which have received the imprimatur of the three-Judge Bench in G.M. Siddeshwar case [G.M. Siddeshwar v. Prasanna Kumar, (2013) 4 SCC 776 : (2013) 2 SCC (Civ) 715] appear not to have been appreciated in the correct perspective. In fact, G.M. Siddeshwar case [G.M. Siddeshwar v. Prasanna Kumar, (2013) 4 SCC 776 : (2013) 2 SCC (Civ) 715] has been cited by the learned Judge to dismiss the petition. If we look at the election petition, the prayer clause is followed by a verification. There is also a verifying affidavit in support of the election petition. Thus, factually it would not be appropriate to say that there is no affidavit in support of the petition, albeit not in Form 25. This was a curable defect and the learned Judge trying the election petition ought to have granted an opportunity to the appellant to file an affidavit in support of the petition in Form 25 in addition to the already existing affidavit filed with the election petition. In fact, a consideration of both the judgments of the Supreme Court referred to by the learned Judge i.e. Ponnala Lakshmaiah [Ponnala Lakshmaiah v. Kommuri Pratap Reddy, (2012) 7 SCC 788] as well as G.M. Siddeshwar [G.M. Siddeshwar v. Prasanna Kumar, (2013) 4 SCC 776 : (2013) 2 SCC (Civ) 715] , ought to have resulted in a conclusion that the correct ratio in view of these facts was to permit the appellant to cure this defect by filing an affidavit in the prescribed form."*

49. I have carefully gone through the entire judgment of the Supreme Court in the case of A. Manju (supra), and have found that the division bench though has referred to the Constitution bench judgement in the case of Murarka Radhey Shyam Ram Kumar (supra) but did not refer to the judgment of the three judges bench in the case of **V. Narayanswamy** (*supra*) wherein Supreme Court had referred to and discussed the constitution bench judgment in the case of Murarka Radhey Shyam Ram Kumar (supra). Since affidavit was not in a prescribed form as an inexperienced Oath Commissioner made a mistake in verification of portion of affidavit, the Court held that to be not such a defect which could be be said to be fatal to the election petition and then the Court referred to the judgment of the Constitution bench. Thus on facts the judgment in A. Manju (supra) is distinguishable and principles of law laid down in by the Supreme Court in the case of M.Karunanidhi (supra) and V. Narayanswamy (supra) and U.S. Sashidharan (supra) have yet not been diluted in subsequent judgments.

50. One of the arguments advanced by learned Senior Advocate appearing for the respondent Sri Manish Goyal was that ingredients as to the grounds questioning

the election that are required to be furnished alongwith affidavit, in compliance to section 33-A is in the nature of a mere information. Whether such information is misleading or suppressing one so as to amount to an act of undue influence within the meaning of 'corrupt practise' would require a trial to be established after parties lead their respective evidence, and therefore, it would not be ground to dismiss the petition in limine.

51. In support of this above argument, reliance has been placed upon judgment of Supreme Court in the case of **Satish Ukey** *(supra*). Factually, I find that to be a case arising out of a criminal complaint lodged under Section 125A of the R.P. Act as details of two cases in which the cognizance had been taken against returned candidate were not mentioned despite returned candidate having due knowledge of the date of submission of nomination form. The Court in that circumstances rejected the complaint to be not maintainable. The District Judge had reversed the order of Magistrate which led to filing of appeal before the High Court. The High Court maintained the order of Magistrate and thus returned candidate, who had become Chief Minister preferred SLP before the Supreme Court. It is in background of that case, that Supreme Court had held that the details given in the affidavit were in response to the voter's right to information as contemplated under Section 33 A of the R.P. Act. Thus the Court while dealing with information part of the provision interpreted it as a mere information as is required in terms of affidavit on a prescribed format. The Court returned a finding that it was a mere information and vide paragraph 24,25 and 26 held thus:

***24**.A cumulative reading of Section 33-A of the 1951 Act and Rule 4-A of the 1961 Rules and Form 26 along with the letters dated 24-8-2012, 26-9-2012 and 26-4-2014, in our considered view, make it amply clear that the information to be furnished under Section 33-A of the 1951 Act includes not only information mentioned in clauses (i) and (ii) of Section 33-A(1), but also information, that the candidate is required to furnish, under the Act or the Rules made thereunder and such information should be furnished in Form 26, which includes information concerning cases in which a competent court has taken cognizance [Entry 5(ii) of Form 26]. This is apart from and in addition to cases in which charges have been framed for an offence punishable with imprisonment for two years or more or cases in which conviction has been recorded and sentence of imprisonment for a period of one year or more has been imposed [Entries 5(i) and 6 of Form 26 respectively].*

25.In the light of the view that we have taken and in view of the clear averment made in the complaint to the effect that the first respondent had knowledge of the two cases against him which had not been mentioned in the affidavit filed by the first respondent along with his nomination papers, we unhesitatingly arrive at the conclusion that the order of the learned trial court upheld by the High Court by the impugned judgment and order dated 3-5-2018 [Devendra Gangadharrao Fadnavisv.Satish Ukey, 2018 SCC OnLine Bom 924 : 2018 Cri LJ 2582] is legally not tenable and the same deserves to be set aside which we hereby do. The complaint of the appellant will be considered afresh by the learned trial court from the stage where it was interdicted by the order dated 30-5-2016.

26. Our view as above is in consonance with a similar view expressed by this Court in para 75 of the Report in Krishnamoorthy v. Sivakumar [Krishnamoorthy v. Sivakumar, (2015) 3 SCC 467 : (2015) 2 SCC (Cri) 359] . Para 75 of the Report in Krishnamoorthy [Krishnamoorthy v. Sivakumar, (2015) 3 SCC 467 : (2015) 2 SCC (Cri) 359] reads as under: (SCC p. 514)

"75. On a perusal of the aforesaid format, it is clear as crystal that the details of certain categories of the offences in respect of which cognizance has been taken or charges have been framed must be given/furnished. This Rule is in consonance with Section 33-A of the 1951 Act. Section 33(1) envisages that information has to be given in accordance with the Rules. This is in addition to the information to be provided as per Sections 33(1)(i) and (ii). The affidavit that is required to be filed by the candidate stipulates mentioning of cases pending against the candidate in which charges have been framed by the Court for the offences punishable with imprisonment for two years or more and also the cases which are pending against him in which cognizance has been taken by the court other than the cases which have been mentioned in Clause (5)(i) of Form 26. Apart from the aforesaid, Clause (6) of Form 26 deals with conviction."

52. In the case of **Adesh Tyagi v. Mahesh Sharma (2020) SCC Online All 589**, the Court proceeded to hold that a mere non compliance of Section 83(1) of the R.P. Act, 1951 would not result in dismissal of the election petition at the very outset and in forming such a view reliance has been placed upon an authority of Supreme Court in the case of **T. M. Jacob v C. Poulose and others, (1999) 4 SCC 274.**

53. In Adesh Tyagi's case the question was as to the true copy of the election petition and where Court held may not be 'exact copy' meant to be served upon the respondent. It was observed that when a reasonable person can understand a copy which is reasonably true to the original one, there can not be said any violation of Section 81(3). But here there is no such case. Hence the issue of concise statement of facts and material particulars, in my considered view, if petition lacks concise statement of facts and fails to detail material particulars in respect therefor, thus would lead a reasonable person to draw only one reference that election petitioner himself is not sure of the ground to question election and that he is confused about material particulars as to corrupt practise. Once one finds it to not be sure enough, than for this the concerned document becomes an integral part. A vague or confused statement of facts by itself cannot make an election petition maintainable, otherwise every election can be challenged in a routine manner. It is not common law suit but statutory remedy and so statute needs to be strictly followed. The learned Judge himself has referred to the judgment of Supreme Court in the case of F.A.Sapa that "maintainability of an election petition, in the context will depend on whether schedule or annexure to petition constituting on integral part, it must satisfy the requirements of Section 81(3) and further in that behalf would be fatal."

54. In the case of **Harkirat Singh v. Amrinder Singh (2005) 13 SCC 511**, putting emphasis on the words and expression material facts which an election petition must contain with common details

of particular, Supreme Court vide paragraph 51 and 52 has held thus

"51.A distinction between "material facts" and "particulars", however, must not be overlooked. "Material facts" are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. "Particulars", on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. "Particulars" thus ensure conduct of fair trial and would not take the opposite party by surprise.

52.All "material facts" must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which is in the nature of evidence a party would be leading at the time of trial."

55. In T.M.Jacob's case (supra) the Court had affirmed the judgment of the High Court that had rejected election petition filed on the ground of suppression of material facts qua two criminal cases; one in which appeal had been allowed and other one in which sentence imposed was of less than a year. The Court took this view that there could not be any influential regarding first criminal case and connection showed set aside and the other case being an award of sentence of less than one year, it would not have disqualified.

56. As I have already discussed above and has been held that in matters of election petition where election of returned candidate is being questioned then every provision of the election law/ statute has to be interpreted literally and strictly and petition filed questioning the election under such statute, has also to be seen strictly falling within four corners of the relevant provisions of law that require election petition to be presented in a definite form.

57. In the finding of part of the judgment in Ram Sukh, Supreme Court has held the provisions as contained Section 83 to be mandatory and if election petition is not presented in that form then it deserves to be dismissed. Vide paragraph 10,11,12,13,14 and 15 interpreting the provisions the Court held thus:

***10**. Section 83, the pivotal provision for the present case, requires that: (a) the election petition must contain a concise statement of "material facts" on which the petitioner relies and (b) he should also set forth "full particulars" of any corrupt practices which the petitioner alleges. Proviso to clause (c) of sub-section (1) of Section 83 also provides that where the petitioner alleges any corrupt practice, the election petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. It is plain that the requirement of disclosure of "material facts" and "full particulars" as stipulated in the section is mandatory.*

***11.**Section 86 mandates that where the election petition does not comply with the provisions of Section 81 or Section*

82 or Section 117 of the Act, the High Court should dismiss the election petition. Section 87 which lays down the procedure required to be followed by the High Court while trying an election petition, requires that every election petition shall be tried, as nearly as may be, in accordance with the procedure applicable under the Code to the trial of the suits, subject of course to the provisions of the Act and of any requirement made thereunder.

12. *It is evident that the controversy in this appeal lies in a narrow compass. It revolves around the ambit of Section 83 of the Act. The point for consideration is whether the election petition lacked "material facts" required to be stated in the election petition in terms of Section 83(1) of the Act and if so, could it be dismissed summarily without trial? As already noted, it is mandatory that all "material facts" are set out in an election petition and it is also trite that if material facts are not stated in the petition, the same is liable to be dismissed on that ground alone. Therefore, the question is as to whether the election petitioner had set out "material facts" in his petition?*

13. The phrase "material facts" has neither been defined in the Act nor in the Code and, therefore, it has been understood by the courts in general terms to mean the entire bundle of facts which would constitute a complete cause of action. In other words, "material facts" are facts upon which the plaintiff's cause of action or the defendant's defence depends. (SeeMahadeorao Sukaji Shivankarv.Ramaratan Bapu[(2004) 7 SCC 181] .) Broadly speaking, all primary or basic facts which are necessary either to prove the cause of action by the plaintiff or defence by the defendant are "material facts". Material facts are facts which, if established, would give the petitioner the relief asked for. But again, what could be said to be material facts would depend upon the facts of each case and no rule of universal application can be laid down.

14.The requirement in an election petition as to the statement of material facts and the consequences of lack of such disclosure with reference to Sections 81, 83 and 86 of the Act came up for consideration before a three-Judge Bench of this Court inSamant N. Balkrishnav.George Fernandez[(1969) 3 SCC 238] . Speaking for the three-Judge Bench, M. Hidayatullah, C.J., inter alia, laid down that:

(i) Section 83 of the Act is mandatory and requires first a concise statement of material facts and then the fullest possible particulars;

(ii) omission of even a single material fact leads to an incomplete cause of action and statement of claim becomes bad;

(iii) the function of particulars is to present in full a picture of the cause of action and to make the opposite party understand the case he will have to meet;(iv) material facts and particulars are distinct matters—material facts will mention statements of fact and particulars will set out the names of persons with date, time and place; and

(v) in stating the material facts it will not do merely to quote the words of the section because then the efficacy of the material facts will be lost.

15.At this juncture, in order to appreciate the real object and purport of the phrase "material facts", particularly with reference to election law, it would be appropriate to notice the distinction between the phrases "material facts" as appearing in clause (a) and "particulars" as appearing in clause (b) of sub-section (1) of Section 83. As stated above, "material facts" are primary or basic facts

which have to be pleaded by the petitioner to prove his cause of action and by the defendant to prove his defence. "Particulars", on the other hand, are details in support of the material facts, pleaded by the parties. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. Unlike "material facts" which provide the basic foundation on which the entire edifice of the election petition is built, "particulars" are to be stated to ensure that the opposite party is not taken by surprise.

58. The ground 8C would only be entertainable if ground 8 A, 8B, 8D are made out prima facie. Section 33 (A) the R.P. Act was incorporated by amendment Act, 1972. It prescribed an affidavit on a format verifying information contained in Section 1 of Section 33 (1)(a). For ready reference. Section 33 A (1) of R.P. Act, reproduced hereunder:"

"33A. Right to information.—

(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) of section 33, also furnish the information as to whether—

(i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence [other than any offence referred to in sub-section (1) or sub-section (2), or covered in sub-section (3), of section 8] and sentenced to imprisonment for one year or more."

59. Going by bare reading of aforesaid provisions two types of information an electorate has a right to know about the candidate:

(i). whether a candidate is an accused of a punishable offence for 2 years or more in a pending case in which charge has been framed by the Court of competent jurisdiction; and (ii) the other one is whether he has been convicted for an offence with an exception given therein.

60. Now when a candidate is required to furnish these two details, either he does not furnish it or furnishes it by suppressing material particulars or gives confusing particulars so as to unduly influence voters. Such details or particulars are to be mentioned in the ground by way of not only concise statement of fact but statement of particulars regarding such suppressed facts and if this is not done, the only statement of fact has been made then such affidavit wherein such particulars have been either suppressed or disclosed or is presented in confusing form, has to compulsorily accompany the election petition as integral part of election petition on the ground of corrupt practise.

61. Prior to 2002 only document on which affidavit was required to be furnished was form 25 but now since form 26 prescribed for an affidavit to contain statement of facts and regarding statement and particulars of criminal cases which are pending and also there in which a candidate has been convicted previously. Allegations regarding non proper disclosure of the same, amounted to a reference directly to the affidavit, and therefore, affidavit ought to have been filed alongwith an election petition. Even on the other grounds that are mentioned in 8B, which is also claimed to

be a corrupt practise that returned candidate did not deliberately disclose the correct facts and suppressed material facts qua movable and immovable properties and other bank loans, I find that the grounds are abosluely silent as to what kind of misleading statement has been made or what kind of material facts have been suppressed. This also relates to nomination papers and affidavit filed in support thereof and since no nomination paper nor, affidavit has been filed, in my considered view these two documents being integral part of the election petition, election petition is liable to be rejected on this count also.

62. Coming to the argument advanced by learned counsel for election petitioner regarding presentation of election petition special provision relating to trial of election petition vide chapter XV-A of the High Court Rules, 1952 I find that definition clause or Rule 2 thereof provides for election petitions means *"an election petition presented under Section 81 of the Act" and the Act vide definition Rule 2(i) means representation of the People Act, 1951"*. Now Rule 3 provides for presentation of election petition before Registrar and further provides that petition shall bear office report regarding court fee and compliance with Section 81, 82 and 83 and 117 of the Act. It also requires petitioner to file a list of documents whether in his possession or not upon which he realizes as evidence in support of his claim. The question, therefore, comes to same as to what is to be led in evidence and what is an integral part of petition to be filed to make it a complete presentation within meaning of Section 83 and 81 of the R.P. Act. The High Court has simply referred to the presentation of petition for the purposes of trial as contemplated under the R.P. Act, 1951. Rules are procedural but rules do not in any manner dilute the provisions of the R.P. Act, 1951. What it requires is that list of documents to be submitted alongwith election petition which petitioner wants to rely upon, whether in possession or not. The question is, mere mention of list of documents in any manner as prescribed would dilute the format of the election petition. Now if the format has not been prescribed and which naturally would not be there under High Court rules. While interprating Rule 3 of Chapter 15-a of the Rules of the High Court, 1952, one has to keep in mind that it talks of presentation only as per R.P. Act which is substantive law on the subject. When the Court refers to the presentation of petition under Section 81, and requires registry to submit a report as to compliance of Section 81, then it is very much clear that format prescribed under Section 81 has not been diluted at all. It is by way of abandoned precaution that Rule 3 further provides that whatever documents being relied upon, a list in that regard may also be appended with petition. I do not see that provision as prescribed under Rule 2 of the High Court Rules to provide a list of document as an evidence to rely upon affidavit does in any manner dilute any proposition of law regarding presentation of election petition. Thus argument advanced by learned counsel appearing for the respondents that election petition was presented as per rules of the Court, and therefore, even if documents that formed an integral part if were not filed, it would not lead to rejection of election petition is unsustainable. The election petitioner in the present case has annexed a schedule alongwith election petition as prescribed for and though has referred to the nomination paper and affidavit on form 26

but these two documents do accompany it, does not consist of that.

63. Thus the questions (b) and (c) are answered in affirmative and so against the election petitioner.

64. Since I have already held that election petition was not presented as it was not accompanied by nomination form and the affidavit, it would mean that it has not been presented in terms of Section 81 to hold trial under Section 86 of the R.P. Act.

65. In view of the above **first point** is decided against the election petitioner and in favour of returned candidate/ respondent no. 1.

66. Besides the above, on the point of affidavit of corrupt practise to be not meeting the requirements of law, I find that the affidavit refers to various paragraphs and form 26 regarding suppression of criminal antecedents and non disclosure of movable and immovable properties. Affidavit as such would have been good enough if the concise statement of fact and particulars of any corrupt practise as required under Section 83(1) (a) and (b) were disclosed in those grounds and paragraphs. Since I have held that in those paragraphs particularly regarding criminal antecedents, no particulars as such have been disclosed, the affidavit of corrupt practise automatically fall as it also does not refer to any particular corrupt practise. A mere reference to paragraphs which itself vague and sketchy, would not make it sufficient enough to hold that to be legally acceptable affidavit within definition of law qua presentation of election petition.

67. Now coming to **second poin**t, I am reminded of a recent decision of the Supreme Court in the case of Kanimozhi Karunanidh (supra) in which proposition of law has been discussed relating to legal aspects herein involved in the present case and the Court having discussed various authorities proceeded to hold that if the election petition does not contain a concise statement of facts upon which petitioner relies and if such material facts also are not stated and particulars are not disclosed, then election petition would be liable to be dismissed not only under 86(i) of R.P. Act, 1951 also on the ground of Rule 11 (a) of Order VII of the Code of Civil Procedure, 1908.

68. After discussing a great deal, authorities of the Supreme Court delivered from time to time vide 28 the Court summarize the law as under:

"28. The legal position enunciated in afore-stated cases may be summed up as under:-

i. Section 83(1)(a) of RP Act, 1951 mandates that an Election petition shall contain a concise statement of material facts on which the petitioner relies. If material facts are not stated in an Election petition, the same is liable to be dismissed on that ground alone, as the case would be covered by Clause (a) of Rule 11 of Order 7 of the Code.

ii. The material facts must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action, that is every fact which it would be necessary for the plaintiff/petitioner to prove, if traversed in order to support his right to the judgement of court. Omission of a single material fact would lead to an incomplete cause of

action and the statement of plaint would become bad.

iii. Material facts mean the entire bundle of facts which would constitute a complete cause of action. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary.

iv. In order to get an election declared as void under Section 100(1)(d)(iv) of the RP Act, the Election petitioner must aver that on account of non-compliance with the provisions of the Constitution or of the Act or any rules or orders made under the Act, the result of the election, in so far as it concerned the returned candidate, was materially affected.

v. The Election petition is a serious matter and it cannot be treated lightly or in a fanciful manner nor is it given to a person who uses it as a handle for vexatious purpose.

vi. An Election petition can be summarily dismissed on the omission of a single material fact leading to an incomplete cause of action, or omission to contain a concise statement of material facts on which the petitioner relies for establishing a cause of action, in exercise of the powers under Clause (a) of Rule 11 of Order VII CPC read with the mandatory requirements enjoined by Section 83 of the RP Act."

69. The court in that case was dealing with ground as contemplated under Section 100 (1)(d) (iv) of the R.P. Act to declare election of the returned candidate void. The bone of contention was, as the Court observed, with regard to certain financial issues relating to income tax dues of her spouse where she had mentioned 'No' and then she stated that her spouse had bank accounts in Singapore with deposits in dollar in further columns prescribed for under form 26 but status of income tax was not disclosed. The Court held election petition carried bald allegations as to the statement of facts. The concise statement of facts and setting-forth of particular was absolutely vague so much so that no prima facie view could be formed as to the allegations made so to hold that there was complete cause of action to maintain election petition. Vide 31, 32 and 33 the Court held :

"31. Mere bald and vague allegations without any basis would not be sufficient compliance of the requirement of stating material facts in the Election Petition. As well settled not only positive statement of facts, even a positive statement of negative fact is also required to be stated, as it would be a material fact constituting a cause of action. The material facts which are primary and basic facts have to be pleaded by the Election petitioner in support of the case set up by him to show his cause of action and omission of a single material fact would lead to an incomplete cause of action, entitling the returned candidate to pray for dismissal of Election petition under Order VII Rule 11(a) CPC read with Section 83(1)(a) of the RP Act.

32. It is also significant to note that an affidavit in Form 26 along with the nomination paper, is required to be furnished by the candidate as per Rule 4A of the said Rules read with Section 33 of the said Act. The Returning Officer is empowered either on the objections made to any nomination or on his own motion, to reject any nomination on the grounds mentioned in Section 36(2), including on the ground that there has been a failure to comply with any of the provisions of Section 33 of the Act. However, at the time of scrutiny of the nomination paper and the

affidavit in the Form 26 furnished by the Appellant-returned candidate, neither any objection was raised, nor the Returning Officer had found any lapse or non-compliance of Section 33 or Rule 4A of the Rules. Assuming that the election petitioner did not have the opportunity to see the Form No. 26 filled in by the Appellant-returned candidate, when she submitted the same to the Returning Officer, and assuming that the Returning Officer had not properly scrutinized the nomination paper of the appellant, and assuming that the election petitioner had a right to question the same by filing the Election petition under Section 100(1)(d)(iv) of the said Act, then also there are no material facts stated in the petition constituting cause of action under Section 100(1)(d)(iv) of the RP Act. In absence of material facts constituting cause of action for filing Election petition under Section 100(1)(d)(iv) of the said Act, the Election petition is required to be dismissed under Order VII Rule 11(a) CPC read with Section 13(1)(a) of the RP Act.

33. As elaborately discussed earlier, Section 83(1)(a) of RP Act mandates that an Election petition shall contain a concise statement of material facts on which petitioner relies, and which facts constitute a cause of action. Such facts would include positive statement of facts as also positive averment of negative fact. Omission of a singular fact would lead to incomplete cause of action. So far as the present petition is concerned, there is no averment made as to how there was non-compliance with provisions of the Constitution or of RP Act or of the Rules or Order made thereunder and as to how such non-compliance had materially affected the result of the election, so as to attract the ground under Section 100(1)(d)(iv) of the RP Act, for declaring the election to be void. The omission to state such vital and basic facts has rendered the petition liable to be dismissed under rder VII, Rule 11(a) CPC read with Section 83(i)(a) of the RP Act, 1951."

70. Applying the above principle to the facts stated in various paragraph in support of the ground on the aspects of movable and immovable property running from ground to paragraph 12,13,14,15,16 and 17 in the present election petition, I find that those details though have already been given, of returned candidate of statement of accounts etc. but in the absence of affidavit filed in support of nomination paper and the affidavit on form 26 as well, it could not be concluded even prima facie that there was any concealment of material facts and particular details indicating corrupt practise in question so as to hold the election petition disclosed a substantial ground to entertain it. Entire bundle of facts that have been stated in paragraphs of the petition, even if are examined very minutely with microscopic eyes, would only lead to a conclusion then that certain statements of facts made regarding criminal antecedents with certain particulars and details regarding immovable properties but what kind of concealment, what kind of misleading statement of suppressed material accounted to in the nomination papers are absolutely vague.

71. One of the arguments could be that, even if material facts are disclosed and material particulars are lacking to some extent then material facts that constitute cause of action would hold petition maintainable. This argument was also advanced by learned counsel appearing for the election petitioner in the case of

petitioner V. Narayanswami (supra) as were referred to, which is reproduced hereunder:

"27. It is contended by Mr Bhandare that all the material facts have been stated in the election petition and that for lack of material particulars, the petition could not have been thrown out at the threshold. He said opportunity should have been given to the appellant to supply the material particulars. It is really a strange proposition to advance. Till the date of the impugned judgment, the appellant had persisted that the petition did not lack material particulars and that the verification was in accordance with the Code and the affidavit in support of the corrupt practice in the form prescribed. Admittedly, the petition lacked material particulars, the verification to the petition was not in accordance with the Code and the affidavit did not conform to the form prescribed. At the first opportunity, the respondent raised objection that the petition lacked both material facts and the material particulars and that the verification to the petition and the affidavit were not in accordance with law. This was repeated in the miscellaneous application (Original Application No. 298 of 1998). In the counter-affidavit and in the reply to the miscellaneous application, the appellant persisted in his stand and termed the objections raised by the respondent as irrelevant. It is not that the appellant did not have the opportunity to correct his mistake which he could have easily done in the rejoinder filed by him to the counter-affidavit of the respondent or even his reply to the miscellaneous application (OA No. 298 of 1998). He had every opportunity even at that stage to supply the material particulars which admittedly were lacking and also to amend the verification and to file the affidavit in the form prescribed but for reasons best known to him, he failed to do so. The existence of material facts, material particulars, correct verification and the affidavit are relevant and important when the petition is based on the allegation of corrupt practice and in the absence of those, the court has jurisdiction to dismiss the petition. The High Court has undoubtedly the power to permit amendment of the petition for supply of better material particulars and also to require amendment of the verification and filing of the required affidavit but there is no duty cast on the High Court to direct suo motu the furnishing of better particulars and requiring amendment of the petition for the purpose of verification and filing of proper affidavit. In a matter of this kind the primary responsibility for furnishing full particulars of the alleged corrupt practices and to file a petition in full compliance with the provisions of law is on the petitioner. (See in this connection the Constitution Bench decision in Bhikaji Keshao Joshi v. Brijlal Nandlal Biyani [AIR 1955 SC 610 : (1955) 2 SCR 428] SCR at p. 144.)"

72. However, the Court in that case after going through every details discussed in the petition came to finally hold that petition not only lacked material facts but also lack material particulars with the effect that there was defective verification and affidavit was also not in the form prescribed order and hence confirmed the order of the High Court rejected the election petition vide paragraph 30 and 31 thus:

"30. It will thus be seen that the election petition not only lacked the material facts, it lacked material particulars, defective verification and the affidavit filed was not in the form

prescribed. Moreover, the ingredients of corrupt practices, as defined in Section 123(1)(B) and 123(2) of the Act are also lacking. It is also not the case of the appellant that any MLA whom the appellant could not meet, received any gratification, as defined, whether as a motive or a reward for voting or refraining from voting, or there was any inducement or attempt to induce any such MLA to vote or refrain from voting. Also it is not the case of the appellant that any undue influence was exercised with the free exercise of any electoral right of any MLA which right, as noted above, has been defined in clause (d) of Section 79 of the Act. There is no allegation if any particular MLA was induced to vote or not to vote in a particular way because he was entertained or otherwise. The allegation is that the appellant himself could not meet the MLAs and he believed that if he had been given a chance to meet them he would have influenced their vote in his favour and against their party of affiliations. There is no allegation that the MLAs were prevented or influenced from freely exercising their electoral right. As stated earlier the appellant did not show as to why he could not meet the MLAs on 2-10-1997 when they were available in Pondicherry. The material fact must be that the appellant was prevented from meeting the MLAs which he did not allege and as to how he was so prevented would constitute material particulars.

31. The election petition read as a whole did not disclose any cause of action or triable issue. Considering the facts of the case and the principles of law applicable, the election petition was rightly dismissed by the High Court in limine"

73. In the considered view of the Court, therefore, in the total circumspect of the facts stated in the election petition, they do not constitute cause of action as such to maintain election petition. Thus **second point** stands answered in favour of returned candidate and against the election petitioner.

74. The grounds that have been raised as ground no. 8 A, 8B and 8D, in so far as they relate to suppression of material facts regarding criminal antecedents, in nomination papers and affidavit filed on the form 26, do not clarify specifically as to what kind of exact concealment of material particulars have taken place which necessitated election petitioner to question election on the ground of alleged corrupt practise. The material facts not only very sketchy but material particulars as to corrupt practise are not quite specific and are also not detailed therein in the relevant paragraphs. The nomination papers including affidavit referred to in the schedule as one of the documents are liable to be held as integral part of the election petition as proper construction of grounds raised relating to the statement facts and particulars would not be possible in the absence of these two documents and so the election petition, election petitioner is liable to be held as not maintainable as proper election petition and its presentation as such within meaning of Section 83 (1) 83 (a), and therefore, such election petition deserves rejection under Section 86(1) of R.P. Act on this count alone. There is no further clarity as to how ground 8D is made out.

75. In the present case as I have already discussed that no such definite particulars have been setforth in the election petition so as to form a view qua corrupt practise for such suppression or misleading facts and since such detailed

information was required to be made on an affidavit prescribed then such an affidavit which has also been referred to in the schedule ought to have been filed alongwith election petition.

76. In view of above and having discussed various authorities on the point and since I have held that election petition not only lacks concise statement of material facts but has failed to set-forth material particulars which are mandatorily required under Section 83 (1)(a),(b) and both the documents, namely nomination form and affidavit mentioned in the scheduled appended to the election petition being an integral part of it and yet having not been filed, the instant election petition deserves rejection under Section 86(1) of the R.P. Act, 1951. Further averments being vague and confusing in totality in various paragraphs, petition also fails to disclose cause of action as such to maintain it. Accordingly, miscellaneous application filed under Section 86(1) of the R.P. Act, 1951 being no. 7 of 2022 moved by the returned candidate and miscellaneous application being no. 4 of 2022 filed under Order VII Rule 11(a) of the CPC are hereby allowed.

77. Election petition is dismissed.

78. Parties to bear their own cost.

(2024) 1 ILRA 467
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE DINESH PATHAK, J.

First Appeal From Order No. 172 of 2022

Rakesh Kumar Jain ...Appellant
Versus
Zulfikar Ali ...Respondent

Counsel for the Appellant:
Sri Ishir Sripat, Sri Devendra Singh, Sri Rahul Sripat (Sr. Advocate)

Counsel for the Respondents:
Sri Pravindra Singh, Sri Ashish Singh, Sri Devendra Singh, Sri Jitendra Shanker Pandey, Sri Mohd. Akbar Shah Alam Khan, Ms. Neha Khan, Sri Pravidnra Singh, Sri Satya Dheer Singh Jadaun, Sri Virednra Singh

A. Criminal Law - Indian Penal Code,1860 – Section 151 - Restoration Application Allowed – The appellant challenged the order dated 10.12.2021 rejecting the restoration application under Order 9 Rule 13 read with Section 151 CPC against the ex-parte decree dated 13.11.2009 in Original Suit No. 684 of 2008 – Held, the trial court erred in dismissing the restoration application, and the ex-parte decree was quashed, with the suit restored for fresh adjudication. (Paras 2, 20, 21)

B. Order 5 CPC – Insufficient Service of Notice – The trial court relied on the Court Amin's report dated 22.07.2008 to deem service sufficient, citing refusal by the appellant's wife – Held, the service was invalid due to non-compliance with Order 5 Rules 12, 15, 17, and 19 CPC, as the Process Server failed to exercise "due and reasonable diligence" to locate the appellant or confirm his unavailability. (Paras 6, 7, 9, 10, 13, 14)

C. Condonation of Delay – Section 5 of Limitation Act – The trial court rejected the restoration application for lack of a formal delay condonation application – Held, as per *Sesh Nath Singh Vs Baidhyabati Sheoraphuli Cooperative Bank Ltd.*, a separate formal application under Section 5 is not mandatory if sufficient cause is shown, and the delay was condoned based on the appellant's bona fide conduct and date of knowledge (09.09.2011). (Paras 15, 20)

D. Substantial Justice Over Technicalities – The court emphasized that technicalities should not obstruct substantial justice – Held,

relying on *Jai Jai Ram Manohar Lal Vs National Building Material Supply* and *Bhivchandra Shankar More Vs Balu Gangaram More*, the restoration application was allowed to ensure the appellant's right to a fair hearing, as the ex-parte decree deprived him of property rights. (Paras 17, 18, 20)

E. Direction for Expeditious Disposal – The court directed the trial court to decide the restored suit (Original Suit No. 684 of 2008) within 12 months from the parties' appearance, with the appellant to file a written St.ment by 22.01.2024 – Held, this ensured timely adjudication to prevent further prejudice. (Paras 22, 23)

Appeal Allowed.

List of Cases cited:

1. Sesh Nath Singh Vs Baidhyabati Sheoraphuli Cooperative Bank Ltd., AIRONLINE 2021 SC 161

2. Sneh Gupta Vs Devi Sarup, (2009) 6 SCC 194

3. Abdul Salam Rowther Vs St. Bank of India, MANU/TN/0487/1993

4. Mrs. Emkamma Bai Vs Ravikumar, (1992) 1 LW 54

5. Kuttiappa Vs Rangasami, MANU/TN/0456/1992, (1992) 2 MLJ 362

6. Jai Jai Ram Manohar Lal Vs National Building Material Supply, AIR 1969 SC 1267

7. Ghanshyam Dass Vs Dominion of India, (1984) 3 SCC 46

8. Bhivchandra Shankar More Vs Balu Gangaram More, (2019) 6 SCC 387

9. N. Balakrishnan Vs M. Krishnamurthy, (1998) 7 SCC 123

(Delivered by Hon'ble Hon'ble Dinesh Pathak, J.)

1. Heard Sri Rahul Sripat, learned Senior Advocate assisted by Sri Ishir Sripat, learned counsel for the appellant and Sri Virendra Singh, Ms. Neha Khan and Sri Jitendra Shanker Pandey, learned counsel for the sole respondent and perused the record.

2. The appellant has preferred instant First Appeal From Order assailing the order dated 10.12.2021 passed by Additional District and Sessions Judge, Court No. 3, Muzaffar Nagar rejecting the restoration application moved by him under Order 9 Rule 13 read with 151 C.P.C., registered as Misc. Case No.17 of 2011, against the ex-parte judgment and decree dated 13.11.2009 passed by Additional District Judge, Court No. 5, Muzaffar Nagar in Original Suit No. 684 of 2008 (Zulfkar Ali Vs. Rakesh Kumar Jain).

3. Facts culled out from the record are that Zulfkar Ali (plaintiff-respondent) has filed suit dated 14.7.2008 for permanent prohibitory injunction against the defendant-appellant to restrain him not to interfere in the peaceful possession of the plaintiff over the property in question shown by letters ABC at the foot of the plaint and also not to dismantle the construction exists over there. The plaintiff came with the case that to secure the money borrowed from the defendant-appellant, document of understanding has been executed on 17.1.1994. At later stage, the plaintiff returned all the money as borrowed from the defendant-appellant, however, now the defendant is trying to dispossess the plaintiff from the property in question. During pendency of the suit, the plaintiff has moved an amendment application dated 23.3.2009 seeking additional relief of cancellation of the registered sale deed dated 2.2.1994 and to declare it as null and void. Aforesaid amendment application was allowed on

8.4.2009. Suit was proceeded ex-parte, vide order dated 11.12.2008, against the defendant-appellant. In the meantime, case was transferred to the Court of Additional District Judge, Court No. 5 on 28.1.2009 and the record was received in the transferee court on 30.1.2009. In absence of the defendant-appellant, suit was ex-parte decreed by judgment and decree dated 13.11.2009. When the defendant/appellant came to know this fact, he moved a restoration application dated 12.09.2011, being Misc. Case No.17 of 2011, under Order IX Rule 13 read with Section 151 C.P.C. Having considered the full knowledge of pendency of suit to the defendant-appellant through his wife, learned trial court, vide order under challenge dated 10.12.2021, has dismissed the restoration application.

4. Learned counsel for the defendant-appellant submits that initially delay was condoned vide order dated 12.09.2011, however, observation with regard to delay condonation was quashed by order dated 08.12.2011 passed by this Court and parties were relegated before the trial court to decide the delay condonation matter afresh. Learned trial court has illegally declined to condone the delay for want of separate formal application for the condonation of delay under Section 5 of the Limitation Act and knowledge of pendency of suit to the defendant-appellant through his wife Shobha Jain, which has been tried to be established illegally based on report of Court Amin dated 22.07.2008. It is further submitted that Court Amin has simply completed the table work. Even otherwise, the provisions as enunciated under Order V Rule 17 C.P.C. has not been complied with in its letter and spirit. Property in question, which is a subject matter of sale deed dated 02.02.1994, has illegally been usurped by the plaintiff-respondent by getting ex-parte decree passed in his favour, that too, by way of amendment of pleading at a very belated stage for cancellation of sale deed dated 02.02.1994 which, in fact, was not maintainable and to that extent relief for cancellation of sale deed was barred by time. It is further submitted that even at later stage, when the case was transferred from regular court, vide order dated 28.01.2009, and received in the transferre court on 30.01.2009, no fresh notice has been issued to the parties, particularly to the defendant, as required under Rule 89 of General Rule Civil. Prayer for condonation of delay has already precisely been made in prayer clause to the restoration application, therefore, no separate formal application for condonation of delay under Section 5 of the Limitation Act is required. In support of his submission, learned counsel for the applicant has relied upon the judgment of the Apex Court in the case of **Sesh Nath Singh vs. Baidhyabati Sheoraphuli Cooperative Bank Ltd.** reported in **AIRONLINE 2021 SC 161**. Learned counsel for the appellant has emphasized as well on the observations made by the learned trial court, while rejecting the restoration application, with respect to title of the parties and submits that learned trial court has exceeded its jurisdiction by giving an observation qua merits of the case of plaintiff-respondent. Lastly, it is submitted that the conduct of the defendant-appellant is bonafide who has been deprived of his property owing to ex parte decree passed against him and restoration application has illegally been rejected on technical grounds. Thus, instant appeal may be allowed and the order

impugned passed by the trial court may be quashed being illegal and unwarranted under the law.

5. Per contra, learned counsel for the plaintiff-respondent has contended that the defendant-appellant had full knowledge about pendency of the suit which is evident from the report submitted by the Court Amit, wherein wife of defendant-appellant has refused to accept the notice, therefore, proper steps for affixing notice at the front of house of the defendant-appellant and obtaining signatures of two witnesses has been completed by the Court Amin as required under the law. It is further contended that when the order dated 11.12.2008 has been passed for ex parte proceeding, there was no occasion to issue fresh notice to the defendant-appellant after transfer of case, vide order dated 28.01.2009, to the court of Additional District Judge, Court No.5, Muzaffar Nagar. It is further contended that Shobha Jain has never appeared and not filed his personal affidavit to corroborate the story of defendant-appellant qua absence of knowledge about pendency of suit. It is next contended that learned trial court has rightly declined to condone the delay for want of proper application under Section 5 of the Limitation Act inasmuch as without separate formal application with the prayer to condone the delay, the court has no jurisdiction to entertain the prayer of litigant for condoning the delay. In support of his contention, learned counsel for the plaintiff-respondent has placed reliance upon the case of **Sneh Gupta vs. Devi Sarup and Others** reported in **(2009) 6 SCC 194**. Supporting the judgment passed by the trial court, learned counsel for the plaintiff-respondent has urged to dismiss the instant F.A.F.O. being misconceived and devoid on merits.

6. Having considered the rival submissions advanced by learned counsel for the parties and perusal of record, it is manifested that learned trial court has rejected the restoration application under Order 9 Rule 13 read with Section 151 C.P.C. treating the service sufficient upon the defendant-appellant in O.S. No.684 of 2008 on the basis of report dated 22.07.2008 (Paper No.14-C) submitted by court Amin. Learned trial court, vide its ex-parte judgement and decree dated 13.11.2009, has decreed the suit (O.S. No.684 of 2008) filed on behalf of plaintiff-respondent for the relief to declare the registered sale deed dated 02.02.1994 to be null and void and also for permanent prohibitory injunction restraining defendant-appellant not to interfere in the peaceful possession and title of the plaintiff over the property in question shown by letters A, B and C at the foot of the plaint. Against ex-parte judgement dated 13.11.2009, at belated stage, restoration application dated 12.09.2011 has been filed on behalf of defendant-appellant showing the date of knowledge to be 09.09.2011 when he went to Tehsil intending to obtain extract of khatauni. As per case of the defendant-appellant, he had taken a back while saw the name of plaintiff-respondent in khatauni pertains to the land in question, thereafter, he has engaged a counsel and got the record inspected on 09.09.2011. In this backdrop of the facts, defendant-appellant came with the case that his application for restoration is well within time from the date of knowledge. Therefore, under Article 123 of the Limitation Act, his application may be treated to be filed within prescribed period of limitation. In rejecting the restoration application, learned trial court has made much emphasis on the report dated 22.07.2008 submitted by court Amin (Paper

No.14-C), which evince that Sobha Jain wife of Rakesh Jain (defendant) was interacted with the Court Amin and stated that Rakesh Jain is not presently available and went outside. She has been made acquainted with the notice of the court and pendency of the case, however, she refused to receive the notice which compelled the Process Server (Court Amin) to affix the notice along with the other documents at the front of the house and obtained signature of the two witnesses at the reverse side of the notices. Perusal of notice (Paper No.15-C), available on record, reveals that the Process Server has simply made following endorsement : "Patni Dwara Inkar - Chaspa". Below the aforesaid endorsement there is a signature of two witnesses namely one Chaman Lal son of Bhola Ram Saini and Wasim Ahmad son of Mohd. Anis. It would also be pertinent to mention that Mr. Wasim Ahmad and Chaman Lal have filed their personal affidavits (Paper No.64-C and Paper No.65-C respectively), reiterating similar facts that on the date of visit of the court Amin i.e. 22.07.2008, Rakesh Kumar Jain was not available at the residence and his wife, who had refused to receive summons had stated that there is no possibility of returning Rakesh Kumar Jain till evening. Learned trial court, relying upon the statement of witnesses of summon, has treated the knowledge of defendant-appellant sufficient with respect to the pendency of the suit. Learned trial court has further observed that affixing notice on the front of the house is sufficient compliance of Order 5 Rule 17 C.P.C.

7. In my considered opinion, however, learned trial court has misread and misinterpreted the affidavits filed by witnesses in the light of observation made by Court Amin at the reverse side of the summon and provisions relating to the service of notice as enunciated under Order 5 and Rules thereunder. Learned trial court has utterly failed to point out contradiction between the endorsement made by the Court Amin and the affidavits filed by witnesses of summon. As per endorsement and the report submitted by Court Amin, wife of defendant has refused to accept notice, however, no detail has been averred by the Court Amin that wife has stated that no possibility returning of the defendant till evening. However, witnesses on the summon have emphasized the fact in their affidavits that the wife has stated that there is no possibility of returning Rakesh Jain till evening. In my opinion, statement of witnesses are not reliable in the light of the endorsement and the report made by Court Amin wherein there is no whisper that defendant will not be available till evening.

8. Apart from that, mere formality of obtaining the signature of witnesses and affixing notice on the outer door or some other conspicuous part of the house in which defendant ordinarily resides are not sufficient to complete the valid formality of service of notice. Legislation is never intended to avoid or bypass the personal service upon the defendant. Order 5 Rule 12 denotes that endeavour should be made to serve the defendant personally, unless he has an agent empowered to accept service. In furtherance thereto, Order 5 Rule 15 C.P.C. denotes that, where neither the defendant is available nor his authorized agent to be served, in that condition notice has been directed to be served upon any adult member of the family, whether male or female, who is residing with defendant. In continuation of the procedure for service of notice, Rule 17 of Order 5 enunciates that in the eventuality, where none of three persons are available to receive notice viz.

defendant or his authorized agent or his adult family member, duty has been casted upon the Process Server to affix the summons on the outer door of the house or some other conspicuous part of the house in which defendant ordinarily resides or carries on business or personally work for gain, and, thereafter, Process Server shall return the original copy of the notice to the court from which it was issued. In the given circumstances of the present matter, Rule 15 and Rule 17 of Order 5 are relevant. Under Rule 15 service of notice could be effectuated on any adult member of the family whether male or female, who is residing with defendant, under the following conditions:

(i) There is no likelihood of his being found at the residence within a reasonable time;

(ii) and he has no agent empowered to accept the service of summon on his behalf.

9. In the eventuality of refusal made by adult family member of the defendant to accept notice as enunciated under Rule 15, there is a provision affixation notice on the conspicuous part of the house etc. under Rule 17 in following conditions:

(i) where defendant or his agent or such other person (family member) refuses to sign the acknowledgement, as required under Rule 16, or

(ii) where serving officer, after using all due and reasonable diligence, cannot find the defendant.

As per Rule 17, under the following condition, defendant shall be treated as “not found” i.e.

(i) who is absent from his residence at the time when service is sought to be effected on him at his residence and

(ii) there is no likelihood of his being found at the residence within reasonable time.

Considering the conditions as enunciated under Rule 15 and 17 of Order 5, the relevant ingredients to treat the defendant absent for the purposes of effective service, is that "there is no likelihood of his being found at the residence within reasonable time". Rule 17, one step ahead, entrust duty upon the Process Server that "to use all due and reasonable diligence" intending to find out the defendant.

10. In the instant matter, I did not find any endeavour made by the Court Amin (Process Server) to discharge his duty properly as entrusted upon him under Rule 12, 15 and 17 of Order 5. A simple statement of wife of defendant-appellant on the first date of visit of the Process Server, wherein wife has refused to accept the notice and shown unavailability of her husband (defendant), has been treated to be sufficient by learned trial court for the purpose of effective service of notice upon the defendant. No discussion has been made by learned trial court as to what "due and reasonable diligence" has been exercised/performed by the Process Server (Court Amin) before affixing the notice on the conspicuous place of the house. It is also not made clear by the Process Server and the learned trial court that under what circumstances they came to conclusion that there is no likelihood of defendant being found at the residence within a reasonable time. There is nothing on the record to demonstrate that the Court Amin has made any endeavour (apart from the first visit) with “due and reasonable diligence” to find out the defendant-appellant. I did not find any justifiable ground to make out a case that defendant-appellant was not likely to

be presented or found at his residence within reasonable time.

11. The Hon'ble High Court of Madras has expounded in the case of ***Abdul Salam Rowther vs. State Bank of India decided on 19.03.1993, (MANU/TN/0487/1993),*** that before treating the service of notice, effective compliance of provisions as enunciated under Order 5 has to be followed properly. For ready reference paragraph nos.7 & 8 of the aforesaid judgement is quoted hereinbelow:

"7. In Mrs. Emkamma Bai v. Ravikumar (1992) 1 L. W. 54, the duty of the process server under Order 5, Rule 15, C.P.C. has been stated by Srinivasan, J in this manner. Under Order 5, Rule 15, C.P.C., it is an essential precondition that the process-server should ascertain whether there was likelihood of the defendants 3 and 4 being found in the residence within a reasonable time. If the defendants 3 and 4 could be found at their residence within a reasonable time, then the process-server should wait or go to the residence of the defendants once again on another day and try to serve on them at their residence personally. In case where the defendants may not be found at their residence within a reasonable time, the process-server could serve the summons on any adult member of the family, whether male or female, residing with such defendant. As the process-server has not ascertained such fact in the present case and has not made any reference in the affidavit to the factum of his ascertaining as to whether there is any likelihood of the defendants being available for service at their residence within a reasonable time, the service of summons on a person, who has described himself as the 4th defendant's brother and 3rd defendant's son is not a valid service. It cannot be countenanced in law as service within the meaning of Order 5, Rule 15, C.P.C. In Kuttiappa v. Rangasami MANU/TN/0456/1992: (1992) 2 MLJ 362, also Srinivasan, J. has reiterated the procedure to be followed as under.

Under Order 5, Rule 15, C.P.C., if the defendant is absent from his residence at the time when the service of summons is sought to be effected on him, the process server must be satisfied, (i) that there is likelihood of the defendant being found at the residence within a reasonable time, and (ii) he had no agent empowered to accept the service of summons on his behalf and in that event, service may be made on any adult member of the family, whether male or female, who is residing with him. Order 5, Rule 17 is to the effect that when the defendant or his agent refuses to sign the acknowledgment or where the serving officer, after using all due and reasonable diligence cannot find the defendant who is absent from his residence and there is no likelihood of his being found at the residence within a reasonable time and if there is no agent or other person to receive the summons, the Serving Officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides and shall then return the original to the court with report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so and, the name and address of the person by whom the house was identified and in whose presence the copy was affixed.

8. It does not appear from the records in this case that any endeavour has been made to follow the procedure prescribed in Order 5, C.P.C. in the service of summons as already referred to. Rule 12 of Order 5

requires that whereever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service in which case service on such agent shall be sufficient. Under Order 9, Rule 6 C.P.C., where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then,

(a) if it is proved that the summons was duly served, the Court may make an order that the suit be heard ex pane.

In this case, there is no record to indicate that the Court was satisfied that there was due service of summons."

12. It is also apposite to mention that while proceeding with the matter ex-parte against the defendant-appellant, vide order dated 11.12.2018, learned trial court has simply shown the absence of the defendant and ordered to be proceeded ex-parte. However, no specific finding has been returned with respect to the effective service of notice upon the defendant as required under Order 9 Rule 6 (a) C.P.C.

13. It is pertinent to be noted as well that to prove the effective service of notice upon defendant under Order 5 Rule 17, Process Server/ Court Amin has to verify the return of summon by filing his personal affidavit as enunciated under Order 5 Rule 19 C.P.C. Return of summon in case not verified by the affidavit of Serving Officer, court shall examine him on oath, however, in case, it has been verified, court may examine him and may make such further enquiry in the matter as it think fit. After such examination, court shall either declare that summon has been duly served or pass an order for such service as it thinks fit. In the matter in hand learned trial court, while passing the order impugned has not complied with the provisions as enunciated under Order 5 Rule 19 C.P.C.

14. Therefore, in this conspectus as above, I am of the view that the learned trial court has failed to consider the relevant provisions for the effective service of notice upon defendant-appellant as enunciated under Order 5 Rule 12, 15, 17 and 19 C.P.C.. Thus, service of notice upon the defendant no.2 cannot be treated to be sufficient for the purposes of deciding the suit ex-parte or for the purposes deciding the delay in filing the restoration application against the ex-parte decree.

15. None filing of separate formal application under Section 5 of the Limitation Act, for the condonation of delay in filing the restoration application against the ex-parte judgement and decree dated 13.11.2009 has also been taken as a vidal ground by learned trial court while dismissed the restoration application on the ground of latches. In this respect, learned counsel for the plaintiff-respondent has cited the case of ***Sneh Gupta (supra)*** and contended that formal application under Section 5 of Limitation Act is necessary. However, learned counsel for the appellant has submitted that separate formal application for the condonation of delay under Section 5 of Limitation Act is not required, in case sufficient ground is made out to prove bona-fide conduct of the defendant. He has place reliance on the judgement of ***Sesh Nath Singh (supra).*** Perusal of restoration application dated 12.09.2011 reveals that in the prayer clause of the application, defendant-appellant has sought relief for the condonation of delay as well with an averment that in case his application is found beyond prescribed

period of limitation, he may be accorded benefit under Section 5 of the Limitation Act. On the premise of prayer made by the defendant-appellant in the restoration application, this fact is quite distinguishable from the facts of case ***Sneh Gupta (supra)*** relied upon by learned counsel for the plaintiff-respondent. There is no such observation made by the Hon'ble Supreme Court in the aforesaid cited case, that even after relief sought for the condonation of delay, same cannot be entertained for want of proper application under Order 5 of the Limitation Act. Even otherwise, case of Sesh Nath Singh (supra) is subsequent to the case of ***Sneh Gupta (supra)***. As per established law, in the matters, if two irreconcilable decision of the Hon'ble Supreme Court delivered by Bench of equal strength, the latter decision of the Hon'ble Supreme Court will prevail. Thus, in the subsequent judgment of ***Sesh Nath Singh (supra),*** the Hon'ble Supreme Court has expounded that even in absence of the formal application delay can be condoned, if there are sufficient material on record disclosing sufficient cause for the delay. In the matter in hand cause shown by the defendant-appellant for delay in filing the restoration application is quite sufficient and convincing. Therefore, in the light of the prayer made by defendant-appellant for granting benefit under Order 5 of the Limitation Act, defendant-appellant cannot be forced to file separate formal application for the condonation of delay under Section 5 of the Limitation Act. As such, in the light of the facts as discussed above, case of the defendant-appellant is liable to be treated within prescribed period of limitation from the date of knowledge i.e. 09.09.2011, under the provisions of law as enunciated under Article 123 of the Limitation Act.

16. So far as the compliance of Rule 89 of General Rule Civil is concerned, as submitted by learned counsel for the appellant, I am of the view that in light of the fact wherein case was already ordered to be proceeded ex-parte by order dated 11.12.2008, subsequent transfer order dated 28.01.2009 has not got much relevance for the purposes of issuance of fresh notices to the parties under Rule 89 of General Rule Civil.

17. Even otherwise, in the matter of delay court should conscious and make endeavour to do complete justice to both the parties appearing before him. It is settled law that all Courts of law are established for furtherance of interest of substantial justice and not to obstruct the same on technicalities. ***Reference-- Jai Jai Ram Manohar Lal Vs. National Building Material Supply; AIR 1969*** SC 1267, wherein it has been held that the substantial justice and technicalities, if pitted against each other, the cause of substantial justice should not be defeated on technicalities. No procedure in a Court of law should be allowed to defeat the cause of substantial justice on some technicalities. Reference - ***Ghanshyam Dass & Ors. Vs. Dominion of India & Ors., AIR (1984) 3 SCC 46.***

18. Apart from that in recent judgment of ***Bhivchandra Shankar More vs. Balu Gangaram More & Ors (decided by Hon'ble Supreme Court on 07.05.2019), reported in 2019(6) SCC 387,*** it is expounded that in condoning the delay "sufficient cause" should be given liberal construction so as to advance substantial justice. The relevant paragraph nos. 15 and

16 of the aforesaid judgment are being quoted herein below:-

"15. It is a fairly well settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of bonafide could be imputable to the appellant. After referring to various judgments, in B. Madhuri, this Court held as under:-

"16. The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay."

19. Observing that the rules of limitation are not meant to destroy the rights of the parties, in ***N. Balakrishnan v. M. Krishnamurthy (1998) 7 SCC 123,*** this Court held as under:-

"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts.

So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time." As pointed out earlier, an appeal under Section 96 CPC is a statutory right. Generally, delays in preferring appeals are required to be condoned, in the interest of justice, where there is no gross negligence or deliberate inaction or lack of bonafide is imputable to the party seeking condonation of delay."

20. In this conspectus as discussed above, I am of the considered view that learned trial court has illegally denied to extend the benefit under Section 5 of the Limitation Act and rejected the restoration application. Defendant-appellant has been deprived of from an adequate opportunity of hearing in original suit which has been decided ex-parte, resulted into depriving the defendant from his property which was subject matter of the sale deed dated 02.02.1994. There is no proper application of judicial mind while rejecting the restoration application filed on behalf of defendant-appellant. Delay in filing the restoration application is liable to be condoned and the restoration application is liable to be allowed as well. Order under challenge is illegal, unwarranted under the law and infirm which is liable to be quashed.

21. Resultantly, instant First Appeal From Order is allowed and the judgement and order dated 10.12.2021 passed by learned trial court dismissing the restoration application moved on behalf of the defendant-appellant under Order 9 Rule 13 C.P.C. is hereby quashed and said restoration application is allowed. Consequently, ex-parte judgement and decree dated 13.11.2009 passed by learned District Judge, Court No.5, Muzaffar Nagar in Original Suit No.648 of of 2008 (Julfkar Ali vs. Rakesh Kumar Jain) is quashed as well and Original Suit No.648 of 2008 is restored to its original number. Parties are relegated to the trial court. Suit shall be decided afresh in accordance with law after giving opportunity of hearing to the parties concerned.

22. Before parting the matter, counsel for the parties have prayed for issuing a direction to the court below for expeditious disposal of the suit. Having considered the peculiar facts and circumstances of the present case, wherein suit was decreed ex-parte on 13.11.2009 resulted into the cancellation of the registered sale deed dated 02.02.1994, it would be befitting to issue a direction for expeditious disposal of the suit. As such, this Court trust and believe that learned trial court shall make all endeavour to decide the suit within 12 months from the date of appearance of the parties along with the certified copy of this order.

23. Both the parties are hereby directed to appear before the trial court concerned and move an appropriate application, along with the certified copy of order of the date, on or before 22.01.2024. Defendant-appellant is hereby directed to submit his written statement along with relevant documents relied upon by him on or before the next date fixed by this Court i.e. 22.01.2024, so that, unnecessary time may not be wasted in filing the written statement and trial could be expedited within a stipulated period as directed above.

(2024) 1 ILRA 477
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2023

BEFORE

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

First Appeal from Order No. 3597 of 2008

The New India Assurance Co. Ltd. ...Appellant
Versus
Smt. Madhu & Ors. ...Respondents

Counsel for the Appellant:
Ms. Aarushi Khare, Sri Sarvesh Kumar Pandey

Counsel for the Respondents:
Sri Vidya Kant Shukla

A. First Appeal From Order – Insurer's Appeal Dismissed, Compensation Enhanced – The New India Assurance Co. Ltd. challenged the Motor Accident Claims Tribunal's award dated 19.08.2008 granting Rs.4,85,000/- with 7% interest – Held, the appeal was dismissed as the Tribunal's findings on the truck's involvement and driver's negligence were upheld, but the compensation was enhanced to Rs.10,68,000/- considering oral cross-objections by the claimants. (Paras 1, 43, 44)

B. Negligence and Vehicle Involvement – Tribunal's Findings Upheld – The Tribunal found that Truck No. MP-09KA-4228 caused the accident due to rash and negligent driving, based on eyewitness testimony (PW-2) – Held, as per *Sunita Vs Rajasthan St. Road Transport Corporation*, a dependable eyewitness account suffices in motor accident claims, and the insurer's unproven documentary evidence (e.g., photocopied receipts) failed to disprove the

truck's involvement. (Paras 19, 22, 24, 27, 28, 31)

C. Standard of Proof in Motor Accident Claims – Preponderance of Probability – The insurer argued the truck was in Indore, not Kanpur, and criticized the eyewitness's credibility – Held, motor accident claims require a preponderance of probability, not proof beyond reasonable doubt, and the Tribunal's inquisitorial role supports accepting PW-2's consistent testimony over unproven police reports or insurer documents. (Paras 24, 25, 30)

D. Compensation Revised – Future Prospects and Conventional Heads – The Tribunal assessed the deceased's income at Rs.3,500/month, applied a 1/3rd deduction, and a multiplier of 17 – Held, the income was revised to Rs.4,500/month, 50% added for future prospects per *National Insurance Co. Vs Pranay Sethi* and U.P. Motor Vehicles Rules, 1998, and conventional heads (loss of eSt., funeral expenses, consortium) increased to Rs.1,50,000 per *Pranay Sethi* and *Magma General Insurance Vs Nanu Ram*, resulting in total compensation of Rs.10,68,000/-. (Paras 34, 37, 39, 40, 41, 42)

E. Court's Power to Enhance Compensation Without Cross-Appeal – The claimants raised oral cross-objections for enhancement – Held, as per *New India Assurance Co. Ltd. Vs Lajjawati*, the court can enhance compensation to ensure a just award under the Motor Vehicles Act, 1988, without formal cross-objections. (Paras 18, 32, 33)

Appeal Dismissed.

<u>List of Cases cited:</u>

1. Sunita Vs Rajasthan St. Road Transport Corporation, (2020) 13 SCC 486

2. Parmeshwari Vs Amir Chand, (2011) 11 SCC 635

3. Mangla Ram Vs Oriental Insurance Co. Ltd., (2018) 5 SCC 656

4. Km. Jyoti Tripathi Vs Devendra Singh Yadav, 2023:AHC:208490

5. Sarla Verma Vs Delhi Transport Corporation, (2009) 6 SCC 121

6. National Insurance Co. Vs Pranay Sethi, (2017) 16 SCC 680

7. New India Assurance Co. Ltd. Vs Urmila Shukla, 2021 SCC OnLine SC 822

8. Sushil Kumar Vs M/s. Sampark Lojastic Private Limited, 2017 (35) LCD 1311

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

10. Puttamma Vs K.L. Narayana Reddy, (2013) 15 SCC 45

11. Rajesh Vs Rajbir Singh, (2013) 9 SCC 54

12. Santosh Devi Vs National Insurance Co. Ltd., (2012) 6 SCC 421

13. Magma General Insurance Co. Ltd. Vs Nanu Ram, (2018) 18 SCC 130

14. New India Assurance Co. Ltd. Vs Lajjawati, 2022 (6) AWC 5291

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

1. This is an appeal by the Insurance Company assailing an award by the Motor Accident Claims Tribunal/ Additional District Judge, Court No.13, Kanpur Nagar passed in Claim Petition No.236 of 2004 dated 19.08.2008, granting the claim and awarding a sum of Rs.4,85,000/- to the claimants together with interest, payable by the Insurance Company.

2. Ramu Gupta was a chaat vendor. He would sell his wares on a mobile cart (*thela*). On the 10th of February, 2004, Ramu Gupta parked his cart in the night hours at the Bhadoria Crossing, situate in Nehru Nagar, Kanpur Nagar and was cycling his way back home. As he reached near the Kanha Shyam Hotel, located at the G.T. Road and was about the petrol pump

there, Truck No. MP-09KA-4228, hit him from the rear with full impact. Ramu along with his bicycle was thrown to the ground and died on the spot. The truck was given a chase by Raj Kumar son of Dularey Ram Verma, who was riding his motorcycle. Another, Nand Kishore son of Lal Deewan, who was riding pillion with Raj Kumar, caught up with the offending truck near the Gurudev Talkies and noted down its registration number. But, the truck driver was successful in making a get away.

3. A First Information Report was lodged by one Deepak Kumar, an employee with the petrol pump against an unknown driver. When the deceased's wife came to know of the particulars of the truck, she went to the police station and conveyed the number of the offending truck. The information regarding the number of the offending truck was also sent by registered post to the Senior S.P., Kanpur Nagar by the deceased's wife on 20.02.2004.

4. The deceased is said to have been a promising and hard working man, who was the only bread-winning member of the family. He was survived by his wife, a minor son and a dependent father. The family have no other source of income. Ramu, at the time of his demise was aged 30 years, and it is said, that he had a monthly income of Rs.5000/-. On the basis of the FIR, Crime No.13 of 2004, under Sections 379, 304-A and 427 IPC, Police Station Nazirabad, District Kanpur Nagar was registered. It is on the foot of these facts that the claim petition, giving rise to the present appeal, was instituted before the Tribunal on 17.03.2004.

5. The claim petition was instituted by Smt. Madhu Gupta, Ramu's widow, his minor son Karan, aged about 7 years through his next friend and mother, Madhu Gupta and Har Dutt, the deceased's father. The three claimants are claimant-respondent Nos.1, 2 and 3 to the appeal. They shall hereinafter be called 'the claimants'. The claim petition was instituted against Hemant Kumar, the owner of the offending truck, arrayed as opposite party No.1 and the New India Assurance Company Limited through the Regional Manager, Civil Lines, Kanpur Nagar, as opposite party No.2. Hemant Kumar is arrayed as defendant-respondent No.4 to this appeal. He shall hereinafter be called 'the owner'. Opposite party No.2 to the claim petition, the Insurance Company aforesaid, are the appellants here, who shall be called 'the insurers', hereinafter.

6. A written statement was put in on behalf of the insurers generally denying the claimants' case. It was pleaded by them that the owner of the offending truck never gave information of the accident to the insurers. It was their case that the offending truck was never involved in the accident. It is next pleaded that the accident happened on account of the deceased's negligence. The further plea raised is that the offending truck, on the date of the accident, was not insured with the insurers and the driver did not hold a valid and effective driving licence. The deceased's age, income and occupation are not established by any documentary evidence.

7. No written statement was filed on behalf of the owner. Accordingly, the claim petition proceeded against the owner ex parte.

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

"(1) Whether on 10.02.2004 at 11.45 p.m. or thereabouts, near Kanha Shyam Hotel, G.T. Goad, in front of the petrol pump, falling in the local limits of Police Station Nazirabad, District Kanpur Nagar, the driver of Truck No. MP-09KA-4228, driving it at a high speed and negligently, hit the deceased Ramu's bicycle, leading to his death on the spot?

(2) Whether the accident in question happened on account of the cyclist's own negligence?

(3) Whether at the time of the accident in question, Truck No. MP-09KA-4228 was insured with opposite party No.2, the New India Assurance Company Ltd?

(4) Whether at the time of the accident in question, the driver of Truck No. MP-09KA-4228 held a valid and effective driving licence?

(5) Whether the claimants are entitled to receive any compensation? If yes, how much and from which opposite party?"

9. The claimants examined in support of their case, PW-1 Madhu Gupta, PW-2 Nand Kishore and PW-3 Rajeev Yadav. The claimants produced in their documentary evidence, through a list, bearing Paper No.6-Ga, a copy of the FIR and a copy of the written information supported by affidavit, sent by registered post to the S.S.P. Through another list, bearing Paper No.35-Ga, two documents were produced from the Nagar Nigam, a copy of the postmortem report and the site-plan. Vide Paper No.41-Ga, a photostat copy of the registration certificate was filed.

10. The insurers produced in their documentary evidence, a copy of the final report and the report of their Investigator, Anil Kumar Pandey. Vide another list, bearing Paper No.48-Ga, the insurers produced a copy of the FIR and a certified copy of the letter written to the Station House Officer, P.S. Nazirabad, a copy of the receipt from the Trade Tax Department and a photostat copy of a receipt issued by the Calcutta-Indore Transport Carrier.

11. The Tribunal decided Issue No.3 in favour of the owner and the claimants and against the insurers., holding that the offending truck, on the date and time of the accident, was validly insured. Issue No.4 was also decided in favour of the owner and the claimants, holding that on the date and time of the accident, the driver of the offending truck held a valid and effective driving licence. Issues Nos.1 and 2 were decided together answering Issue No.1 in the manner that the accident was caused by the driver of the offfending truck driving it at a high speed and negligently, resulting in Ramu's death on the spot. Issue No.2 was answered in favour of the claimants and against the insurer and the owner, holding that the accident did not happen on account of the deceased's negligence, in any manner. In answering Issue No.5, the Tribunal proceeded to work out the dependency crediting the deceased with a monthly income of Rs.3500/-. A one-third was deducted towards the deceased's personal and living expenses and a multiplier of '17' was applied. Thus, the substantive dependency worked out was a sum of Rs.4,76,000/-. To this were added under the conventional head, Rs.2000/- towards cremation expenses, Rs.5000/- towards the loss of consortium and mental agony and Rs.2000/- towards the loss of estate, aggregating a sum of Rs.9000/-. In this manner, a total compensation of Rs.4,85,000/- was awarded together with 7% interest payable annually. The compensation was directed to be paid by the insurers. A direction for apportionment

of the compensation was made in terms that the deceased's father was held entitled to a sum of Rs.50,000/-, whereas out of the remainder of the compensation, the widow and the minor child were each entitled to a half share. The compensation payable to the minor was directed to be invested in fixed deposit with a nationalized bank until time that he attained majority.

12. Disillusioned by the award, the insurers have appealed under Section 173 of the Motor Vehicles Act, 1988 (for short, 'the Act').

13. Heard Mr. Sarvesh Kumar Pandey holding brief of Ms. Aarushi Khare, learned Counsel for the insurers and Mr. Vidya Kant Shukla, learned Counsel appearing on behalf of the claimants.

14. It is argued by the learned Counsel for insurers that the deceased was travelling on a bicycle, when he was hit by an unknown vehicle, and died. According to him, it is a case of hit and run. On the fateful day, that is to say, 10.02.2004, the offending truck was in Indore and the accident took place at Kanpur Nagar. According to the learned Counsel, the offending truck has been falsely shown involved in the accident by the claimants, acting in collusion with the owner. This is apparently so because it was not possible for the offending truck to cause an accident at Kanpur Nagar, when it was present on that day at Indore. It is the learned Counsel's submission that the Tribunal failed to consider documentary evidence, comprising Paper No.50-C/1, that is to say, the owner's application to the Police dated 25.09.2007, Paper Nos.51-C and 52-C/1, filed by the insurers, which show that the offending truck was in Indore on 10.02.2004, making its involvement in the accident at Kanpur an impossibility. The FIR was lodged against an unknown vehicle. It was subsequently and after lapse of a period of ten days that the claimants passed on information to the Police about the offending truck's registration number.

15. It is emphasized by the insurers that no charge-sheet was filed against the offending truck or its driver, though detailed investigation was undertaken by the Police. The Investigating Officer came to the conclusion that the insured vehicle's involvement in the accident was not proved by evidence. The eye-witness produced by the claimants before the Tribunal was not named in the final report submitted by the Police. It is contended that it can, therefore, be unmistakably concluded that the eye-witness produced was got up by the claimants. It is also emphasized that it is not the claimants' case that they filed a protest petition before the Magistrate, where the Police had put in their final report.

16. On the other hand, learned Counsel for the claimants, Mr. Vidya Kant Shukla, has submitted that the accident happened when the deceased was returning home riding his bicycle. The offending truck hit the deceased at about 11.45 p.m. in front of the petrol pump located on the G.T. Road. The FIR in the matter was lodged by Deepak Kumar, an employee with the petrol pump. The offending truck was given a chase by Raj Kumar son of Dularey Ram and Nand Kishore son of Lal Deewan. Nand Kishore appeared in the witness-box as PW-2 and proved the accident involving the offending truck. The registration number of the offending truck was provided by Nand Kishore to the deceased's widow, and, it was, thereupon conveyed to the Senior Superintendent of

Police on 20.02.2004, by registered post. The Police, however, did not investigate the matter fairly and properly. They submitted a final report on the basis that the unknown truck driver was not traceable. It is emphasized that the owner of the offending truck never contested the claim, against whom the claim proceedings went ex parte.

17. The present appeal has been carried by the insurers alone on ground, inter alia, that the offending truck was not involved in the accident. The insurers have filed receipts from a petrol pump, where the offending truck was allegedly refuelled, but the same have not been proved by any witness. It is, particularly, emphasized that the eye-witness, PW-2 has not been cross-examined about the identification of the offending truck by the insurers. The owner of the offending truck addressed the Police and sent the driver's name as well as a photostat copy of his driving licence, registration certificate, the insurers' policy etc. on 07.09.2007. He never said that his vehicle was not involved in the accident. The owner again sent information on 25.09.2007 taking a stand that on the date of accident, the vehicle was away from the place of accident, but documents to prove the fact, were never proved by any witness. The fact that the vehicle was involved in the accident is well established by the claimants' testimony, both oral and documentary.

18. It is next submitted on behalf of the claimants that the deceased was a chaat vendor and would earn Rs.250-300/- per day. In this regard, the testimony of PW-1 has been emphasized. The Tribunal has assessed his income at a figure of Rs.125/- per day i.e. Rs.3750/- per month, but calculated compensation on the basis of a monthly income of Rs.3500/-. It is next submitted that the deceased was 30 years old and according to the law laid down by the Supreme Court in **Sarla Verma (Smt) v. Delhi Transport Corporation and another, (2009) 6 SCC 121**, a multiplier of '17' ought to have been adopted by the Tribunal, the deceased being in the age bracket of 26-30. The award of compensation under the conventional heads is urged to be inadequate, as also the non-grant of compensation towards future prospects. In substance, the claimants have come up with an oral cross-objection to the extent that they claim enhancement of compensation in order to make it a just award.

19. Upon hearing learned Counsel for the parties, this Court finds that the Tribunal has meticulously considered the testimony of PW-2 and believed it. PW-2 is an eye-witness. The truck number is said to have been given out by PW-1 to the Police after she was informed about it by Raj Kumar Soni and Nand Kishore Soni at her house, as she says in her testimony.

20. So far as PW-2 is concerned, this Court has looked into his testimony. In the examination-in-chief, he has testified:

"दिनांक 11.2.04 को मैं अपने रिस्तेदार श्री राजकुमार सोनी की मोटर साइकिल में पीछे बैठकर सब्जी मण्डी वादशाही नाका से लाजपत नगर अपने घर जा रहा था। जैसे ही हम लोग जीटी० रोड पर कान्या श्याम होटल के पास पेट्रोल टंकी के सामने रात्रि 11-45 बजे पहुंचे कि देखा कि हमारे सामने जा रहे एक साइकिल चालक को ट्रक नम्बर MP09K.A.4228 के ड्राईवर ने बडी तेजी व लापरवाही से चलात हुआ साइकिल चालक को सड़क के किनारे 2 जा रहा था जोरदार टक्कर मार दिया साइकिल चालक गिर गया था ट्रक चालक ट्रक को लेकर

कल्यानपुर की तरफ भाग रहा था गुरूदेव चौराहे तक हम दोनों ने पीछा किया लेकिन रोकने की कोसिस की लेकिन रूका नहीं उस रात हम लोग नम्बर नोट करके अपने 2 घर चले गये थे। घटना की सूचना तीसरे दिन अखवार के माध्यम से जानकारी हुई कि उक्त घायल व्यक्ति की मृत्यु हो गई। मैंने नजीराबाद थाने में नाम पता किया (मृतक का) इसके बाद मृतक के घर रावतपुर गांव गया। मृतक की पत्नी मधु गुप्ता को ट्रक का नम्बर लिखकर व अपना नाम पता लिखकर दे आये थे।"

21. In the cross-examination of the witness, that was deferred on 02.10.2006 to 28.11.2006, PW-2 has stated:

"और 10.2.04 को भी मैं बादशाही नाका पर सब्जी के कारोबार में व्यस्त था। तथा 11.2.04 को भी मैं बादशाही नाका में ही था। राजकुमार सोनी मेरे रिश्तेदार है। तथा उनका मकान नं० मुझे नहीं मालूम। राजकुमार सोनी ही मोटर साइकिल चला रहे थे। मोटर साइकिल का नम्बर मुझे नहीं मालूम। उनकी मोटर साइकिल काले रंग की हीरो होन्डा था। घटना स्थल पर तुरन्त ही मैं पहुंच गया था। भागते हुए ट्रक को मैं पकड़ नहीं पाया वह निकल गया। नम्बर नोट कर लिया था। ट्रक लोडेड था। और मैंने उसका नम्बर देख भी लिया था उसके आगे गुरूदेव टाकिज तक पीछा किया और वहॉ पर पहुंच पुलिस वालो को मैंने बताया। उन्होंने मुझसे कहा कि तू भी मरना चाहता है क्या, तू अपने घर जा। और पुलिस वालो ने मुझे भाग दिया। इसके बाद मैं अपने घर आ गया।""

22. So far as this witness is concerned, his testimony is consistent and natural. The fact that he gave information to the deceased's wife some three days after the occurrence, is also logical, because the two are not acquaintances. In a road accident, the likelihood of an eye-witness, being a stranger to the victim and his family, enhances his credit rather than render his testimony doubtful. In the logical sequence of things, if the witness, who has given the offending truck a chase and noted its number, would miss the identity of the deceased, who in the meantime would have been removed from site. The FIR in this case was lodged by the petrol pump attendant, Deepak Kumar. After the chase was over and the offending truck's number noted by PW-2, there was no way the witness would have known the deceased's whereabouts, except the way he has himself spoken of in his examination-in-chief. He read about the name of the deceased in the newspaper and went to the police station concerned. It was there that he came to know of his address, went over and conveyed the number of the offending truck to his wife. In the nature of things, the testimony of PW-2 is natural and his presence not doubtful. In his cross-examination, the witness has said that he chased the vehicle upto a certain Gurudev Talkies, where he found some policemen on duty, whom he informed about the offending truck, that was still in the vicinity. He has stated in his cross-examination that the policemen told him if he too wants to die and that he should go home. This attribution to the policemen is also something, which is not unbelievable. This kind of apathy is often seen amongst the lower ranks of the police, if something like an accident is brought to their notice by a common man of no special status. There is no reason to discard the eye-witness account of Nand Kishore, PW-2, which the Tribunal has wholesomely believed. We are in agreement with the Tribunal on this point.

23. The learned Counsel for the insurers has criticized the findings of the Tribunal about the eye-witness on ground that in the final report submitted by the Police, this witness is not mentioned. As already noticed, the learned Counsel for the insurers has dubbed this witness a planted one. There is a scathing criticism of his testimony in the minutest detail by the learned Counsel for the insurers. We cannot agree with the approach that the learned Counsel for the insurers wants us to adopt in evaluating the testimony of PW-2.

24. In a motor accident, the standard by which the case has to be established is not one beyond reasonable doubt or the criminal standard. It may even be lesser than the strict civil standard of probability. The reason is that what the Tribunal does is not precisely hold trial of an action. It has to hold an inquiry into the accident, where its role is primarily inquisitorial. The Act is a social welfare legislation and the Tribunal in keeping with its purpose, has to ensure that an aggrieved, if there be evidence, should not be denied recompense by adopting a hyper-technical approach to the evidence that is forthcoming. A dependable eye-witness account before the Tribunal by a solitary eye-witness, who has identified the vehicle, is good enough to fix liability.

25. The remarks of the Supreme Court in **Sunita and others v. Rajasthan State Road Transport Corporation and others, (2020) 13 SCC 486** are illuminating. It is observed in Sunita (supra):

"30. Clearly, the evidence given by Bhagchand withstood the respondents' scrutiny and the respondents were unable to shake his evidence. In turn, the High Court has failed to take note of the absence of cross-examination of this witness by the respondents, leave alone the Tribunal's finding on the same, and instead, deliberated on the reliability of Bhagchand's (AD 2) evidence from the viewpoint of him not being named in the list of eyewitnesses in the criminal proceedings, without even mentioning as to why such absence from the list is fatal to the case of the appellants. This approach of the High Court is mystifying, especially in light of this Court's observation (as set out in Parmeshwari [Parmeshwari v. Amir Chand, (2011) 11 SCC 635 : (2011) 4 SCC (Civ) 828 : (2011) 3 SCC (Cri) 605] and reiterated in Mangla Ram [Mangla Ram v. Oriental Insurance Co. Ltd., (2018) 5 SCC 656 : (2018) 3 SCC (Civ) 335 : (2018) 2 SCC (Cri) 819]) that the strict principles of proof in a criminal case will not be applicable in a claim for compensation under the Act and further, that the standard to be followed in such claims is one of preponderance of probability rather than one of proof beyond reasonable doubt. There is nothing in the Act to preclude citing of a witness in motor accident claim who has not been named in the list of witnesses in the criminal case. What is essential is that the opposite party should get a fair opportunity to cross-examine the witness concerned. Once that is done, it will not be open to them to complain about any prejudice caused to them. If there was any doubt to be cast on the veracity of the witness, the same should have come out in cross-examination, for which opportunity was granted to the respondents by the Tribunal."

26. In this case also, the insurers got ample opportunity to cross-examine PW-2, but there is nothing in his cross-examination that may shake his veracity or make his presence doubtful on the scene of

accident. About the approach of the Tribunal to be more inquisitorial in a motor accident claim than adversarial, reference may be made to the decision of this Court in **Km. Jyoti Tripathi and others v. Devendra Singh Yadav and others, 2023:AHC:208490**. This Court, therefore, is in wholehearted agreement with the Tribunal about the conclusions that it has reached based on the testimony of PW-2.

27. There is much contention on behalf of the learned Counsel for the insurers that the documentary evidence shows that the offending truck was at a far away place on the date of occurrence, which makes it impossible to be involved in the accident. To this end, reliance has been placed on the fact that the truck was booked with a consignment from Calcutta (now Kolkata) to Indore on 05.02.2004. This is attempted to be proved by Paper No.51-Ga, which is a sales tax receipt. The margin of this receipt bears the signature of the driver, Rajvansh. It also bears the receipt of the Trade Tax Department. The receipt has been relied on to show that the offending truck left Calcutta for destination Indore on 05.02.2004, carrying its consignment. The Tribunal has remarked that there is no testimony to show that after 07.02.2004, what were the whereabouts of the offending truck. The Tribunal has observed that the accident happened on 10.02.2004 at 11.45 in the night hours. In the absence of testimony to indicate the whereabouts of the offending truck between 07.02.2004 and 10.02.2004, a period of three days and three nights is enough, as the Tribunal says, for a fast moving vehicle like a truck to conveniently traverse the distance and arrive at Kanpur on the date and time of the accident. This finding by the Tribunal cannot be flawed.

28. Moreover, the receipt Paper No.51-Ga is a photostat copy of the document and no explanation has been given why the original has not been or could not be produced. It is difficult to place reliance on secondary evidence in this fashion.

29. There are then documents about refueling of the vehicle, Paper No.52-Ga from B.P. Malva, Fatehpur (U.P.) dated 08.02.2008. This records the number of the truck and the quantity of the diesel oil purchased and its price. This too is a photocopy of the receipt. There is a computerized receipt and a hand written receipt. Both the receipts are photocopies. The receipts, as already said, have been issued by petrol pump in District Fatehpur, Uttar Pradesh. The receipt is dated 08.02.2004. It is not known what route the truck was taking at the time when it refueled at Fatehpur and if it was still en route to Indore. If it was not proceeding to Indore, Fatehpur is located hardly 70 kilometers away from Kanpur and the offending truck could have very well been at Kanpur on 10.02.2004, when the accident happened. The Tribunal has remarked that it is urged that the consignment loaded at Calcutta was delivered to the consignee Anil Enterprises at Indore on 11.02.2004 by the offending truck, but this fact has not been proved by examining the proprietor or the manager of Anil Enterprises. The approach of the Tribunal in drawing its inference about the whereabouts of the vehicle at the time of the accident is flawless, which we uphold.

30. The police investigation has been much harped upon by the learned Counsel

for the insurers. The Tribunal, for detailed reasons assigned, has not accepted the conclusions of the Police. This Court is not inclined to extend much credit to the police investigation in the present case, contrary to a dependable eye-witness account.

31. For all that we have said about the remarks of the Tribunal regarding the involvement of the offending truck in the accident, this Court holds in agreement with the Tribunal that the accident was caused by the offending truck. The deceased was riding a bicycle and was hit by the truck on the rear side. The Tribunal has found that the deceased was not at all negligent and for the reasons that the Tribunal has given and otherwise too, we believe the testimony of PW-2 on this score and hold that the accident was caused solely on account of the offending truck's driver's negligence.

32. This takes this Court to the other question, if the compensation awarded by the Tribunal should be enhanced. There is certainly an oral cross-objection, though no formal cross-objection or cross-appeal has been filed. The claimants have asked for just compensation to be awarded.

33. It is the duty of this Court under the Act to make a just award. That this Court has the power, in the absence of cross-objections by the claimant, to pass a just award, has been held in **New India Assurance Co. Ltd. v. Smt. Lajjawati and others, 2022 (6) AWC 529**1. Accordingly, this Court holds that compensation in this case ought to be revised. This Court proceeds to do so.

34. The Tribunal after considering the deceased's avocation, who was a chaat vendor and the testimony about the affairs of his business has estimated his income at a sum of Rs.125/- per day as against Rs.250/- to Rs.300/- claimed for him. The accident happened in the year 2004. It is difficult to precisely assess the income of a vendor of foodstuffs, like chaat, but given the circumstances that the deceased was occupied in his avocation until the late evening hours, in a city like Kanpur, about the year 2004, one can reasonably infer for the deceased a daily income of Rs.150/-. This would lead to a monthly income of Rs.4500/-. The annual income would, therefore, be Rs.54,000/-.

35. The deceased had a family of three, besides himself, that is to say, his wife, a minor child and aged father, who are his dependents. Considering the child to be half a unit, the deceased would be placed in the bracket of 2-3 as laid down in Paragraph No.32 of the report in **Sarla Verma (supra)**. For the said bracket, deduction towards personal and living expenses would be one-third. The finding of the Tribunal on this score is, therefore, flawless and affirmed.

36. The Tribunal has adopted a multiplier of '17', which also accords with what is laid down in Paragraph No.42 of the report in **Sarla Verma**. The adopted multiplier also does not require interference.

37. What the Tribunal, however, has not awarded is compensation payable on account of future prospects. After the decision in **National Insurance Company v. Pranay Sethi and others (2017) 16 SCC 680**, it is well settled that future prospects are payable even to those, who are self-employed or work on fixed wages. The percentage of addition towards future prospects in the State of U.P. is governed

by Rule 220-A(3) of the U.P. Motor Vehicles Rules, 1998 (for short, 'the Rules of 1998') as held in **New India Assurance Co. Ltd v. Urmila Shukla and others, 2021 SCC OnLine SC 822.**

38. The fact that this accident took place much before the introduction of Rule 220-A to the Rules of 1998, would not make the Rules inapplicable, as held in **Sushil Kumar and others v. M/s. Sampark Lojastic Private Limited and others, 2017 (35) LCD 1311.**

39. Under Rule 220-A(3) of the Rules of 1998, the deceased being aged less than 40 years, 50% would have to be added to her income on account of future prospects.

40. So far as conventional heads go, the law in this regard is again laid down by **Pranay Sethi** *(supra),* where it is held:

"**48.** This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule to the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra [UP SRTC v. Trilok Chandra, (1996) 4 SCC 362] . Recently, in Puttamma v. K.L. Narayana Reddy [Puttamma v.K.L. Narayana Reddy, (2013) 15 SCC 45 : (2014) 4 SCC (Civ) 384 : (2014) 3 SCC (Cri) 574] it has been reiterated by stating : (SCC p. 80, para 54)

"54. … we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

49. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for general damages in case of death. It is as follows:

"3. General damages (in case of death):

The following general damages shall be payable in addition to compensation outlined above:

(i)	Funeral expenses	Rs 2000
(ii)	Loss of consortium, if beneficiary is the spouse	Rs 5000
(iii)	Loss of estate	Rs 2500
(iv)	Medical expenses — actual expenses incurred before death supported by bills/vouchers but not exceeding	Rs 15,000"

50. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra [UP SRTC v.Trilok Chandra, (1996) 4 SCC 362] and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs 1,00,000 was granted towards consortium inRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . The justification for grant of consortium, as we find fromRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC

(Cri) 817 : (2014) 1 SCC (L&S) 149] , is founded on the observation as we have reproduced hereinbefore.

51. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

52. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh[Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] . It has granted Rs 25,000 towards funeral expenses, Rs 1,00,000 towards loss of consortium and Rs 1,00,000 towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. ThoughRajesh [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 : (2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149] refers to Santosh Devi [Santosh Devi v. National Insurance Co. Ltd., (2012) 6 SCC 421 : (2012) 3 SCC (Civ) 726 : (2012) 3 SCC (Cri) 160 : (2012) 2 SCC (L&S) 167] , it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs 15,000, Rs 40,000 and Rs 15,000 respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads."

(emphasis by Court)

41. So far as the loss of consortium is concerned, the principles are elaborately laid down by the Supreme Court in **Magma General Insurance Company Ltd. v. Nanu Ram alias Chuhru Ram and others, (2018) 18 SCC 130**, where it has been observed:

"21. A Constitution Bench of this Court in Pranay Sethi[National Insurance Co. Ltd. v. Pranay Sethi, (2017) 16 SCC 680 : (2018) 3 SCC (Civ) 248 : (2018) 2 SCC (Cri) 205] dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is loss of consortium. In legal parlance, "consortium" is a compendious term which encompasses "spousal consortium", "parental consortium", and "filial consortium". The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse : [Rajesh v. Rajbir Singh, (2013) 9 SCC 54 :

(2013) 4 SCC (Civ) 179 : (2013) 3 SCC (Cri) 817 : (2014) 1 SCC (L&S) 149]

21.1. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation". [Black's Law Dictionary(5th Edn., 1979).]

21.2. Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training".

21.3. Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.

(emphasis by Court)

42. In view of the aforesaid legal position, the just compensation to which the claimants are entitled, requires to be revised in the following manner:

(i)	Monthly Income (of the deceased) =	**4500**
(ii)	Annual Income (of the deceased) =4500x12	**54000**
(iii)	Annual Income+Future Prospects (annual income x 50%) = 54000+27000 =	**81000**
(iv)	Annual Dependency = Annual Income – one-third deduction towards personal expenses of the deceased = 81000-27000	**54000**
(v)	Total Dependency = Annual Dependency x Applied Multiplier = 54000 x 17	**918000**
(vi)	Claimant's entitlement towards conventional heads = Loss of Estate + Funeral Expenses + dependents' Consortium =15000+15000+40000x3	**150000**
	The total compensation would therefore, work out to a figure of = Rs.918000+ Rs.150000 =	**1068000**

43. In the result, the appeal filed by the insurers fails. However, considering the oral cross-objections by the claimants seeking enhancement, the award passed by the Tribunal is modified and enhanced to a sum of Rs.10,68,000/-. The said sum of money will carry interest @ 7% per annum from the date of institution of the claim petition, until realization. Any sum of money, already deposited, pursuant to the impugned award passed by the Tribunal, or any interim orders of this Court, shall be adjusted. The directions of the Tribunal regarding apportionment of compensation between the heirs of the deceased shall remain intact with the modification that nothing shall now be held in fixed deposit for the then minor claimant, the deceased's son. The entire compensation shall be remitted in account to the deceased's son as well.

44. This appeal is **disposed of** in terms of the aforesaid orders.

45. There shall be no order as to costs.

(2024) 1 ILRA 490
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2023

BEFORE

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

First Appeal From Order No. 4163 of 2011

The New India Assurance Co. Ltd. ...Appellant
Versus
Ran Vijay Singh & Anr. ...Respondents

Counsel for the Appellant:
Sri Vinod Swarup, Sri Kuldip Shanker Amist

Counsel for the Respondents:
Sri Vidya Kant Shukla, Sri P.K. Sinha, Sri Vidya Kant Shukla, Sri Utkarsh Pandey

Civil Law - Motor Vehicles Act, 1988 - Sections 66 & 170 - On 31.12.2008, claimant, while jogging with other person, hit by school bus which was driven rashly, sustaining multiple fractures - B.Sc. graduate (2007), earning through milk supply and preparing for competitive exams - FIR lodged by claimant's father - Tribunal framed five issues - Issues 1 to 5 decided in favour of claimant, holding no contributory negligence on his part - On Issue 6, Tribunal awarded Rs.5,34,048/- with 6% simple interest per annum as compensation - Appeal raises two issues i.e. whether school bus is exempt from permit requirement rendering insurer liable to indemnify, and whether driver hold valid licence on date of accident - As per National Insurance Co. Ltd. (infra), use of transport vehicle without permit absolves insurer, but pay and recover principle applies to safeguard claimant - Tribunal erred in holding school bus owned by educational institution required no permit - Tribunal wrongly decided Issue No.4 without any proof of driver's licence - No copy of driving licence held by driver of offending bus was filed either by claimant or owner - Despite absence of driver's licence on record, claimant cannot be left to pursue recovery from owners alone - Thus, Claimant will first recover compensation from insurer, who may thereafter recover amount from owner and driver, jointly and severally. (Para 2, 12, 15, 24, 25)

Writ petition partly allowed. (E-13)

List of Cases cited:

1. Catholic Diocese of Gorakhpur Education Society, Gorakhpur & anr. Vs St. of U.P.& anr., (2001) 1 UPLBEC 915

2. Amrit Paul Singh & anr. Vs TATA AIG General Insurance Co. Ltd. & ors. (2018) 7 SCC 558, (Paras 18, 24)

3. Pappu & ors. Vs Vinod Kumar Lamba & anr., (2018) 3 SCC 208

4. National Insurance Co. Ltd. Vs Swaran Singh, (2004) 3 SCC 297

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

1. This is an appeal by the Insurance Company, arising out of a judgment and award passed by Mr. Arun Prakash, the Motor Accident Claims Tribunal/ Additional District Judge, Court No.2, Kanpur Nagar in Claim Petition No.575 of 2009, dated 14.09.2011, partly allowing the claim petition.

2. The facts giving rise to the motor accident claim, subject matter of this appeal, are:

On December, the 31st, 2008 between 6:00-7:00 in the morning hours, Ran Vijay Singh, the claimant was jogging down the Ramaipur Bharu Shahpur Majhawan Road. He was jogging on the side of the road. He was accompanied by Vinod Singh, a native of his village. A school bus, bearing Registration No. UP-53T-3894 approached from the Ramaipur side, driven at a high speed and negligently. The bus hit the claimant, leading him to

sustain multiple fractures to his right lower limb, besides injury to other parts of his body. According to the claimant, he had passed his B.Sc. Examination in the year 2007, but being unemployed, had purchased milch cattle and was into the business of supplying milk. Apart from earning his livelihood this way, he would prepare to write various competitive examinations, leading to a possible employment.

3. After the accident, the claimant was taken to the Primary Health Centre Bidhnoo. Since his condition was serious, he was referred to the Regency Hospital, where he was admitted on 04.01.2009. After discharge, he was treated as an outdoor patient by Dr. Nadeem Faruqui for a few months. The claimant says that he has become handicapped because of the injury to his right lower limb. He has become non-ambulatory and cannot move about. His business of supplying milk is ruined. He cannot look after his milch cattle nor can he go to Ramaipur or the town to sell milk. Before the accident, he had an income of Rs.9000/- per mensem. For the purpose of treatment, besides whatever it involved in running about and eating a nourishing diet, he had to spend a sum of Rs.2 lacs approximately. The physical handicap, that has followed the accident, has given him extreme mental pain, besides physical, which are life long. It is impossible to compensate the injury.

4. An FIR regarding the accident was got lodged by the claimant's father at P.S. Bidhnoo. This claim petition was instituted by Ran Vijay Singh before the Motor Accident Claims Tribunal/ The District Judge on 20.05.2009 and assigned to the Additional District Judge, Court No.2, Kanpur Nagar on 21.05.2009. Ran Vijay Singh, the sole claimant, who is respondent No.1 to this appeal, shall hereinafter be called 'the claimant'. Param Hans Ram Mangal Das Inter College, Sawayajpur, Narwal, District Kanpur Nagar, who are owners of the offending bus, were arrayed as opposite party No.1 to the claim petition and are impleaded as respondent No.2 to this appeal. They shall hereinafter be referred to as 'the owners'.

5. The offending vehicle was insured with the New India Assurance Company Limited, Civil Lines, Kanpur Nagar. They were arrayed as opposite party No.2 to the claim petition and are the appellants here. The appellant, Insurance Company aforesaid, shall hereinafter be called 'the insurers'.

6. A written statement was filed on behalf the owners on 25.11.2009, signed and verified by one Santosh Kumar Dwivedi, a person authorized on behalf of the owners to sign and verify pleadings. The owners generally denied the claimant's case and pleaded that the accident never happened. It was said that for the said reason, the income, dependency and other facts are all irrelevant and set up to establish a hefty claim. The owners also denied the registration of any criminal case against the bus driver. They also pleaded that even if it has been registered with the Police by resort to manipulation, the same is without basis. The owners also denied that their bus ever plied on the route indicated or the place where the accident occurred. It was never involved in the accident in question. Their further case is that the offending bus is insured with the insurers under Policy No. 420202/31/08/02/00000030, effective from 08.04.2008 to 07.04.2009.

7. In the additional pleas, it is averred by the owners that the offending bus was being driven by a driver possessed of a valid and effective driving licence at the relevant time and date. Therefore, if there is any claim provable against the owners, it has to be met by the insurers. There is a particular plea in Paragraph No.11 to the effect that the offending bus is owned by a recognized institution and a registered society. It is not involved in any commercial activity. It ferries poor girl students to and fro from the college. It was also pleaded in the alternative that the claimant has put forward an exaggerated and inflated claim relating to his medical treatment, and, on that ground alone, the claim petition deserves to be dismissed. It is pleaded that the claimant has misdescribed his injuries and incorrectly alleged the amount of expenses incurred in his treatment. According to the owners, all these incorrect facts have been put forth to fetch a higher compensation.

8. Another written statement was filed on behalf of the insurers on 15.05.2010. The insurers have generally denied the claimant's case saying that the burden of proof rests on his shoulders to establish. The claimant's income being a sum of Rs.9000/- per mensem has been denied with a plea that there is no tangible evidence to prove it. It is also pleaded that the claimant's parents are said to be his dependents, but there is no proof that indeed they are so. It is averred that the claimant's right lower limb is said to have been fractured at three sites, but no positive proof about the fact has been offered by the claimant. It is also said by the insurers that the claimant alleges that he was treated by a doctor, but the identity of the doctor has not been revealed. In the absence of positive proof about it, the claim is not tenable. The insurers also say that though the identity of the owners has been disclosed, but in the absence of the insurance certificate relating to the bus being produced, the insurers do not accept their liability on the policy. The burden to prove the policy lies on the owners and the claimant. The claim is said to be one that is exaggerated and inflated. The claimant's story has been castigated as a concoction and one that is unbelievable.

9. In the additional pleas, it is averred that no cause of action arose to the claimant to institute the claim petition. The insurers never had any information about the accident, because neither the owners nor the claimant intimated the insurers about it. It is pleaded that bearing in mind the description of the incident in the claim, it is evident that the entire case is concocted and founded on falsehood. The owners have violated the conditions of the insurance policy. The first breach pointed out is that the insurers were never intimated about the accident, whereas in accordance with the rules and the insurance policy, the Branch that had issued it, had to be intimated of the accident. It is also pleaded that the claimant and the owners appeared to have entered into a conspiracy, where the insurers would not bear responsibility to compensate. A plea is also raised that the insurers are entitled to the protection of Section 170 of the Motor Vehicles Act, 1988 (for short, 'the Act of 1988'). The insurers' further case is that it was the burden of the claimant as well as the owners to prove that on the date and time of the accident, the offending bus was validly registered, had a valid permit, a valid fitness certificate and other valid and effective documents permitting it to operate. The insurers have pleaded that the burden to produce the said documents lay on the claimant and the owners. If the

owners and the claimant could not discharge that burden, or the papers produced, not found valid, the insurers would have no liability to satisfy the award. It is also pleaded that if the owners or the claimant establish the existence of a valid insurance policy, the owners would still have to show that he has complied with the provisions of Section 64-VB of the Insurance Act, 1938, and if they fail, the insurers would not be liable. There is also a plea that the accident happened because of the claimant's negligence. The claim petition is said to be bad for non-joinder, because the driver of the offending bus was not impleaded.

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

"1. Whether on 31st December, 2008 at about 6:00-7:00 a.m., Ran Vijay Singh, who was jogging on the Ramaipur-Bharu-Shahpur Majhawan Road, was hit from rear by the driver of bus No. UP-53T-3894, driving it at a high speed and negligently, in consequence of which Ran Vijay sustained grievous injuries?

2. Whether on the date and time of the said accident, the aforesaid bus was insured with opposite party No.2, Insurance Company?

3. Whether on the date of the said accident, the driver of the aforesaid bus held a permit and fitness certificate?

4. Whether the driver of the aforesaid bus, on the date of the accident, held a valid and effective driving licence?

5. Whether the accident was the result of contributory negligence?

6. Whether the claimant is entitled to any compensation? If yes, how much and from which party?"

11. In support of his case, the claimant examined himself as PW-1 and Surendra Singh Chauhan as PW-2. The insurers examined Prateek Kumar Sinha as DW-1. The claimant filed through a list of documents Paper No.7-Ga1, a copy of the FIR and through list 11-Ga1, a copy of the insurance policy. He filed through another list bearing Paper No.15-Ga1, medical prescriptions of medicines bearing Page Nos.1 to 72. Another list 41-Ga carrying seven papers was filed on behalf of the claimant, which include copies of the charge-sheet, the site-plan, receipts evidencing purchase of buffaloes dated 07.08.2007, 14.08.2007, 14.08.2007, 14.08.2007 and 14.08.2007. Through another list Paper No.93-Ga1, another four documents were filed.

12. Issue No.1 was decided in favour of the claimant and against the owners and the insurers. Issue No.2 was decided in favour of the claimant and against the insurers. Issue No.3 was also decided in favour of the claimant and the owners and against the insurers. Issue No.4 was also decided in favour of the claimant and the owners and against the insurers. Issue No.5 was decided in favour of the claimant and against the owners and the insurers, holding that there was no contributory negligence by the claimant. In deciding Issue No.6, the Tribunal held the claimant entitled to a compensation in the sum of Rs.5,34,048/-, and passed an award for the said sum of money, carrying simple interest @ 6% per annum.

13. Aggrieved by the impugned award, the insurers have preferred the present appeal.

14. Heard Mr. K.S. Amist, learned Counsel for the insurers, Mr. Utkarsh

Pandey, Advocate holding brief of Mr. P.K. Sinha, learned Counsel for the owners and Mr. Vidya Kant Shukla, learned Counsel for the claimant. Records have been perused.

15. There are two issues alone that arise for consideration in this appeal. The first is if the Tribunal was right in holding that a school bus is exempt from the requirement of holding a permit and the insurers would be liable to indemnify. The other is if the finding of the Tribunal regarding the driver holding a valid and effective driving licence on the date of the accident is correct.

16. It is argued by the learned Counsel for the insurers that the Tribunal while passing the impugned award relied on the authority of a Bench decision of this Court in **Catholic Diocese of Gorakhpur Education Society, Gorakhpur and another vs. State of Uttar Pradesh and another, (2001) 1 UPLBEC 915**, while deciding the twin issues against the insurers, relating to the validity of the driving licence and the non-requirement of holding a permit by a school bus. Insofar as the requirement of holding a permit is concerned, the learned Counsel for the insurers submits that under Section 66 (1) of the Act of 1988, no transport vehicle is permitted to ply without holding a permit issued by the competent authority. He has, particularly, emphasized that Clause (h) of Section 66(3) of the Act last mentioned, granting exemption from holding a permit to transport vehicles belonging to educational institutions recognized by the Central or State Government, and societies registered under the Societies Registration Act, 1860, or under any other law being used exclusively for their own purpose, was omitted vide Act No.27 of 2000 w.e.f. 11.08.2000. The accident here took place on 31.12.2008. Therefore, there was no exemption in favour of an educational institution or a registered society in the matter of their vehicle's obligation to ply without a valid permit issued by the competent authority.

17. It is next submitted that according to the owners' case, they were not using the vehicle for their own use, but had given it on hire to a charitable society for ferrying students. The submission is that even if Clause (h) of Section 66(3) of the Act of 1988 were not omitted, the exemption under the Act would not obtain. The Tribunal, according to the learned Counsel for the insurers, decided the issue in manifest error against the insurers. In support of his contention that the school bus in question was obliged to operate on a permit issued by the competent authority under the Act of 1988, the learned Counsel for the insurers has reposed faith in the authority of the Supreme Court in **Amrit Paul Singh and another v. TATA AIG General Insurance Co. Ltd. and others, (2018) 7 SCC 558.**

18. So far as the other issue about the driver of the offending vehicle operating it without a valid licence is concerned, it is pointed out that the decision of the Tribunal placing reliance on **Catholic Diocese of Gorakhpur Education Society (supra)** is misplaced because the said decision is an authority on the issue of permit and not about the requirement of holding a valid driving licence. It is argued that it is apparent from the award that no driving licence was produced, and, according to the law laid down by the Supreme Court in **Pappu and others v. Vinod Kumar Lamba and another, (2018) 3 SCC 208**, the initial burden would be upon the owner

and the driver to produce the driving licence, so that the insurers may verify the same, and if no driving licence is filed, the insurers would not be liable. In that case, they would be given a right to pay and recover. The learned Counsel for the insurers on both counts has vehemently argued for a right to pay and recover.

19. The learned Counsel for the claimant and the owners have supported the impugned judgment and award.

20. So far as the requirement for a bus owned by an educational institution to ply without a permit is concerned, no doubt the Bench decision of this Court in **Catholic Diocese of Gorakhpur Education Society** is a direct authority in the owners' support, but the question is if the statute, on the foot of which the Division Bench opined in **Catholic Diocese of Gorakhpur Education Society**, has changed altogether so as to remove the basis of the decision. This Court notices that vide Section 4 of Act No.27 of 2000, which came into force on 11.08.2000, Clause (h) of Section 66(3) of the Act of 1988, was omitted. In order to understand the import of Clause (h) of sub-Section (3) of Section 66 of the Act of 1988, one has to look to the said provision as it stood before Clause (h) was omitted by Act No.27 of 2000. The unamended statute (relevant part) reads:

"66. Necessity for permits.—(1) No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him the use of the vehicle in that place in the manner in which the vehicle is being used:

Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a contract carriage:

Provided further that a stage carriage permit may, subject to any conditions that may be specified in the permit, authorise the use of the vehicle as a goods carriage either when carrying passengers or not:

Provided also that a goods carriage permit shall, subject to any conditions that may be specified in the permit, authorise the holder to use the vehicle for the carriage of goods for or in connection with a trade or business carried on by him.

Provided also that where a transport vehicle has been issued any permit or permits, as well as a licence under this Act, such vehicle may be used either under the permit, or permits, so issued to it, or under such licence, at the discretion of the vehicle owner.

(2) x x x

(3) The provisions of sub-section (1) shall not apply—

(a) to (g) x x x x

(h)* "to any transport vehicle owned by, and used solely for the purposes of, any educational institution which is recognised by the Central or State Government or whose managing committee is a society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India;".

*[Omitted by Act 27 of 2000, S. 4 (w.e.f. 11-8-2000)]"

21. There is no doubt that the Division Bench of this Court in deciding **Catholic Diocese of Gorakhpur**

Education Society did so in a very different statutory context. The exemption that was available to a transport vehicle owned by and used solely for the purpose of an educational institution recognised by the Central or the State Government etc., was one under the statute that ceased to exist after Clause (h) was omitted vide Act No.27 of 2007. Thus, the very basis of the decision in **Catholic Diocese of Gorakhpur Education Society** stands effaced. Here, the accident happened admittedly on 31.12.2008, much after the statute was amended. Therefore, in our opinion, there was absolutely no basis for the Tribunal to have followed the Bench decision of this Court in **Catholic Diocese of Gorakhpur Education Society** and held against the insurers on this point.

22. The holding in **Amrit Paul Singh (supra)** that plying a transport vehicle without a permit amounts to a fundamental breach of the policy conditions needs to be noticed. It was held in **Amrit Paul Singh:**

"18. The learned counsel for the appellants would submit that there has been no fundamental breach of the policy conditions. In this context, we may profitably refer to the decision in Challa Upendra Rao [National Insurance Co. Ltd. v. Challa Upendra Rao, (2004) 8 SCC 517 : 2005 SCC (Cri) 357] wherein a two-Judge Bench squarely dealt with the absence of a permit and ruled that plying a vehicle without a permit is an infraction and the insurer is not liable."

23. But, in **Amrit Paul Singh**, it has been further observed:

"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."

24. Therefore, while plying a transport vehicle without a permit indeed discharges the insurers of their obligation, following the decision of the Supreme Court in **National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297.** The 'pay and recover' principle, however, ought to be invoked in order to safeguard interest of the unwary claimant and extend him the benefit of the social welfare legislation that the Act of 1988 is. This Court is, therefore, of opinion that the Tribunal was in manifest error, in deciding Issue No.3 and holding that there was no requirement for a permit to be held by the offending bus, as it was owned by an educational institution.

25. The other finding by the Tribunal on Issue No.4, which is about the fact if the driver held a valid and effective driving licence. What this Court notices is that the Tribunal has virtually reproduced its finding on Issue No.3, in deciding Issue No.4. Issue No.4 is about the validity of the driving licence, if any, held by the driver of the offending vehicle on the date and time of the accident. However, the Tribunal decided the said issue against the insurers and in favour of the claimant and the owners, relying on the authority of a Bench decision of this Court in **Catholic Diocese of Gorakhpur Education Society**. The said authority had nothing to do with the issue of a valid driving licence. Apparently, the Tribunal went astray and without application of mind decided Issue No.4. There is nothing on record to show that a copy of the driving licence held by the driver of the offending bus was ever filed, either by the claimant or the owners. In the circumstances, following the principle laid down by the Supreme Court in **Pappu** *(supra)*, the insurers cannot be held bound by terms of the policy. Of course, the omission to discharge their burden about bringing on record a photostat copy or a copy of the driving licence, the claimant would not be left in the uncertain alley of pursuing the owners alone for recovery of compensation. He will have the right to recover from the insurers in the first instance and the insurers the right to pay and recover; pay the claimant and recover from the owners and the driver, jointly and severally. It is held, accordingly.

26. No other ground or point was pressed by either side.

27. In the result, the appeal **succeeds** and is **allowed in part**. The impugned award passed by the Tribunal is modified and it is ordered that the compensation awarded by the Tribunal shall, in the first instance, be recoverable from the insurers by the claimant, who will then be at liberty to recover it from the owners and the driver, jointly and severally, by making a miscellaneous application to the Tribunal for the purpose. The insurers would not be required to bring any independent action to recover.

28. There shall be no order as to costs.

(2024) 1 ILRA 497
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Habeas Corpus Writ Petition No. 131 of 2023

Devendra Pratap Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Devendra Upadhyay

Counsel for the Respondents:
G.A., A.S.G.I., Dr. Pooja Singh

(अ) फौजदारी कानून - भारतीय दंड प्रक्रिया संहिता ,1973 - धारा 161, भारतीय दंड संहिता, 1860 - धारा 120-B, 142, 143, 153-A, 295, 295-A, 298, 504, 504 (2) एवं 506 - राष्ट्रीय सुरक्षा अधिनियम, 1980 - धारा 3(2),3(4),3(5),4,5,12(1) - संविधान के अनुच्छेद 21 में किसी नागरिक को प्रदत्त दैहिक स्वतंत्रता का मौलिक अधिकार उसे आत्यंतिक (Absolutely) रूप से प्रदत्त नहीं किया गया है, वरन यह स्वतंत्रता विधि के प्रावधानों से शासित होती है - Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. Security of State, maintenance of public order and services essential to the community, prevention of smuggling and blackmarketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life. (पैरा -61,62)

(ब) भारत का संविधान, 1950 - किसी व्यक्ति की व्यक्तिगत स्वतंत्रता का अधिकार हमारे संविधान द्वारा ईर्ष्या से संरक्षित है, लेकिन यह स्वतंत्रता निरपेक्ष नहीं है और इसे ऐसी गतिविधियों में लिप्त होने के लिए लाइसेंस के रूप में नहीं समझा जाना चाहिए जो समुदाय या समाज को आवश्यक सेवाओं और आपूर्ति से गलत और अन्यायपूर्ण रूप से वंचित करती हैं - समग्र रूप से समाज का अधिकार, अपनी प्रकृति से, किसी व्यक्ति के अधिकार की तुलना में बहुत अधिक महत्वपूर्ण है - दोनों अधिकारों के बीच टकराव के मामले में, व्यक्ति के अधिकार को हमारे संविधान द्वारा समाज के व्यापक हित में उचित प्रतिबंधों के अधीन किया जाता है। (पैरा - 61)

आपराधिक षडयंत्र - सार्वजनिक स्थल पर रामचरित मानस की प्रतियां फाड़कर व उन्हें पैरों से कुचलते हुए जला दिया गया - रामचरित मानस व रामचरित मानस के अनुयायियों पर अभद्र टिप्पणी भी की गई - जिनसे आम जनमानस में अत्यंत आक्रोश फैल गया व लोक व्यवस्था छिन्न-भिन्न हो गई (पैरा - 2,3,4,)

निर्णय:- याची ने अपने सहयोगियों के साथ, सार्वजनिक स्थल पर, दिन के प्रकाश में, समाज के बहुसंख्यक वर्ग द्वारा उनकी धार्मिक मान्यताओं व आस्था के अन्तर्गत आराधित भगवान राम के, जीवन के घटनाक्रम से संबंधित धर्म ग्रंथ रामचरित मानस का जिस प्रकार से अपमान किया है, उससे समाज में आक्रोश व गुस्से का उत्पन्न होना स्वाभाविक है, समाज में धार्मिक उन्माद व आक्रोश फैलने की स्थिति का परिदृश्य में आ सकना, वर्तमान स्थिति में विशेषकर जहां मोबाइल फ़ोन व सोशल मीडिया से समाज का लगभग प्रत्येक व्यक्ति जुड़ा हुआ है, स्वाभाविक प्रतीत होता है। अतः ऐसी स्थिति में जबकि आसन्न खतरे को देखते हुए कार्यपालिका/प्रशासन द्वारा याची को निरुद्धि आदेश दिनांक 08.02.2023 के जरिए निरुद्ध किया गया है, इसे याची के व्यक्तिगत स्वतंत्रता का अयुक्तियुक्त व विधि विरुद्ध प्रतिबंध नहीं माना जा सकता है।(पैरा - 63)

याचिका निरस्त की जाती है। (E-7)

उद्धृत मामलों की सूची :-

1. महाराष्ट्र राज्य और अन्य बनाम भाऊराव पंजाबराव गवांडे, (2008) 3 एससीसी 613

2. अरुण घोष बनाम पश्चिम बंगाल राज्य, 1970.1 एससीसी 1998

3. राम रंजन चटर्जी बनाम पश्चिम बंगाल राज्य, (1975) 4 एससीसी 143

4. इंद्रदेव महतो बनाम पश्चिम बंगाल राज्य, (1973) 4 एससीसी 4

5. इब्राहिम नजीर बनाम तमिलनाडु राज्य और दूसरा, (2006) 6 एससीसी 64

6. खुदीराम दास बनाम पश्चिम बंगाल राज्य, (SCC pp. 90-91, para 8)

7. सूरज पाल साहू बनाम महाराष्ट्र राज्य और अन्य, (1986) 4 एससीसी 378

8. भारत संघ बनाम अरविंद शेरगिल, (2000) 7 एससीसी 601

9. मगन गोप बनाम पश्चिम बंगाल राज्य, (1975) 1 एससीसी 415

10. पंजाब राज्य बनाम सुखपाल सिंह, (1990) 1 एससीसी 35

11. सरबजीत सिंह मोख बनाम जिला मजिस्ट्रेट, जबलपुर और अन्य, 2021 एससीसी ऑनलाइन एससी 1019

12. मोहम्मद. सुब्रती उपनाम मोहम्मद करीम बनाम पश्चिम बंगाल राज्य, (1973) 3 एससीसी 250

13. महाराष्ट्र राज्य और अन्य बनाम भाऊराव पंजाबराव गवांडे, (2008) 3 एससीसी 613

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. हस्तगत याचिका देवेंद्र प्रताप यादव पुत्र अर्जुन प्रसाद द्वारा अपने पैरोकार/पिता अर्जुन प्रसाद के द्वारा निम्नलिखित अनुतोष के साथ प्रस्तुत की गई हैः-

"(i) To issue a writ, order or direction in the nature of Habeas Corpus directing the Respondents to release the petitioner-detenue forthwith;

(II) To issue a writ, order or direction in the nature of Certiorari quashing the impugned detention order dated 08.02.2023 passed by District Magistrate, District Lucknow i.e. Opposite Party No.-4 as well as order dated 16.02.2023 and 27.03.2023 passed by the opposite party no-3., as contained in Annexure No.-1, 2 and 3 and rejection order dated 22.02.2023 passed by District Magistrate, District Lucknow i.e. Opposite Party No.-4 to as contained in Annexure No.-7 to this writ petition as well as the entire consequential proceedings and orders with respect to the detention of the petitioner.

(III) To issue any other writ, order or direction which this Hon'ble Court may deem just and proper in circumstances of the case.

(IV) To allow this writ petition with all costs in favour of the petitioner."

2. संक्षेप में प्रकरण के तथ्य निम्नवत हैंः-

दिनांक 29.01.2023 को समय 23:47 बजे वादी सतनाम सिंह लवी ने थाना पी०जी०आई लखनऊ में प्रथम सूचना रिपोर्ट अन्तर्गत धारा 120-B, 142, 143, 153-A, 295, 295-A, 298, 504, 504 (2) एवं 506 भारतीय दण्ड संहिता इस आशय से अंकित करवाई की, आज दिनांक 29.01.2023 को समय लगभग 9:00 बजे, पूर्व सुनियोजित योजना के अनुसार व एक आपराधिक षडयंत्र के अन्तर्गत स्वामी प्रसाद मौर्य के द्वारा रामचरित मानस के प्रति किए गए

अपमानजनक टिप्पणी के समर्थन में व उनकी शह पर देवेंद्र प्रताप यादव, यशपाल सिंह लोधी, सतेन्द्र कुशवाहा, महेन्द्र प्रताप यादव, सुजीत यादव, नरेश सिंह, एस.एस यादव, संतोष वर्मा, सलीम व अन्य कुछ अज्ञात व्यक्तियों द्वारा, आवास विकास ऑफिस सेक्टर-9 के पास, नई रोडवेज गेट पर रामचरित मानस की प्रतियां फाड़कर सार्वजनिक स्थान पर पैरों से कुचलते हुए जला दिया गया व स्वामी प्रसाद मौर्या के समर्थन में नारेबाजी की गई तथा रामचरित मानस व इसके अनुयायियों पर अभद्र टिप्पणी की गई, जिससे वहाँ आक्रोश फैल गया व अगल-बगल के लोग आक्रोशित होकर इकट्ठा होने लगे। अग्रेतर वादी प्रथम सूचनाकर्ता ने यह भी अंकित किया है कि "मैं भी मौके पर मौजूद था तथा मैंने भी आपत्ति किया था, लेकिन ये लोग नहीं माने और मुझे भी धमकाया।"

उपर्युक्त लोगों के द्वारा एक समुदाय की भावना को आहत करने, साम्प्रदायिक दंगे, वर्ग-विद्वेष फैलाने, हिंसा के लिए उकसाने लखनऊ तथा राज्य की लोक व्यवस्था व कानून व्यवस्था को खराब करने व माहौल बिगाड़ने के लिए जानबूझकर उक्त कृत्य किया गया है जिससे आम जनमानस में अत्यंत आक्रोश व्याप्त है। अग्रेतर वादी ने यह भी कथन किया है कि," मैंने पुलिस को भी सूचना दी है। इन लोगों के द्वारा उक्त कृत्य देश व समाज के अमन व भाईचारे के पूर्णतः प्रतिकूल है व अराजकता फैलाने के उद्देश्य से किया गया है। अतः समुचित कार्यवाही की जाए।"

3. तत्पश्चात पुलिस द्वारा सक्रिय होकर व तत्परता से याची देवेंद्र प्रताप यादव व यशपाल सिंह व अन्य तीन अभियुक्तगण को गिरफ्तार किया गया। दिनांक 01.02.2023 को विवेचक द्वारा अभियुक्त/याची देवेंद्र प्रताप यादव के घर से व उसकी निशानदेही पर घटना से संबंधित एक मोबाइल फोन (Samsung) को पुलिस द्वारा कब्ज़े में लिया गया साथ ही उक्त दिनांक 01.02.2023 को ही पुलिस द्वारा याची/अभियुक्त की निशानदेही पर "अनंत स्टेशनरी" वृन्दावन सेक्टर-2 स्थिति दुकान से एक रेडमी मोबाइल फोन, जिसके सम्बंध में कहा गया है कि उक्त मोबाइल फोन पर मंगवाए गए रामचरित मानस की प्रतियों को उक्त दुकान से प्रिंट कराया गया था एवं पुलिस ने सम्बंधित प्रिंटर को भी उक्त दुकान से अपने कब्ज़े में लिया तथा इन सब बरामद वस्तुओं की फर्द बरामदगी (Recovery memo) भी तैयार की गईं।

4. याची/अभियुक्त द्वारा किये गये उक्त कृत्य के संबंध में दिनांक 07.02.2023 को प्रभारी निरीक्षक, थाना पी०जी०आई० लखनऊ ने पुलिस उपायुक्त (पूर्वी) लखनऊ को अपनी आख्या प्रस्तुत की, जिसमें यह अंकित किया गया है कि याची देवेंद्र प्रताप यादव, यशपाल सिंह व अन्य के द्वारा आवास विकास ऑफिस सेक्टर-9 के पास, सार्वजनिक स्थल पर रामचरित मानस की प्रतियां फाड़कर व उन्हें पैरों से कुचलते हुए जला दिया गया तथा रामचरित मानस व रामचरित मानस के

अनुयायियों पर अभद्र टिप्पणी भी की गई, जिनसे आम जनमानस में अत्यंत आक्रोश फैल गया व लोक व्यवस्था छिन्न-भिन्न हो गई। जब भीड़ इकट्ठा होने लगी तब उक्त लोग धमकी देते हुए एवं नारेबाजी करते हुए भाग गए। अभियुक्तगण ने सुनियोजित योजना के अन्तर्गत लखनऊ कमिश्नरेट व प्रदेश को हिंसा की आग में झोंकने के लिए उक्त कृत्य को कारित करते हुए, उनका वीडियो भी बनाया था, ताकि उसे प्रसारित कर प्रदेश को हिंसा की आग में झोंक सकें। प्रभारी निरीक्षक ने अग्रेतर यह भी अंकित किया है कि, समय लगभग 13:34 बजे के आसपास सोशल मीडिया पर उक्त वीडियो वायरल होने लगी। वीडियो प्रसारित होने पर एक समुदाय में आक्रोश और क्षुब्धता बढ़नी शुरू हो गयी थी। तथ्य की जानकारी होने पर प्रभारी निरीक्षक द्वारा उप-निरीक्षक चन्द्रभान वर्मा को थाने से रवाना किया गया। रात होते-होते माहौल काफी गर्म हो गया था। लोग तरह-तरह की चर्चाएं करने लगे थे। ऐसा लग रहा था कि इस कृत्य में कोई गहरा षडयंत्र व साजिश है। अभियुक्तों को चिह्नित करने के लिए अलग-अलग थाने से पुलिसबल की टीमें रवाना की गईं व सभी चौकी प्रभारियों व थाने की फोर्स को सतर्कता बरतने हेतु क्षेत्र में भेजा गया व सतर्क रहने के निर्देश भी दिए गए। देर रात होते-होते अभियुक्तों द्वारा किए गए इस कृत्य का वायरल वीडियो से उक्त थाना क्षेत्र में चारों तरफ सनसनी व तनाव का माहौल व्याप्त हो गया व सामान्य जनजीवन अस्त-व्यस्त हो गया। थाना क्षेत्र में संवेदनशीलता लगातार बढ़ती जा रही थी, जिस पर अगल-बगल के थानाध्यक्षों को क्षेत्र में पहुँचने व फोर्स भेजने व अतिरिक्त सतर्कता बरतने के लिए अनुरोध किया गया। घटना वाले दिन रात में ही अभियुक्तगण देवेंद्र प्रताप यादव व सतेंद्र कुशवाहा आदि को गिरफ्तार किया गया। पुलिस द्वारा किसी प्रकार से स्थिति को नियंत्रण में लाया जा सका था, लेकिन तनाव लगातार बरकरार रहा है। आवंटित अतिरिक्त पुलिस फोर्स को एस०पी० कार्यालय कैंट में रोका गया था। क्षेत्र में भारी पुलिस बल का पैदल मार्च भी संवेदनशील स्थानों पर कराया गया। आख्या में थाना प्रभारी ने अग्रेतर यह भी अंकित किया है कि, मैं व उच्चाधिकारीगण भ्रमण पर रहकर लोगों को समझाते बुझाते रहे। अभी-भी क्षेत्र में तनाव बना हुआ है। विभिन्न समाचारपत्रों तथा इलेक्ट्रानिक चैनलों ने भी उक्त खबर को लगातार प्रमुखता से प्रसारित किया है। पुलिस के द्वारा एक्सपर्ट के माध्यम से भी वीडियो का प्रसारण/परिचालन को रोकने का प्रयास किया गया। अभियुक्तगण अपना जुर्म स्वीकार करते हुए उक्त जघन्य कृत्य को आगे भी जारी रखने की बात कह रहे हैं। प्रकरण में राज्य व देश के अमनचैन में खलल डालने वाली बाहरी एजेंसियों के संलिप्तता की भी सम्भावना दिख रही है और यदि पुलिस द्वारा तात्कालिक तौर पर तत्परता पूर्वक कार्यवाही न की गई होती तो देश व प्रदेश दंगे की चपेट में भी आ सकता था। थाना प्रभारी ने यह भी अंकित किया है कि, अभियुक्त देवेंद्र प्रताप यादव ने उक्त अपराध संख्या 75 सन 2023 में जमानत हेतु मुख्य

न्यायिक मजिस्ट्रेट लखनऊ के समक्ष जमानत प्रार्थना पत्र प्रस्तुत किया था जो न्यायालय द्वारा निरस्त कर दिया गया है, परन्तु देवेंद्र प्रताप यादव ने पुनः सत्र न्यायालय में जमानत प्रार्थना पत्र प्रस्तुत कर दिया है और जमानत पर छूटने का हर सम्भव प्रयास कर रहा है। उसके जमानत पर छूटने की प्रबल सम्भावना है। यह भी सुनिश्चित है कि जमानत पर छूटने पर वह पुनः इसी प्रकार के आपराधिक कृत्यों में लिप्त हो जाएगा। अतः अभियुक्त देवेंद्र प्रताप यादव को राष्ट्रीय सुरक्षा अधिनियम की धारा 3(2) के अन्तर्गत निरुद्ध करने हेतु निरोधात्मक प्राधिकारी/जिला मजिस्ट्रेट लखनऊ से अनुरोध करने की कृपा की जाए।

5. तत्क्रम में सहायक पुलिस आयुक्त, (कैंट) कमिश्नरेट, लखनऊ के द्वारा भी प्रभारी निरीक्षक थाना पी०जी०आई० लखनऊ की उक्त आख्या दिनांकित 07.02.2023 से सहमत होते हुए उक्त आख्या को पुलिस उपायुक्त (पूर्वी) लखनऊ को दिनांक 07.02.2023 को ही अग्रसारित कर दिया।

6. पुलिस उपायुक्त (पूर्वी) लखनऊ ने भी प्रभारी निरीक्षक थाना पी०जी०आई० की आख्या दिनांक 07.02.2023 से सहमत होते हुए याची देवेंद्र प्रताप यादव को राष्ट्रीय सुरक्षा अधिनियम की धारा 3(2) के अन्तर्गत निरुद्ध किये जाने हेतु, निरोधादेश पारित करने के अनुरोध के साथ अपनी आख्या दिनांकित07.02.2023जिला मजिस्ट्रेट लखनऊ को प्रेषित कर दिया, जिसमें पुलिस उपायुक्त (पूर्वी) लखनऊ ने याची देवेंद्र प्रताप यादव व उसके सहयोगियों द्वारा किए गए कृत्य, वायरल कराए गए वीडियो व इस घटना का जनमानस पर असर पड़ने के तथ्य व लोक व्यवस्था छिन्न-भिन्न होने की स्थिति को देखते हुए, पुलिस के व्यापक प्रबंध के तथ्य को विस्तृत रूप से अंकित, करने के साथ ही साथ यह भी अंकित किया है कि उक्त देवेंद्र प्रताप यादव न्यायिक अभिरक्षा में है और उसने जमानत हेतु प्रार्थना पत्र भी प्रस्तुत कर रखा है, जिसके शीघ्र ही स्वीकार किए जाने की सम्भावना है और यदि वह जमानत पर निर्मुक्त हो गया तो पुनः इसी प्रकार की आपराधिक गतिविधियों में लिप्त हो जाएगा।

7. जिला मजिस्ट्रेट लखनऊ ने प्रभारी निरीक्षक थाना पी०जी०आई० व पुलिस उपायुक्त की आख्याओं का सम्यक परिशीलन व परीक्षण करते हुए अपनी संतुष्टि को, विस्तार से, निरुद्धि के आधार दिनांक 08.02.2023 में उल्लेख करते हुए याची देवेंद्र प्रताप यादव को राष्ट्रीय सुरक्षा अधिनियम (जिसे अग्रेतर 'अधिनियम' अंकित किया गया है) की धारा 3 (2) के अन्तर्गत जिला कारागार लखनऊ में निरुद्ध किए जाने हेतु निरोधादेश दिनांक 08.02.2023 को पारित किया।

8. जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 ने उक्त दिनांक 08.02.2023 को ही निरोधादेश, निरुद्धि के आधार, व प्रकरण से

संबंधित समस्त प्रलेखिय साक्ष्य बतौर 'अनुक्रमणिका', कागजात क्रमांक 1 से 37 (जिसे याची ने अपनी याचिका में संलग्नक 4 के तौर पर संलग्न किया है), याची पर तामीली हेतु प्रतिपक्षी संख्या 6/जेल अधीक्षक लखनऊ को दिनांक 08.02.2023 को प्रेषित किया, जहां याची अपराध संख्या 75 सन 2023 में दिनांक 29.01.2023निरुद्ध था। प्रतिपक्षी संख्या 6/जेल अधीक्षक लखनऊ ने उक्त आदेश व अन्य संलग्न प्रपत्र याची को दिनांक 08.02.2023 को ही उपलब्ध करा दिए तथा उनकी पावती पत्र दिनांक 20.02.2023, जिला मजिस्ट्रेट लखनऊ को प्रेषित कर दिया।

9. प्रकरण में यह तथ्य भी दर्शित किया गया है कि याची के विरुद्ध दिनांक 29.01.2023 को अंकित कराई गई प्रथम सूचना रिपोर्ट मुकदमा अपराध संख्या 0075 सन 2023 अन्तर्गत धारा 120B, 142, 143, 153A, 295, 295A, 298, 504, 505(2) व 506 भा०दं०वि० में याची का जमानत प्रार्थना पत्र विशेष न्यायाधीश पी०सी० एक्ट प्रथम लखनऊ द्वारा दिनांक 13.02.2023 को स्वीकार कर लिया गया व याची अभियुक्त को रु० 1,00,000/- के दो स्थानीय जमानतों व समान धनराशि के व्यक्तिगत बंधपत्र पर सशर्त जमानत पर निर्मुक्त करने का आदेश पारित कर दिया गया।

10. निरोधादेश दिनांक 08.02.2023 को अनुमोदित किए जाने हेतु निरोधादेश, निरुद्धि के आधार, संबंधित प्रलेखिय साक्ष्य व उपरोक्त के संदर्भ में आख्या सहित प्रतिपक्षी संख्या 4 जिला मजिस्ट्रेट लखनऊ द्वारा दिनांक 08.02.2023 को ही उत्तर प्रदेश शासन लखनऊ। प्रतिपक्षी संख्या 1 को, अनुमोदनार्थ प्रेषित कर दिया गया था, जिसे प्रतिपक्षी संख्या 1 के सम्बंधित अनुभाग (Section) द्वारा दिनांक 09.02.2023 को प्राप्त किया गया। तत्पश्चात प्रतिपक्षी संख्या-1 के द्वारा दिनांक 14.02.2023 को विपक्षी संख्या 4 द्वारा पारित निरोधादेश को अनुमोदित कर दिया गया। इस स्तर पर, पाँच दिवस का समय अनुमोदन में लगने के बिंदु पर, मौखिक तर्कों, में विद्वान शासकीय अधिवक्ता द्वारा यह बताया गया कि चूंकि विपक्षी सं०1 के कार्यालय (सचिवालय) के कार्य 'Rules of Business' के नियमानुसार संचालित होते हैं, तथा सचिवों के विभिन्न स्तरों (समीक्षाधिकारी, अनुसचिव, विशेष सचिव, सचिव व अपर मुख्य सचिव) पर प्रकरण का अवलोकन व परीक्षण होता है, अतः पाँच दिवस का समय लगना अनावश्यक नहीं है और किसी भी अन्य सूरत में, उक्त अनुमोदन चूंकि अधिनियम की धारा 3(4) में अधिनियमित ,12दिवस की विहित अवधि के अंदर ही किया गया है, अतः विपक्षी संख्या 1 के द्वारा याची के निरोधादेश को अनुमोदित करने में प्रतिपक्षी संख्या 1 के स्तर से, न तो कोई अनावश्यक विलंब कारित किया गया है और न अधिनियम के धारा 3 (4) का कोई उल्लंघन ही कारित किया गया है। प्रतिपक्षी संख्या 1 द्वारा, प्रतिपक्षी संख्या 4 को, अपने

उक्त 'अनुमोदन आदेश' को रेडियोग्राम द्वारा याची को संसूचित करने हेतु, दो दिवस के अंदर ही अर्थात दिनांक 16.02.2023 को, प्रतिपक्षी संख्या 6 को प्रेषित कर दिया गया था, जिसे दिनांक 17.02.2023 को प्रतिपक्षी संख्या 6 द्वारा याची को नियमानुसार संसूचित कर दिया गया था तथा संसूचना/पावती की आख्या दिनांक 17.02.2023 भी प्रतिपक्षी संख्या 4 को प्रेषित कर दिया था।

11. विपक्षी संख्या 1 के द्वारा, निरुद्धि आदेश दिनांक 08.02.2023, निरुद्धि के आधार दिनांक 08.02.2023, प्रकरण से सम्बंधित कागज़ात जो उन्हें जिला मजिस्ट्रेट लखनऊ के द्वारा प्रेषित किया गया था तथा निरुद्धी आदेश को अपने स्तर से अनुमोदन के आदेश दिनांक 14.02.2023 की प्रति सहित पत्र दिनांक 16.02.2023, गृह सचिव भारत सरकार/प्रतिपक्षी संख्या 2 को भी प्रेषित कर दिया गया था। (चूंकि प्रतिपक्षी संख्या-1 द्वारा उक्त अनुमोदन सम्बंधी प्रपत्र गृह सचिव भारत सरकार को अनुमोदन कि तिथि से 7 दिवस के अंदर प्रेषित कर दिया गया था। अतः प्रतिपक्षी संख्या-1 द्वारा अधिनियम की धारा 3 (5) का उल्लंघन किया जाना परिलक्षित नहीं होता है)

12. निरोधात्मक आदेश के विरुद्ध याची द्वारा अपना प्रतिवेदन दिनांकित 20.02.2023, जिला मजिस्ट्रेट लखनऊ, उत्तर प्रदेश शासन, परामसर्श दात्री परिषद (निरुद्धी) व केंद्र सरकार को प्रेषित किए जाने हेतु प्रतिपक्षी संख्या 6/जेल अधीक्षक लखनऊ को दिनांक 20.02.2023 को प्राप्त कराया गया। प्रतिपक्षी संख्या 6 द्वारा दिनांक 20.02.2023को ही, याची के उक्त प्रतिवेदन व उसकी प्रतियों को सम्बंधित प्रतिपक्षीगण को प्रेषित किए जाने हेतू प्रतिपक्षी संख्या 4 को प्रेषित कर दिया गया, तथा प्रेषण संबंधी आख्या दिनांक 20.02.2023 भी जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 को प्रेषित कर दिया गया।

13. जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 द्वारा याची के उक्त प्रतिवेदन दिनांक 20.02.2023 पर, सम्यक विचार करते हुए, उसे अपने आदेश दिनांक 22.02.2023 के द्वारा निरस्त कर दिया गया तथा प्रतिवेदन के निरस्तीकरण आदेश को जेल अधीक्षक लखनऊ/ प्रतिपक्षी संख्या 6 को 'ई-मेल' के जरिए दिनांक 22.02.2023 को ही प्रेषित कर दिया गया, जिसे जेल अधीक्षक लखनऊ/प्रतिपक्षी संख्या 6 द्वारा दिनांक 22.02.2023को ही, याची को नियमानुसार संसूचित कर दिया गया तथा प्रतिपक्षी संख्या 6 द्वारा उसकी पावती आख्या दिनांक 22.02.2023, प्रतिपक्षी संख्या 4 को प्रेषित कर दिया गया था।

14. जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 द्वारा प्रेषित याची का प्रतिवेदन दिनांक 20.02.2023मय सम्बंधित कागज़ात व प्रस्तरवार आख्या, विपक्षी संख्या 1 को

25.02.2023 को प्राप्त हुई, जिसका परीक्षण, अंडर सेक्रेटरी (अनु सचिव) एवं विशेष सचिव द्वारा दिनांक 27.02.2023 को सचिव उत्तर प्रदेश शासन द्वारा दिनांक 28.02.2023 को व प्रमुख सचिव (गृह) उत्तर प्रदेश शासन द्वारा भी दिनांक 28.02.2023 को ही किया गया। तत्पश्चात पत्रावली को उत्तर प्रदेश शासन के उच्चाधिकारियों के अवलोकन व अंतिम आदेश हेतु प्रस्तुत की गई। उपरोक्त स्तर से प्रकरण पर सम्यक विचारण के पश्चचात, उत्तर प्रदेश शासन/प्रतिपक्षी संख्या 1 द्वारा याची के प्रतिवेदन दिनांक 20.02.2023 को, दिनांक 01.03.2023 को (प्रतिवेदन प्राप्ति से पाँच दिवस के अंदर) निरस्त कर दिया गया। निरस्तीकरण के उक्त आदेश को प्रतिपक्षी संख्या 1 ने यथासंभव व शीघ्रता से प्रतिपक्षी संख्या 6 को प्रेषित कर दिया गया था, जिसे प्रतिपक्षी संख्या 6 द्वारा याची को, दिनांक 02.03.2023 को संसूचित कर दिया गया।

15. प्रतिपक्षी संख्या 1/उत्तर प्रदेश शासन को प्रतिपक्षी संख्या 4 द्वारा प्रकरण से संबंधित जो प्रपत्र व आख्या दिनांक 16.02.2023 को उन्हें उपलब्ध कराया गया था, उन्हें अपने पत्रों दिनांकित 25.02.2023 के द्वारा प्रतिपक्षी संख्या 1 ने प्रतिपक्षी संख्या 2/ केन्द्रीय सरकार व परामर्शदात्री परिषद (Advisory Board) को प्रेषित कर दिया गया था।

16. उत्तर प्रदेश परामर्शदात्री परिषद लखनऊ ने प्रकरण की सुनवाई करने की तिथि दिनांक 17.03.2023 नियत किया और प्रतिपक्षी संख्या 1 के माध्यम से संसूचित करते हुए, याची से यह वांञ्छा की कि वह सुनवाई के समय व्यक्तिगत रूप से अथवा अपने वाद मित्र के द्वारा सुनवाई में उपस्थित रहना चाहता है। परामर्शदात्री परिषद लखनऊ द्वारा, याची को संसूचित किए जाने हेतु, अपने पत्र दिनांकित 13.03.2023 के जरिए, प्रतिपक्षी संख्या 1 को प्रेषित किया, जिसे प्रतिपक्षी संख्या 6 के जरिए, समयान्तर्गत याची को संसूचित कर दिया गया। ततक्रम में नियत तिथि पर याची ने उ०प्र० परामर्शदात्री परिषद के समक्ष प्रस्तुत होकर अपना पक्ष रखा, जिसे सुनवाई व विचारण के पश्चचात परिषद द्वारा निरस्त करते हुए अपनी आख्या मय प्रकरण से सम्बंधित प्रपत्र, अपने पत्र दिनांकित 21.03.2023 के साथ प्रतिपक्षी संख्या 1/उत्तर प्रदेश शासन को भेजा जो विपक्षी संख्या 1 के सम्बंधित अनुभाग (Section) को दिनांक 23.03.2023 को प्राप्त हुआ। उपरोक्त प्रकार से परामर्शदात्री परिषद द्वारा, याची के प्रत्यावेदन का निस्तारण, करके शासन को आख्या निरोधादेश के पारित होने की तिथि से 7 सप्ताह के अंदर ही प्रेषित कर दिया गया था। अतः उत्तर प्रदेश परामर्शदात्री परिषद द्वारा भी याची के प्रतिवेदन के निस्तारण किए जाने में, अधिनियम के धारा 11(1) के प्राविधान का कोई अननुपालन नहीं किया गया है।

17. उपरोक्त के अनुक्रम में, प्रतिपक्षी संख्या 1 द्वारा, याची के प्रतिवेदन मय

प्रस्तरवार आख्या व सम्बंधित अभिलेख, जो प्रतिपक्षी सं० 2को जरिए पत्र दि० 25.02.2023 भेजा गया था तथा जिसे दिनांक 01.03.2023 को पोस्ट ऑफिस से अग्रसारित किया गया था, वह केंद्र सरकार के केंद्रीय रजिस्ट्री कार्यालय में दिनांक 09.03.2023 को प्राप्त हुआ। दिनांक 11 व 12 को अवकाश दिवस थे अतः याची का प्रतिवेदन दिनांक 13.03.2023 को अंडर सेक्रेटरी (अवर सचिव) द्वारा (परिशीलन/परीक्षण) किया गया, जिसे दिनांक 14.03.2023 को विहित डायरी में अंकित किया गया और जिसे दिनांक 15.03.2023 को गृह सचिव के समक्ष प्रस्तुत किया गया। गृह सचिव द्वारा प्रतिवेदन व सम्बंधित परिपत्रों का अवलोकन व परीक्षण करने के उपरांत याची के प्रत्यावेदन को दिनांक 16.03.2023 को निरस्त कर दिया गया तथा निरस्तीकरण के आदेश की सूचना दिनांक 17.03.2023 को प्रतिपक्षी सं० 1 के पास भेजा गया, जिसे दि० 22.03.2023 को, याची को, प्रतिपक्षी संख्या 6 द्वारा संसूचित कर दिया गया।

18. प्रतिपक्षी संख्या 1/उत्तर प्रदेश शासन द्वारा, प्रकरण से सम्बंधित समस्त प्रपत्रों का अवलोकन करते हुए, अपने आदेश दिनांक 27.03.2023 के जरिए याची के निरुद्धिकरण का आदेश, निरुद्धि की तिथि से अनन्तिम रूप से तीन माह तक की अवधि कि लिए विस्तारित कर दिया गया तथा इस आदेश को जरिए रेडियोग्राम प्रतिपक्षी संख्या 6/जेल अधीक्षक को याची के सूचनार्थ उसी दिन प्रेषित भी कर दिया गया, जिसे प्रतिपक्षी संख्या 6 ने दिनांक 27.03.2023 को ही याची को संसूचित कर दिया और इसके फार्मल आदेश की प्रति, दिनांक 01.04.2023 को, प्रतिपक्षी सं० 6 को प्राप्त होने पर, उसे भी याची को संसूचित करा दिया गया, जिसकी पावती भी प्रतिपक्षी सं० 6 द्वारा प्रतिपक्षी सं० 4 को दि० 01.04.2023 को ही प्रेषित कर दी गई।

19. याची के निरोधादेश को आदेश की तिथि से अनन्तिम रूप से छः माह तक विस्तारित किए जाने के आदेश का रेडियोग्राम दिनांक 01.05.2023 को व इसका फार्मल आदेश दिनांक 09.05.2023 को प्रतिपक्षी संख्या 6 को प्राप्त हुआ, जिसे प्रतिपक्षी संख्या 6 द्वारा प्राप्त होने की उक्त तिथियों पर ही याची को नियमानुसार संसूचित कर दिया गया।

20. उत्तर प्रदेश शासन द्वारा पुनः याची के निरोधादेश को निरुद्धि की तिथि से अग्रतर 9 माह की अवधि के लिए विस्तारित करते हुए विस्तारण आदेश की प्रति को जरिए रेडियोग्राम दिनांक 31.07.2023, प्रतिपक्षी संख्या 4 के जरिए, विपक्षी संख्या 6/जेल अधीक्षक लखनऊ को भेजा गया, जिसे प्रतिपक्षी संख्या 6 ने याची को उसी दिन संसूचित कर दिया। तत्पश्चात उक्त विस्तारण आदेश का फार्मल आदेश दिनांक 05.08.2023 को प्राप्त होने पर इसे भी प्रतिपक्षी संख्या 6 द्वारा याची को उसी दिन संसूचित कर दिया गया।

21. याचिका में याचिका के आधार के समर्थन में प्रस्तुत शपथ पत्र के प्रत्युत्तर में, प्रतिपक्षीगण द्वारा प्रत्युत्तर शपथ पत्र (Counter Affidavit) प्रस्तुत किया गया है, जिसके अनुक्रम में, प्रतिपक्षी संख्या 1 व 3 की तरफ से प्रत्युत्तर शपथ पत्र दिनांक 17/18.07.2023 को प्रतिपक्षी संख्या 2 की तरफ से प्रत्युत्तर शपथ पत्र दिनांक 31.05.2023 को व प्रतिपक्षी संख्या 4 की तरफ से दिनांक 07.07.2023 को प्रतिपक्षी संख्या 5 की तरफ से दिनांक 27/28.07.2023 को प्रतिपक्षी संख्या 6 की तरफ से दिनांक 5/7.07.2023 को व प्रतिपक्षी संख्या 7 की तरफ से दिनांक 31.07.2023 को अपने-अपने प्रत्युत्तर शपथ पत्र (Counter Affidavit) प्रस्तुत किए गए। उपरोक्त प्रत्युत्तर शपथ पत्रों के जवाब में पुनः याची द्वारा जवाबी प्रत्युत्तर शपथ पत्र (Rejoinder Affidavit), दिनांक 31.07.2023 को व प्रतिपक्षीगण संख्या 2, 3, 5 व 6 प्रस्तुत किया गया, तत्पश्चात प्रतिपक्षी संख्या 6 द्वारा अनुपूरक प्रत्युत्तर शपथ पत्र (Supplementary Counter Affidavit) दिनांक 01.11.2023 को न्यायालय में प्रस्तुत किया गया है।

22. याची के विद्वान अधिवक्ता द्वारा मौखिक तर्कों में यह कथन किया गया है कि जिला मजिस्ट्रेट लखनऊ द्वारा याची को गलत व विधि विरुद्ध तरीके से आदेश पारित करके निरुद्ध किया गया है जो संविधान द्वारा प्रदत्त अनुच्छेद 21 के प्राविधानों का उल्लंघन है। जिला मजिस्ट्रेट के समक्ष उनके व्यक्तिपरक संतुष्टि (Subjective Satisfaction) हेतु व प्रश्नगत आदेश पारित किए जाने हेतु समुचित तथ्य व साक्ष्य उपलब्ध नहीं थे। इस प्रकार से जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 द्वारा संविधान के अनुच्छेद 19, 21व 22 का उल्लंघन किया गया है। जबकि प्रथम सूचना रिपोर्ट के तथ्यों के अनुसार लोक व्यवस्था भंग होने की कोई स्थिति, परिदृश्य में नहीं थी। अतः प्रश्नगत आदेश निरस्त होने योग्य है।

23. तर्क के उपरोक्त बिन्दु के संदर्भ में सर्वप्रथम राष्ट्रीय सुरक्षा अधिनियम 1980 के तत्संबंधी प्राविधान, धारा 3 का, परिशीलन करना समीचीन होगा:-

"3. Power to make orders detaining certain persons. - (1) The Central Government or the State Government may,-

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of Public order or from acting in any manner prejudicial to the

maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation. (3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided..

(4).....

(5)....

24. उपरोक्त प्राविधानों के अनुसार, किसी व्यक्ति के निरुद्धिकरण का आदेश, केंद्र सरकार अथवा राज्य सरकार अथवा जिला मजिस्ट्रेट अथवा पुलिस आयुक्त के द्वारा दोषी व्यक्ति के विरुद्ध, उसके समाज के हित के विरुद्ध हानिकारक कृत्य करने या लोक व्यवस्था को बनाए रखने के विरुद्ध कार्य करने अथवा भारत की सुरक्षा के प्रतिकूल कार्य करने से रोकने के लिए व उस कृत्य के परिणामस्वरूप सम्बंधित क्षेत्र में उत्पन्न हुई स्थिति, अथवा पैदा हो सकने वाली स्थिति, के परिप्रेक्ष्य में अपनी सम्यक व्यक्तिपरक संतुष्टि (Subjective Satisfaction) के उपरांत पारित किया जा सकता है।

25. प्रकरण के तथ्यानुसार याची ने अपने सहयोगियों के साथ दिनांक 29.01.2023 को सार्वजनिक स्थल पर समय लगभग प्रातः 9:00 बजे धार्मिक ग्रंथ रामचरित मानस की प्रतियों को फाड़कर व उन्हें पैरों से कुचलते हुए जला दिया गया तथा नारेबाजी की गई व अनुयायीयों के विरुद्ध अभद्र टिप्पणियां की गई थी। साथ ही उक्त कृत्य का वीडियो बनाकर उसे सोशल मीडिया पर परिचालित किया गया, जिसकी सूचना मिलने पर तात्कालिक तौर पर थाना पी०जी०आई० लखनऊ के प्रभारी निरीक्षक, जिसके कार्य क्षेत्र में घटनास्थल आता है, ने सर्व प्रथम घटनास्थल पर पहुँचकर आवश्यक कार्यवाही की। जिसके संदर्भ में प्रभारी निरीक्षक ने अपने अनुरोध पत्र दिनांक 07.02.2023 में विस्तार से यह भी अंकित किया है कि याची व उसके सहयोगियों के उक्त कृत्य से आम जनमानस में अत्यंत आक्रोश फैल गया, लोक व्यवस्था छिन्न-भिन्न हो गई और जैसे ही याची के कृत्यों का वीडियो परिचालित हुआ एक समुदाय में और क्षुब्धता बढ़नी शुरू हो गई। रात होते-होते माहौल काफी गर्म हो गया,लोग चर्चाओं में मशगूल हो गए। देर रात होते-होते याची व उसके सहयोगियों द्वारा किए गए कृत्य का वीडियो हर तरफ वायरल हो गया, जिससे उक्त थाना क्षेत्र में चारों तरफ सनसनी व तनाव का माहौल व्याप्त हो गया। सामान्य जन जीवन भी अस्तव्यस्त हो गया था। थाना प्रभारी द्वारा भेजी गई पुलिसकर्मियों की टीमें क्षेत्र में लोक व्यवस्था के अनुरक्षण में लगी रहीं, फिर भी क्षेत्र में संवेदनशीलता बढ़ती जा रही थी। जिस पर, प्रभारी निरीक्षक ने उच्चाधिकारियों से

अतिरिक्त फोर्स भेजने का अनुरोध किया, जिस पर घटना वाले दिन व उसके अगले दिन भी, थाना आशियाना, कैंट व आलमबाग के प्रभारी निरीक्षकगण मय भारी फोर्स के संवेदनशील स्थानों पर मौजूद रहे और लोगों को समझाने-बुझाने व प्रतिकूलता की स्थिति के निवारण हेतु लगे रहे। रिजर्व/आवंटित फोर्स भी तैयार स्थिति में ए०सी०पी० कार्यालय कैंट में उपस्थित रहीं। क्षेत्र में भारी पुलिस बल का पैदल मार्च, संवेदनशील स्थानों पर कराया गया। अग्रतर प्रभारी निरीक्षक ने यह भी दर्शित किया है कि थाना की पुलिस ने घटना वाले दिन ही याची के साथ-साथ उसके सहयोगियों सतेंद्र कुशवाहा, सुरेश सिंह यादव, मोहम्मद सलीम व यशपाल सिंह कुल पाँच नफर अभियुक्तों को तत्परता के साथ गिरफ्तार भी कर लियार था। जिससे अन्य कोई प्रतिकूलता की स्थिति उत्पन्न नहीं हो पाई, परन्तु क्षेत्र में तनाव अभी-भी कायम है व आम जनता अज्ञात आशंकाओं से अभी-भी सशंकित है। दिनांक 29.01.2023 के उक्त घटनाक्रम को इलेक्ट्रानिक चैनलों व समाचार पत्रों ने भी प्रमुखता से लगातार, प्रसारित किया है। प्रभारी निरीक्षक ने अपने अनुरोध पत्र में यह भी अंकित किया है कि अभियुक्तगण गिरफ्तारी में रहते हुए भी अपने अपराध को स्वीकार करके उक्त कृत्य को आगे भी जारी रखने के लिए कह रहे हैं। पुलिस छानबीन से यह तथ्य भी उजागर हुए कि अभियुक्तों की योजना प्रदेश के विभिन्न जिलों में रामचरित मानस की प्रतियाँ जलाकर देश व प्रदेश के विभिन्न समुदायों में दंगा फैलाने की थी और यदि तत्परतापूर्वक पुलिस ने परिस्थितियों को संभालने की कार्यवाही न की होती तो, देश व प्रदेश दंगे की चपेट में आ सकता था। प्रभारी निरीक्षक ने उक्त घटना में बाहरी एजेंसियों के शामिल होने की आशंका को भी जाहिर किया है तथा यह भी कथन किया है कि याची ने उपरोक्त अपराध के संदर्भ में अपना जमानत प्रार्थना पत्र मजिस्ट्रेट के न्यायालय में प्रस्तुत किया था जो कि न्यायालय द्वारा निरस्त कर दिया गया है, परन्तु अब याची/अभियुक्त ने सत्र न्यायालय में अपना जमानत प्रार्थना पत्र प्रस्तुत कर दिया है, जिसके स्वीकार होने व उसके जमानत पर छूटने की प्रबल सम्भावना है। इस बात की भी सम्भावना है कि यदि अभियुक्तगण जमानत पर छूट जाते हैं तो वह पुनः इसी प्रकार के आपराधिक कृत्यों में लिप्त हो जाएंगे और लोक व्यवस्था की स्थिति पुनः भंग हो जाएगी।

26. जिला मजिस्ट्रेट लखनऊ ने प्रभारी निरीक्षक पी०जी०आई० लखनऊ की उक्त आख्या दिनांक 07.02.2023व उस पर पुलिस उपायुक्त (पूर्वी) लखनऊ के अभिमत से सहमति/अनुशंसा पत्र दिनांक 08.02.2023व घटना के संदर्भ में प्रस्तुत फोटोग्राफ्स, अभियुक्तगण व साक्षीगण के द्वारा विवेचना के अनुक्रम में दिए गए बयान, मोबाइल फ़ोन व प्रिंटर के रिकवरी मेमो, घटना की विवेचना के क्रम में किता की गई केस डायरी एवं घटना वाले दिन व उसके पश्चात पुलिसकर्मियों के घटनास्थल पर नियुक्ति सम्बंधी ड्युटी चार्ट,

याची/अभियुक्त के जमानत प्रार्थना पत्र को मुख्य न्यायिक मजिस्ट्रेट लखनऊ द्वारा निरस्त किए जाने का निरस्तीकरण आदेश दि० 02.02.2023 व याची के द्वारा दिनांक 04.02.2023 को सत्र न्यायालय लखनऊ को प्रस्तुत जमानत प्रार्थना पत्र की प्रति आदि का साक्ष्य सम्यक व गहनता से परीक्षण करके याची/अभियुक्त को अधिनियम के धारा 3(2) के प्राविधान के अंतर्गत, निरुद्धि हेतु समुचित पाते हुए, याची के विरुद्ध निरुद्धिकरण आदेश दिनांक 08.02.2023 पारित कर दिया, जिसे हस्तगत याचिका में चुनौती दी गई है।

27. प्रदेश/संबंधित जिलों में, कानून व्यवस्था/लोक व्यवस्था की स्थिति का आंकलन करने व उसे अक्षुण्ण रखने का कार्य कार्यपालिका का है। अतः अधिनियम के अन्तर्गत विधायन ने समुचित परिस्थितियों में निरोधादेश पारित करने का अधिकार, कार्यपालिका के उच्चाधिकारियों को दे रखा है जो समस्त तथ्यों, परिस्थितियों व तत्सम्बंधित प्रलेखीय व अन्य साक्ष्यों व आख्याओं पर विचार करने व अपनी व्यक्तिपरक संतुष्टि (Subjective Satisfaction) के उपरांत निरोधादेश पारित करने की अधिकारिता रखते हैं वस्तुतः अधिनियम की धारा 3(2) में पारित किया जाने वाला निरोधक आदेश, दोषी व्यक्ति द्वारा किए गए कृत्य/अपराध, के संदर्भ में, की जाने वाली दाण्डिक कार्यवाहियों से पृथक व अपराध के किए जाने के परिणामस्वरूप पैदा होने, अथवा हो सकने वाली, परिस्थितियों, को रोकने यथा लोक व्यवस्था को कायम रखने में बाधक कृत्य से बचाने के अनुक्रम में, कार्यपालिका द्वारा दोषी व्यक्ति के विरुद्ध तात्कालिक रूप से की गई कार्यवाही होती है।

28. उपरोक्त बिन्दु पर माननीय उच्चतम न्यायालय ने **State of Maharastra & Others vs Bhaurao Punjabrao Gawande (2008) 3 SCC 613** में निम्नानुसार अभिमत व्यक्त किया हैः-

"32. There is no authoritative definition of "preventive detention" either in the Constitution or in any other statute. The expression, however, is used in contradistinction to the word "punitive". It is not a punitive or penal provision but is in the nature of preventive action or precautionary measure. The primary object of preventive detention is not to punish a person for having done something but to intercept him before he does it. To put it differently, it is not a penalty for past activities of an Individual but is intended to pre-empt the person from Indulging in future activities sought to be prohibited by a relevant law and with a view to preventing him from doing harm in future.

33. In Haradhan Saha v. State of W.8.1 explaining the concept of preventive detention, the Constitution Bench of this Court, speaking through Ray, C.J. stated: (SCC p. 205, para 19)

19. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner

similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case a person is punished on proof of his guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in Section 3 of the Act to prevent."

34. In another leading decision in Khudiram Das v. State of W.B.this Court stated: (SCC pp. 90-91, para 8).

"8... The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. Since preventive measure is based on the principle that a person should be prevented from doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof, Patanjali Sastri, C.J. pointed out In State of Madras v. V. G. Row that preventive detention is 'largely precautionary and based on suspicion and to these observations may be added the following words uttered by the learned Chief Justice in that case with reference to the observations of Lord Finlay In R.v. Halliday, namely, that "the court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely, based This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in any of sub-clauses (i), (ii) and (iii) of Clause (1) of sub-section (1) of Section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made a condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose but he subjective opinion of the detaining authority, and if a subjective opinion is formed by the detaining authority as regards the necessity of detention for a specified purpose, the condition of exercise of the power of detention would be fulfilled. This would

clearly show that the power of detention is not a quasi – judicial power."

35. Recently, in Naresh Kumar Goyal v. Union of India the Court said: (SCC p. 280, para 8)

"8. It is trite law that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent the anti-social and subversive elements from imperilling the welfare of the country or the security of the nation or from disturbing the public tranquility or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances, etc. Preventive detention is devised to afford protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. It, therefore, becomes imperative on the part of the detaining authority as well as the executing authority to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenu and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of preventive action and turn the detention order as a dead letter and frustrate the entire proceedings. Inordinate delay, for which no adequate explanation is furnished, led to the assumption that the live and proximate link between the grounds of detention and the purpose of detention is snapped. (See P.U. Iqbal v. Union of India, Ashok Kumar v. Delhi Admn. and Bhawarlal Ganeshmalji v. State of T.N.17)"

29. हस्तगत प्रकरण में पत्रावली के परिशीलन से यह परिलक्षित होता है कि निरोधक अधिकारी जिला मजिस्ट्रेट लखनऊ ने निरुद्धि के अधिकार में अभियुक्त/ याची व उसके अन्य सहयोगीगण के कृत्य व उसके परिणामस्वरूप क्षेत्र के एक वर्ग विशेष में उत्पन्न आक्रोश व तनावपूर्ण माहौल के कारण बिगड़ने व बिगड़ सकने वाली लोक व्यवस्था (Public Order) तथा इसे रोकने के लिए पुलिस बल की कार्यवाही, भविष्य की आशंका, याची व अभियुक्तगण के जमानत पर निर्मुक्त होने के पश्चात उनकी उपरोक्त कृत्य/अपराध में पुनः संलिप्तता की आशंका व इनके परिणामस्वरूप बिगड़ सकने वाली साम्प्रदायिक सौहार्दता व क्षोभित हो सकने वाली लोक व्यवस्था का गहनता से विश्लेषण करने के उपरांत तथा इस सम्बंध में उपलब्ध कराए गए दस्तावेजी साक्ष्य तथा अपराध की विवेचना के अनुक्रम में विवेचक द्वारा की गई कार्यवाही व संकलित साक्ष्य के प्रकाश में, जिला मजिस्ट्रेट लखनऊ द्वारा निरोधादेश दिनांक 08.02.2023 पारित किया गया है। उपरोक्त के संदर्भ निरोधक अधिकारी के व्यक्तिपरक संतुष्टि का परीक्षण इस न्यायालय द्वारा नहीं किया जा सकता है।

30. निरुद्धि के आधार का परिशीलन करने से यह परिलक्षित होता है कि याची व अन्य अभियुक्तगण के उक्त कृत्यों के परिणामस्वरूप प्रशासनिक व पुलिस अधिकारियों के समक्ष मात्र कानून व्यवस्था के ही बिगड़ने की आशंका ही नहीं थी, बल्कि लोक व्यवस्था के खतरे में

पड़ने की स्थिति परिदृश्य में उभर रही थी। रामचरित मानस,जिसमें समाज के बहुसंख्यक वर्ग के आराध्य भगवान राम के जीवन काल से सम्बंधित घटनाओं का वर्णन किया गया है, एक सम्मानित धर्म ग्रंथ है जिसे विभिन्न धार्मिक स्थलों व धार्मिक उत्सवों के अवसर पर सम्मान के साथ पूजित भी किया जाता है। समाज का बहुसंख्यक वर्ग उक्त ग्रंथ का पाठन व श्रवण आज भी अपने लौकिक एवं पारलौकिक कल्याण, पुण्य प्राप्ति, पाप मोचन व आदर्श जीवनशैली के मार्गदर्शन हेतू पूरी श्रद्धा से करता है। याची व उसके सहयोगियों, जिसमें एक अन्य वर्ग के व्यक्ति मो० सलीम का नाम भी अभियुक्त के तौर पर प्रथम सूचना रिपोर्ट में अंकित किया गया है, के द्वारा सार्वजनिक स्थल पर रामचरित मानस ग्रंथ की प्रतियों के पृष्ठ को फाड़ने, पैरों से कुचलकर अपमानित करने व जलाने व उनके अनुयायियों के प्रति अभद्र बातों के कहने से समाज के बहुसंख्यक वर्ग के मध्य आक्रोश की भावना का जाग्रत होना अत्यंत स्वाभाविक प्रतीत होता है। दिन के प्रकाश में सार्वजनिक स्थल पर कारित किए गए उक्त कृत्य व उसके चित्रांकन/वीडियो के परिचालित होने से अफ़वाहों व धार्मिक उन्माद का पैदा हो जाना भी स्वाभाविक रूप से सम्भावित परिलक्षित होता है। धार्मिक उन्माद के कारण, सामाजिक व साम्प्रदायिक सौहार्दता के बिगड़ने के परिणामस्वरूप, जीवन व सम्पत्ति की हानि होने व राज्य का विकास कार्य अवरूध होने की घटनाओं के अनेकानेक उदाहरण विगत समय में देश के अन्य क्षेत्र में हुई घटनाओं से देखे जा सकते हैं। ऐसी स्थिति में असामाजिक तत्व, जिनका अपना कोई धर्म व नैतिकता नहीं होती वह भी अपने स्वार्थ सिद्धि में परिस्थितियों को बद से बदतर बना देते हैं। हमारे देश में जहां सभी धर्मों के लोग आपस में मिल जुलकर सम्भाव से रहते हैं व विश्वपटल पर अनेकता में एकता का विशेष उदाहरण प्रस्तुत करते हैं, याची व उसके सहयोगियों के उपरोक्त अविवेक पूर्ण कृत्य से सामाजिक सौहार्द के मध्य आपसी वैमनस्यता के बीज अंकुरित होने की ऐसी सम्भावना व परिस्थितियों को आशंकित कर सकते हैं, जिनसे निश्चय ही समाज व राष्ट्र के विकास के मार्ग में प्रतिकूल स्थितियां उत्पन्न हो सकती थीं। अतः उपरोक्त तथ्यों के प्रकाश में यह नहीं कहा जा सकता कि याची व उसके अन्य सहयोगीगण के उक्त कृत्य/अपराध मात्र कानून व व्यवस्था की स्थिति से सम्बंधित रहे हैं। माननीय उच्चतम न्यायालय ने लोक व्यवस्था के प्रभावित होने की स्थितियों का आकलन **Arun Ghosh Vs. State of West Bengal, 1970 1 SCC 1998** में निम्नवत किया है:-

"3. The submission of the counsel is that these are stray acts directed against individuals and are not subversive of public order and therefore the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified. In support of this submission reference is made to three cases of this Court: Dr Ram Manohar Lohia v. State of Bihar (1966) 1 SCR 709; Pushkar Mukherjee v. State of W.B. WP No. 179 of 1968, decided on November 7, 1968:

(1969) 1 SCC 10 and Shyamal Chakraborty v. Commissioner of Police, Calcutta WP No. 102 of 1969, decided on August 4, 1969: (1969) 2 SCC 426. In Dr Ram Manohar Lohia case [(1966) 1 SCR 709] this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its affect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but

not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr Ram Manohar Lohia case examples were given by Sarkar and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its affect upon the community. The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."

31. **Ram Ranjan Chatterjee Vs. State of West Bengal, (1975) 4 SCC 143** में भी माननीय उच्चतम न्यायालय ने कानून व्यवस्था एवं लोक व्यवस्था के मध्य अंतर को निम्नानुसार विवेचित किया हैः-

"8. It may be remembered that qualitatively, the acts which affect "law and order" are not different from the acts which affect "public order". Indeed, a state of peace or orderly tranquility which prevails as a result of the observance or enforcement of internal laws and regulations by the Government, is a feature common to the concepts of "law and order" and "public order". Every kind of disorder or contravention of law affects that orderly tranquility. The distinction between the areas of "law and order" and "public order" as pointed by this Court in Arun Ghosh v. State of West Bengal, "is one of degree and extent of the reach of the act in question on society". It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. If the contravention in its effect is confined only to a few individuals directly involved as distinguished from a wide spectrum of the public, it would raise a problem of law and order only. These concentric concepts of "law and order" and "public order" may have a common "epicentre", but it is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps distinguish it as an act affecting "public order" from that concerning "law and order"."

32. उपरोक्त बिन्दु पर **Indradeo Mahato v. State of W.B., (1973) 4 SCC 4** में भी माननीय उच्चतम न्यायालय ने यह अवधारित किया है किः-

"Similar acts in different situations may give rise to different problems in one set of circumstances an act may pose only a law and order problem whereas in another it may generate deep and widespread vibrations having serious enough impact on the civilized peace-abiding society so as to affect public order, one has to weigh the degree and sweep of the harm the act in question is capable of in its context. Every case has, therefore, to be considered on its own facts and circumstances."

33. जहाँ तक जिला मजिस्ट्रेट लखनऊ द्वारा पारित निरोधादेश के संदर्भ में उनके व्यक्तिपरक संतुष्टि (Subjective Satisfaction) का प्रश्न है तो यह इस तथ्य से निर्धारित होता है कि क्या उक्त निरोधक अधिकारी ने आदेश

पारित करते समय अपने समक्ष प्रस्तुत "समस्त सामग्री" जिसे निरोधक आदेश को पारित करने की संस्तुति करने वाले अधिकारियों द्वारा उसके समक्ष प्रस्तुत किया गया है, वह घटना से सुसंगत है अथवा नहीं और उन सामग्रियों व घटनाक्रम के तथ्यों एवं परिस्थितियों तथा उक्त घटना के प्रतिक्रिया स्वरूप उत्पन्न लोक व्यवस्था की स्थिति व परिस्थितियों का समुचित आंकलन निरोधक अधिकारी ने किया है अथवा नहीं अथवा प्रस्तुत सामग्रियों व साक्ष्य से किसी अन्य परिस्थितियों अथवा वर्णित परिस्थितियों से इतर कोई अन्य परिस्थितयां तो परिदृश्य में नहीं आती है।

34. हस्तगत प्रकरण में यह तथ्य भी विचारणीय होगा कि निरोधादेश पारित करने की तिथि पर याची/अभियुक्त, तत्संबंध में पंजीकृत अपराध संख्या 75 सन 2023 के अनुक्रम में कारावास में निरुद्ध था तथा उस पर अधिरोपित भारतीय दण्ड संहिता की सभी धाराऐं मजिस्ट्रेट न्यायालय द्वारा विचारणीय थीं, जिसमें अधिकतम कारावास की दंड अवधि 7 वर्ष से न्यून थी। अतः भले ही अपराध की गंभीरता को देखते हुए मुख्य न्यायिक मजिस्ट्रेट लखनऊ द्वारा दिनांक 02.02.2023 को याची के जमानत प्रार्थना पत्र निरस्त कर दिया गया है, मगर याची द्वारा सत्र न्यायालय लखनऊ के समक्ष जमानत प्रार्थना पत्र दिनांक 04.02.2023 को प्रस्तुत कर दिया गया था, जिसमें दण्ड के परिमाण को देखते हुए याची के जमानत पर निर्मुक्त हो जाने की आशंका को भी निरोधक अधिकारी द्वारा अपने निरुद्धि के आधार में विचार में लिया गया था। निरोधक अधिकारी द्वारा इस तथ्य की आशंका पर भी विचार किया जाना परिलक्षित होता है कि याची यदि जमानत पर निर्मुक्त होगा तो पुनः उपरोक्त प्रकृति का कृत्य पुनः कारित कर सकता है, क्या?

35. याची द्वारा विवेचना के दौरान अपने दिए बयान अन्तर्गत धारा 161 दण्ड प्रक्रिया संहिता में यह स्वीकार किया है कि "हम लोगों ने रामचरित मानस की प्रतियों को फाड़कर पैरों से कुचला व जलाया है व उसकी वीडियो रिकॉर्डिंग भी वायरल की है।" याची ने यह भी कथन किया है कि,"हम लोग इसे अनवरत जारी रखेंगे और हमारे लोग कल रामचरित मानस की प्रतियां फूकेंगे और कोई रोक नहीं सकता है। अभी और जिले, तहसील, ब्लॉक व मुख्यालय में प्रतियां फूंकी जाएंगी कोई कुछ नहीं कर सकता है।" यद्यपि याची के विद्वान अधिवक्ता ने, याचिका के आधार में यहा कहा है कि धारा 161 दण्ड प्रक्रिया संहिता के कथन विचारण में मान्य नहीं होते हैं, मगर यह विचारणीय होगा कि निरोधादेश, विचारण (Trial) का अंश नहीं है। याची द्वारा किए गए उक्त कथन की सत्यता व समर्थन, याची के प्रतिवेदन दि०20.02.2023 के प्रस्तर 8 में किए गए कथनों से भी परिलक्षित होता है, जिसमें उसने यह भी स्वीकार किया है कि उसने रामचरित मानस के पृष्ठ की कुछ प्रतियों को

जलाया है। पत्रावली के परिशीलन से यह भी स्पष्ट होता है कि निरोधक अधिकारी ने कुल 35 अदद सुसंगत प्रपत्रों पर विचार करके निरोधादेश पारित किया है और उन प्रपत्रों को निरोधादेश पारित करने वाले अधिकारी/ प्रतिपक्षी संख्या 4 ने, निरोधादेश के साथ "अनुक्रमणिका" के तौर पर याची को निरोधादेश व निरुद्धि के आधार के साथ, जेल में उपलब्ध भी कराया है। उपरोक्त के अलावा निरोधक अधिकारी ने सम्बंधित कानून, राष्ट्रीय सुरक्षा अधिनियम के सुसंगत प्राविधानों की छायाप्रति व भारतीय संविधान में वर्णित मूल अधिकारों की छायाप्रति भी याची को उपलब्ध कराई हैं तथा निरुद्धि के आधार में, अधिनियम की धारा 8 के प्रकाश में याची को यह भी बताया है कि वह निरुद्धि आदेश के विरुद्ध अपना प्रतिवेदन, निरोधक अधिकारी, राज्य सरकार, केंद्र सरकार व परामर्श दात्री परिषद को देने का अधिकार रखता है। उक्त प्रतिवेदन याची को किसके समक्ष देना होगा उसका विवरण भी अधिनियम की धारा 9, 10, 11 व 14 के परिप्रेक्ष्य में, दिए जाने हेतू उसे निर्देशित किया है। अतः उपरोक्त तथ्यों के प्रकाश में निरोधक प्राधिकारी द्वारा, याची को बिना समुचित साक्ष्य व बिना सम्यक मस्तिष्क के प्रयोग के व बगैर समुचित संतुष्टि के निरुद्ध किए जाने का तर्क, जैसा कि याची के विद्वान अधिवक्ता द्वारा प्रस्तुत किया गया है, पत्रावली में उपलब्ध सामग्री के परिशीलन से बलहीन प्रतीत होता है।

36. याची के जमानत पर निर्मुक्त होने की आशंका के बाबत निरोधक अधिकारी के व्यक्तिपरक संतुष्टि (Subjective Satisfaction) के संदर्भ में माननीय उच्चतम न्यायालय ने विधि व्यवस्था **Ibrahim Nazeer Vs. State of T.N. and another, (2006) 6 SCC 64 के प्रस्तर 7** में यह धारित किया है कि:-

"7. It has to be noted that whether prayer for bail would be accepted depends on circumstances of each case and no hard and fast rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipsi dixit of the detaining authority. On the basis of materials before it, the detaining authority came to the conclusion that there is likelihood of detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not to be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of the detenu being released on bail. It has been clearly stated that in similar cases, orders granting bail are passed by various courts. Appellant has not disputed the correctness of this statement. Strong reliance was placed by learned counsel for the appellant on Rajesh Gulati v. Govt. of NCT of Delhi. The factual scenario in that case was entirely different. In fact, five bail applications filed had been already rejected. In that background this Court observed that it was not a "normal"

case. The High Court was justified in rejecting the stand of the appellant."

37. उपरोक्त बिन्दु पर माननीय उच्चतम न्यायालय ने **State of Maharastra & Others Vs Bahurao Punjabrao Gawande (Supra) के प्रस्तर 31 में Khudiram Das vs The State Of West Bengal** में की गई निम्न विवेचना को उद्धृत किया हैः-

"8.... The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. Since every preventive measure is based on the principle that a person should be prevented from, doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof. Patanjali Sastri, C.J. pointed out in State of Madras v. V.G. Rowiz that preventive detention is 'largely precautionary and based on suspicion and to these observations may be added the following words uttered by the learned Chief Justice in that case with reference to the observations of Lord Finlay in R. v. Halliday, namely, that

'the court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely, based'

This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in any of sub-clauses (1), (ii) and (iii) of Clause (1) of sub-section (1) of Section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is. deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made a condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose but the subjective opinion of the detaining authority, and if a subjective opinion is formed by the detaining authority as regards the necessity of detention for a specified purpose, the condition of exercise of the power of detention would be fulfilled. This would clearly show that the power of detention is not a quasi-judicial power."

38. अग्रतर प्रस्तर 36 में यह भी निष्कर्षित किया है कि:-

"36. Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. The framers of the Constitution were, conscious of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on the one hand and security and safety of the country and interest of the society on the other hand. Security of State, maintenance of public order and services essential to the community, prevention of smuggling and blackmarketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life."

39. मा० उच्चतम न्यायालय ने **Suraj Pal Sahu Vs State of Maharastra & others (1986) 4 SCC 378** में यह निष्कर्षित किया है कि:-

"The facts that a man is not in jail per se would not be determinative of the factor that order of preventive detention could not be passed against him. The fact that a man was found not guilty in a criminal trial would not also be determinative of the factors alleged therein. All these factors must be objectively considered and if there are causal connections and if bona fide belief was formed then there was nothing to prevent from serving an order of preventive detention even against a person who was in jail custody if there is imminent possibility of his being released and set at liberty if the detaining authority was duly satisfied."

40. जहाँ तक निरोधक अधिकारी के व्यक्तिपरक संतुष्टि (Subjective Satisfaction) के इस न्यायालय द्वारा परीक्षण का प्रश्न है, इस बिन्दु पर माननीय उच्चतम न्यायालय ने विधि व्यवस्था **Union of India Vs. Arvind Shergill (2000) 7 SCC 601** में यह धारित किया है कि :-

"The High Court has virtually decided the matter as if it was sitting in appeal on the order passed by the detaining authority The action by way of preventive detention is largely based on suspicion and the court is not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person. The language of Section 3 clearly Indicates that the responsibility for making a detention order rests upon the detaining authority which alone is entrusted with the duty in that regard and it will be a serious derogation from that responsibility if the court substitutes its judgment for the satisfaction of that authority on an investigation undertaken regarding sufficiency of the materials on which such satisfaction was grounded.

The court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detenu from engaging in smuggling activity. The said satisfaction is subjective in nature and such a satisfaction, if based on relevant grounds, cannot be stated to be invalid. The authorities concerned have to take note of

the various facts including the fact that this was a solitary incident in the case of the detenu and that he had been granted bail earlier in respect of which the application for cancellation of the same was made but was rejected by the Court In this case, there has been due application of mind by the authority concerned to that aspect of the matter as we have indicated in the course of narration of facts. Therefore, the view taken by the High Court in the circumstances of the case cannot be sustained."

41. एक्ट संख्या 26 सन 1971 (Maintenance of Internal Security Act 1971) की धारा 3 (1)(a) के प्राविधान जो कि National Security Act 1980 के धारा 3 के समतुल्य हैं के परिप्रेक्ष्य में माननीय उच्चतम न्यायालय ने **Magan Gope Vs. State of West Bengal (1975) 1 SCC 415** के मामले में यह धारित किया है किः-

"9. It will be seen that the power can be exercised only on one or more of the grounds enumerated above. If the exercise of the power is not on the face of the order correlated to any of those grounds or concerns activities, which are not germane to any of these grounds, such exercise would be vitiated for lack of jurisdiction. Further, the satisfaction spoken of in Section 3(1)-which is the sine qua non to the exercise of the power is the subjective satisfaction of the authority which cannot be tested in court by objective standards. Ordinarily, therefore, the court cannot go behind the satisfaction expressed on the face of the order.

42. इस बिंदु पर मा० उच्चतम न्यायालय ने **State of Punjab Vs. Sukhpal Singh (1990) 1 SCC 35** के प्रस्तर 10 में निम्न निष्कर्ष अवधारित किए हैंः-

"10. It is submitted that in the instant case, there were sufficient materials to show that the detenu would act in the future to the prejudice of the maintenance of public order, security of the State and the government's effort to curb terrorism. From the nature and contents of his speeches stated in the grounds of detention there was sufficient justification for the inference that he would repeat such speeches if not eventively detained. Again when grievous crime against the community was committed it would surely be subject to the penal law and stringent sentences, but at the same time it could be considered unsafe to allow him the opportunities to repeat prejudicial acts during the period the penal process was likely to take. The learned Attorney General refers us to Giani Bakshish Singh v. Government of India, Smt. Hemlata v State of Maharashtra and Raj Kumar Singh v. State of Bihar submitting that the possibility of criminal prosecution was no bar to order any preventive detention and that the court should not substitute its decision or opinion in place of decision of the authority concerned on the question of necessity of preventive detention: [(1981) 4SCC p.656,para21]

"A prosecution or the absence of it is not absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. The detaining authority is not the

sole judge of what national security or public order requires. But neither is the court the sole judge of the position. When power is given to an authority to act on certain facts and if that authority acts on relevant facts and arrives at a decision which cannot be described as either irrational or unreasonable, in the sense that no person instructed in law could have reasonably taken that view, then the order is not bad and the court cannot substitute its decision or opinion in place of the decision of the authority concerned on the necessity of passing the order."

43. याची के विद्वान अधिवक्ता द्वारा एक तर्क यह भी प्रस्तुत किया गया है कि याची को आदेश दिनांक 27.03.2023, जिसके द्वारा याची की निरुद्धि विपक्षी संख्या 1 उत्तर प्रदेश शासन द्वारा निरुद्धि की तिथि से तीन माह तक के लिए विस्तारित की गई थी। मूल रूप से याची को प्राप्त नहीं कराया गया है।

44. तर्क के उपरोक्त बिन्दु पर पत्रावली का परीक्षण करने पर यह परिलक्षित होता है कि जेल अधीक्षक/प्रतिपक्षी संख्या 6 ने अपने प्रति शपथ पत्र दिनांकित 5/7.07.2023 के प्रस्तर तीन में यह कहा गया है कि आदेश संख्या 84/2/14/2023 CX-5 दिनांकित 27.03.2023 के द्वारा बन्दी की निरुद्धि की अवधि को दिनांक 08.02.2023 से अनन्तिम रूप से तीन माह तक की अवधि के लिए बढ़ा दिया गया था तथा उक्त आदेश को उसी दिन, बन्दी देवेंद्र प्रताप को संसूचित करा दिया गया था। इस संबंध में प्रतिपक्षी संख्या 6/वरिष्ठ अधीक्षक जिला कारागार लखनऊ के पत्र दिनांकित 01.04.2023 की प्रति प्रतिपक्षी संख्या 6 के प्रति शपथ पत्र दिनांक 05.07.2023 के साथ संलग्न 6 के तौर पर पत्रावलित की गई है, और जिसमें विशेष सचिव गृह उत्तर प्रदेश शासन द्वारा प्रतिपक्षी संख्या 6 को प्रेषित रेडियोग्राम दिनांक 27.03.2023 की प्रति (याचिका के साथ संलग्नक 3 के तौर पर पत्रावलित) को याची को प्राप्त करा देने का उल्लेख है, उक्त आदेश दिनांक 27.03.2023 में इस तथ्य का सम्यक उल्लेख है कि "After Consideration of the entire case afresh along with all material concerned and relevant to his case and the report of the Advisory Board (Detention), Government has confirmed, repeat, confirmed under section 12(1) of the National Security Act 1980, the order of Detention in Dated 08.02.2023 passed by the District Magistrate Lucknow against the above named detenu. Aforesaid detenu will be under detention for a period of three months tentatively commencing from the date of actual detention under N.S.A that is from date 08.02.2023. Formal orders are being sent by speed post. The detenu be informed accordingly at once and his signature to this effect be obtained immediately". इस रेडियोग्राम की प्रति (जो प्रतिपक्षी संख्या 6 द्वारा अपने प्रतिशपथ पत्र में संलग्नक 3 के तौर पर पत्रावलित की गई है) पर याची के अंगूठा निशान भी है, जिन्हें जेलर, जिला कारागार लखनऊ ने दिनांक 27.03.2023 को प्रमाणित भी किया है।

45. अपने प्रति शपथ पत्र के प्रस्तर 10 में प्रतिपक्षी संख्या 6 द्वारा यह भी कहा गया है कि आदेश दिनांक 27.03.2023 मूल रूप में

(फार्मल ऑर्डर) दिनांक 01.04.2023 को डाक के माध्यम से कारागार पर प्राप्त हुआ है, जिसे एन०एस०ए० निरुद्धि को एक प्रति मूल रूप में उसी दिन प्राप्त करा दी गई है। उक्त के संबंध में कार्यालय वरिष्ठ जेल अधीक्षक जिला कारागार लखनऊ के द्वारा दिनांक 01.04.2023 को प्रेषित पत्र की प्रति प्रतिपक्षी संख्या 6द्वारा बतौर संलग्नक 6 (प्रतिशपथ पत्र) प्रस्तुत की गई है। अतः याची का यह कथन कि उसे आदेश दिनांक 27.03.2023 की मूल प्रति प्राप्त नहीं हुई है, विश्वनीय नहीं है। वस्तुतः प्रतिपक्षी संख्या 6 के द्वारा, उपरोक्त के संदर्भ में गलत तथ्य प्रस्तुत करने का अथवा गलत तथ्य के साथ जिलाधिकारी लखनऊ को पत्र प्रेषित करने का कोई आधार का होना परिलक्षित नहीं होता है। प्रतिपक्षी संख्या 6 के द्वारा उक्त पत्र दिनांक 01.04.2023 जिसमें प्रतिपक्षी संख्या 6 ने यह कहा है कि याची को आदेश दिनांक 27.03.2023 की मूल प्रति (Formal Order) प्राप्त करा दी गई है, प्रतिपक्षी संख्या 6 ने अपने सामान्य कर्तव्य के पालन में प्रेषित किया है, जिसे याची द्वारा कथन मात्र से झुठलाया जाना विधि मान्य नहीं हो सकता है। आदेश को संसूचित किए जाने का एक मात्र उद्देश्य यह होता है कि याची को इस तथ्य का ज्ञान हो सके कि प्रश्नगत आदेश पारित करने में संबंधित अधिकारी/प्राधिकारी द्वारा प्रकरण से संबंधित समस्त उपलब्ध सामग्री को सम्यक रूप से विचार में लिया है। प्रतिपक्षी संख्या 2 द्वारा पारित आदेश दिनांक 27.03.2023 के रेडियोग्राम की प्रति प्राप्त करने की स्वीकारोक्ति याची ने याचिका के प्रस्तर 7 में भी की गई है।

46. याची ने याचिका की सुनवाई के दौरान दिनांक 21.11.2023 को यह भी कथन किया था कि उसे रेडियोग्राम दिनांक 17.03.2023, जिसकी प्रति अनुपूरक प्रति शपथ पत्र के साथ संलग्नक 10के तौर पर प्रतिपक्षी संख्या 6 द्वारा प्रस्तुत की गई है और जिसके जरिए केंद्र सरकार/प्रतिपक्षी संख्या 2 ने याची के प्रतिवेदन को निरस्त कर दिया था, प्रार्थी को जेल अधीक्षक द्वारा नहीं प्रदान की गई। वाद की सुनवाई के दौरान इस बिन्दु पर न्यायालय द्वारा जेल अधीक्षक/ प्रतिपक्षी संख्या 6 के संबंधित रिकॉर्ड को मूल रूप से आहूत किया गया था। मूल रिकार्ड के परिशीलन से न्यायालय ने उक्त रेडियोग्राम की प्रति दिनांक 17.03.2023 को, याची द्वारा, प्राप्त करने की 'प्राप्ति' को रिकार्ड में मौजूद पाया। आहूत रिकॉर्ड के परिशीलन से इस न्यायालय ने याची के विद्वान अधिवक्ता के उक्त कथन को भी सत्य नहीं पाया था, जिसमें उन्होंने यह कथन किया था कि जेल अधीक्षक/ प्रतिपक्षी संख्या 6 ने अपने फर्जी हस्ताक्षर करके पत्र प्रेषित किए हैं। दिनांक 21.11.2023 को याची पक्ष से प्रस्तुत तर्क व उस पर न्यायालय द्वारा पारित आदेश निम्नवत उद्धरित हैं:-

"(1) Learned Senior counsel has objected to the S.C.A.-17 being relied upon by the learned A.G.A.-I.

(2) Learned A.G.A. says that it is a copy of the Index maintained in the paper book relating to the petitioner's detention.

(3) According to the learned Senior counsel, it is only a short note prepared by the Parokar for the Assistance of learned A.G.A. and is an afterthought.

(4) The Central Government has sent its records through an Official, Mr. Vikas Kumar.

(5) We have perused the records from which it is evident that the State Government had sent a copy of the Representation of the petitioner against his detention to the Central Government by its Letter dated 25.02.2023. However, the envelope in which such Representation was contained alongwith covering letter of the State Government was posted from the Post Office concerned on 01.03.2023, it was received in the Central Registry on 09.03.2023. On 11 & 12.03.2023, there were Holidays. The Under Secretary, received the Representation on 13.03.2023 it was diarised on 14.03.2023 to be put up on 15.03.2023 before the Home Secretary. The Home Secretary rejected the said Representation on 16.03.2023, it was sent to the File Section. 17.03.2023 & 18.03.2023 were Holidays. The wireless message containing information regarding rejection of such Representation was issued by the Receipt and Issue Section on 20.03.2023.

(6) Learned Senior counsel appearing on behalf of the petitioner says that the State Government in its affidavit filed through the signatures of the Deputy Secretary Home (Confidential Department) on 18.07.2023 has stated that the State Government had sent copies of the Representation alongwith parawise comments thereon to the Central Government through two separate letters to the Central Government, New Delhi and the U.P. Advisory Board (Detention) on 25.02.2023.

(7) It has been submitted that there is mis-representation in the affidavit filed by the State Government, they have stated that they have sent a Representation on 25.02.2023 whereas the Central Government has produced its record to show that the envelope was actually posted on 01.03.2023.

(8) We have carefully examined Paragraph-6 of the counter affidavit which is being quoted hereinbelow:-

"That it is submitted that a copy of petitioner's representation dated 20.02.2023 alongwith parawise comments was received in the concerned Section of State Government on 25.02.2023 alongwith letter of District Magistrate, Lucknow, dated 22.02.2023. The State Government sent copies of the Representation and parawise comments thereon to the Central Government, New Delhi and to the U.P. Advisory Board (Detention) vide its separate letters both dated 25.02.2023. Thereafter, the concerned Section i.e. Home (Gopan) Anubhag-5 of the State Government examined the representation on 27.02.2023".

(9) It is evident from the language used by the deponent of the affidavit that he only talks of letters being dated 25.02.2023, the deponent does not say that the letters were actually posted on 25.02.2023.

(10) The month of February is of 28 days, the letters may have been dated 25.02.2023 and signed on the same day. There was three days delay in sending the same that is 26.02.2023, 27.02.2023 and 28.02.2023. They were actually posted on 01.03.2023 which were received in the concerned Section only on 13.03.2023, it was diarised to be put up before the Home Secretary on 15.03.2023 who rejected it on

16.03.2023 and the communication was issued on 20.03.2023.

(11) The counsel for the petitioner, at this stage, says that the Opposite party no.6 in his First Affidavit has not stated anywhere that he had communicated the rejection of the Representation to the petitioner. Only during the course of arguments, when it was pointed out that the rejection of the Representation by the Central Government was not communicated that a supplementary counter affidavit has been filed wherein the Jail Superintendent has stated that the communication of the rejection of the Representation received through wireless message on 20.03.2023 and was communicated to the detenue on 20.03.2023. Since in the First Affidavit filed by the Jail Superintendent, there is no mention of any date of receipt of communication regarding rejection of the Representation and service upon the same very day, it should be assumed that no communication was actually made. Since the detenue is in the custody of Jail Superintendent, the documents that have been filed as Annexures to the Supplementary Counter Affidavit have all been obtained forcibly from the detenue and created as an afterthought to prejudice this Court.

(12) Learned counsel for the petitioner has referred to Paragraph nos.14 & 15 of his Rejoinder Affidavit filed on 01.11.2023 in Paragraph-14 it has been stated that the Radiogram (S.C.A.-9) referred to Paragraph-9 of the Supplementary Counter Affidavit was never served to the petitioner rather after filing counter affidavit, the L.T.I. and signature of the petitioner have been obtained on such radiogram dated 02.03.2023 without permitting him to mention the date below his Signature/ L.T.I. and, as such, service of the said Radiogram dated 02.03.2023 was neither annexed with the previous counter affidavit filed by the Opposite party no.6 nor it is annexed with the present Supplementary Counter Affidavit filed by him which is general official practice.

"It is submitted that the radiogram dated 02.03.2023 (SCA-09) referred to in Para-11 of the Supplementary Counter Affidavit was never served to the petitioner, rather after filing counter affidavit the L.T.I. and signature of the petitioner has been obtained on such radiogram dated 02.03.2023 without permitting him to mention the date below his signatures/L.T.I. and as such, the service report of said radiogram dated 02.03.2023 was neither annexed with previous counter affidavit filed by the Opposite party no.6 nor it is annexed with present supplementary counter affidavit filed by him which is his general official practice."

(13) In Paragraph-15 of the Supplementary Rejoinder Affidavit it has been submitted that the (Radiogram dated 17.03.2023) (S.C.A.-10) referred to Paragraph-12 of the Supplementary Counter Affidavit was never served to the petitioner, rather after filing counter affidavit the L.T.I. of the petitioner has been obtained on such Radiogram dated 17.03.2023 without permitting him to mention the date below his Signature/ L.T.I. as such, service report of the said Radiogram dated 17.03.2023 was neither annexed with the previous Counter affidavit filed by the Opposite party no.6 nor it is annexed with the present Supplementary Counter Affidavit filed by him which is general official practice.

(14) This Court had earlier noted this argument raised by the learned Senior counsel appearing for the petitioner-Devendra Pratap Yadav, and had called for the record from the Jail Superintendent.

Such records were produced before this Court and this Court had gone through the records and had found such receiving of the petitioner, therefore, this Court had rejected the argument earlier that the rejection of Representation was not served upon the petitioner. This Court had also rejected the arguments made by the learned Senior Counsel that in the records the Jail Superintendent's signature was forged as it had been done by shaky hands and was apparently different from the signatures verifying the L.T.I. made by the Jail Superintendent earlier.

(15) We had carefully examined the signatures /initials made by the Jail Superintendent. Both documents as referred by the learned Senior counsel this Court has rejected such arguments by observing that it does not stand to reason that the same Jail Superintendent who had earlier filed counter affidavit and who was deponent of the Supplementary Counter Affidavit would have the need for-forging of his signatures on the receiving/verifying L.T.I. of the petitioner on 22.03.2023.

(16) Learned counsel for the petitioner has placed reliance upon the judgment rendered by the Hon'ble Supreme Court in the case of Sarabjeet Singh Mokha Vs. District Magistrate, Jabalpur and others, reported in 2021 SCC Online SC 1019 and Paragraph nos.23, 48, 51, 54, 55, 56, 57, 58 & 59 thereof. He has emphasized right from the very beginning the petitioner has been alleging that he has not been served a copy of the rejection of his Representation. He has referred to Paragraph-6 of the writ petition wherein it has been stated that the petitioner had sent his Representation on 20.03.2023 through Jail Superintendent but no decision has been taken except Opposite party no.4 vide his rejection order dated 22.02.2023 and that the original order passed by the Opposite party no.4 has not been served upon the petitioner till date.

(17) Learned counsel for the petitioner has also pointed out Paragraph-7 of the writ petition wherein it has been stated that the order dated 27.03.2023 passed by the Opposite party no.3 has not been served to the petitioner, only a photostat copy of the Radiogram which mentions that the actual order shall be sent through Speed Post, was served upon the petitioner.

(18) It has been argued by the learned Senior counsel appearing for the petitioner that all along his case stands that no Authority except the District Magistrate i.e. the Opposite party no.4 has decided the Representation of the petitioner against its detention order.

(19) Learned Senior counsel has concluded his arguments.

(20) Sri S. P. Singh, learned A.G.A. for the State Respondents has pointed out that on the basis of arguments made by the learned Senior Counsel that the petitioner had not been served a copy of rejection of his representation. The Court had summoned the record by its order dated 05.10.2023. The record was produced in Court on 12.10.2023, it was directed to be sealed and kept in the safekeeping of the Senior Registrar and the matter was taken up on 13.10.2023. On 13.10.2023, the Court noted the arguments made by the counsel for the parties and returned the record and directed the learned A.G.A. for State to file a Supplementary Counter Affidavit bringing on record documentary evidence as is available on the record. It is only thereafter that the supplementary counter affidavit was prepared. The Court was gone through the record as is evident from its order dated 13.10.2023 and then given time to the State Respondents to file supplementary counter affidavit. It cannot

therefore, be said that the supplementary counter affidavit sworn on 26.10.2023 was prepared with forged documents fabricated on an afterthought.

(21) It has also been submitted that the Jail Superintendent in matters relating to N.S.A. is extremely careful and meticulously treats all correspondence and maintains the record and also make sure that all correspondence i.e. received and is marked to be served upon the detenue is actually served upon the detenue on the same day.

(22) It has been argued that the arguments of the learned Senior Counsel should not be accepted by this Court. This Court should decide the matter on the basis of material available on the record.

(23) Learned counsel appearing for the Union of India, Dr. Pooja Singh, has produced before this Court, a copy of the information sent on 22.03.2023 by the Senior Jail Superintendent, Lucknow, to the District Magistrate which mentions that the decision of the Government of India has been communicated/served upon the detenue and his signatures/Thumb impression has been taken on such receipt, which should be further forwarded to the Government of India.

(24) This Court has gone through the documents/receipt enclosed to the letter dated 22.03.2023 and finds the thumb impression of the detenue, Devendra Pratap Yadav, on it alongwith signature of the Jail Superintendent verifying such L.T.I. be taken after service of the telegram upon the detenue, it is kept on record.

(25) Learned Senior Counsel, however, has pointed out that whatever document has been produced by the counsel for the Government of India, cannot be relied upon by this Court as in the initial counter affidavit filed by the Jail Superintendent, he has not mentioned that he has communicated the rejection of the representation by the Central Government to the detenue in time.

(26) Arguments have been heard.

(27) Judgement is reserved."

Order dated: 21.11.2023

47. (इस स्तर पर निर्णय अंकित करवाते समय (while dictating the judgment), आभास होने पर कैलेण्डर से जांच करने पर यह पता चला कि, आदेश दिनांक 27.11.2023 के बारहवीं पंक्ति में जहां "17.03.2023 & 18.03.2023 were Holidays" अंकित है, वहां typing की त्रुटि से तारीख गलत टंकित हो गई है। चूँकि कैलेण्डर के अनुसार, दिनांक 18.03.2023 को शनिवार व 19.03.2023 को रविवार था अतः उक्त पंक्ति में सही तौर पर दिनांक "18.03.2023 & 19.03.2023 *were Holidays*" होना चाहिए। तदनुसार उक्त आदेश के प्रस्तर पाँच की बारहवीं पंक्ति को यथा संशोधित पढ़ा जाना समुचित होगा)।

48. याची पक्ष के विद्वान अधिवक्ता द्वारा यह तर्क भी प्रस्तुत किए गए हैं कि निरुद्धि आदेश के साथ प्रस्तुत दस्तावेजी साक्ष्यों में से कुछ प्रपत्रों की प्रतियां अपठनीय थी, परन्तु किन प्रपत्रों की प्रति अपठनीय थी इसे याची के विद्वान अधिवक्ता द्वारा नहीं बताया गया है और यह भी नहीं बताया गया है कि उक्त प्रपत्र के अपठनीय होने के कारण याची के अधिकारों पर क्या विपरीत प्रभाव पड़ा है। उपरोक्त के अलावा याची ने अपने प्रतिवेदन दिनांक 20.02.2023 में यह कहीं नहीं अंकित किया है कि उसे

उपरोक्त प्रपत्र अस्पष्ट अथवा अपठनीय प्राप्त हुए हैं। अतः याची के विद्वान अधिवक्ता का यह तर्क मान्य नहीं है।

49. याची पक्ष से याचिका में एक आधार यह भी लिया गया है कि निरोधादेश दिनांक 08.02.2023 में याची की निरुद्धि की अवधि अंकित नहीं है। इस संबंध में अधिनियम की धारा 3 के 'परन्तुक' के अनुसार निरुद्धि की अवधि को नियत करने का अधिकार निरोधक अधिकारी, जिला मजिस्ट्रेट को न देकर,अधिनियम द्वारा राज्य सरकार को प्रदत्त किया गया है। विधानतः जिला मजिस्ट्रेट द्वारा पारित निरुद्धि आदेश की अवधि, राज्य सरकार द्वारा उसे अनुमोदित न किए जाने की स्थिति, में धारा 4 में दिए गए प्रावधान के अनुसार मात्र 12 दिवस की ही होती है। निरोधादेश को अनुमोदित करने का अधिकार प्रतिपक्षी संख्या 1में निहित है, अतः निरुद्धि आदेश पारित करते समय उक्त आदेश में निरुद्धि की अवधि को जिला मजिस्ट्रेट द्वारा अंकित किए जाने का कोई औचित्य ही नहीं है।

50. याची द्वारा याचिका में एक आधार यह भी लिया गया है, निरुद्धि आदेश एक प्रोफार्मा आदेश है, जबकि उक्त आदेश दिनांक 08.02.2023 के परिशीलन से उसे प्रोफार्मा आदेश का होना नहीं पाया जाता है। वस्तुतः निरुद्धि का आदेश विपक्षी संख्या 6 के द्वारा विवेचना में अंकित किए गए निरुद्धि के आधार के साथ व उसके पूरक के तौर पर पठनीय है। अतः याची द्वारा लिया गया उक्त आधार भी बलहीन है।

51. याची द्वारा याचिका के आधार में यह भी कहा गया है कि याची के विरुद्ध अंकित कराई गई प्रथम सूचना रिपोर्ट झूठे व अविश्वनीय आधार पर राजनैतिक विद्वेश के कारण अंकित कराई गई है। फर्द बरामदगी (Recovery Memo) गलत बनाए गये हैं। याची की गिरफ्तारी गलत दर्शाई गई है और प्रकरण में माननीय उच्चतम न्यायालय के विधि व्यवस्था के निर्देश व मानवाधिकार के नियमों का पालन नहीं किया गया है। याची घटनास्थल पर उपस्थित नहीं था। याची का अपराध 7 वर्ष से कम वर्ष के लिए दण्डनीय है। याची का रिमांड गलत व विधि विरुद्ध लिया गया है। वस्तुतः याची पक्ष द्वारा प्रस्तुत किए गए, तर्क के उक्त आधार, संबंधित अपराधिक वाद, अपराध संख्या 75 सन 2023 के परीक्षण का विषय है। यह न्यायालय न तो उक्त आपराधिक वाद का परीक्षण कर रही है और न अपीलीय क्षेत्राधिकार के अन्तर्गत अपराधिक वाद की सुनवाई कर रही है और न ही आपराधिक वाद इस याचिका की विषयवस्तु है। अतः इस तथ्य की विवेचना रिट क्षेत्राधिकार के अन्तर्गत करने का इस न्यायालय को कोई क्षेत्राधिकार हासिल नहीं है।

52. याची द्वारा अपने मौखिक तर्कों में यह भी कहा गया है कि उसका प्रतिवेदन सक्षम अधिकारी/प्राधिकारियों द्वारा शीघ्रता व तत्परता

से निस्तारित नहीं किया गया है। अतः याची भारतीय संविधान के अनुच्छेद 22(5) के प्रावधानों के अनुपालन के अनुक्रम में निर्मुक्ति का अधिकारी है।

53. संविधान के अनुच्छेद 22 (5), निम्न प्रावधान विहित करता है:-

"निवारक निरोध का उपबंध करने वाली किसी विधि के अधीन किए गए आदेश के अनुसरण में जब किसी व्यक्ति को निरुद्ध किया जाता है तब आदेश करने वाला प्राधिकारी यथाशक्य शीघ्र उस व्यक्ति को यह संसूचित करेगा कि वह आदेश किन आधारों पर किया गया है और उस आदेश के विरुद्ध अभ्यावेदन करने के लिए उसे शीघ्रातिशीघ्र अवसर देगा।

उपरोक्त संविधानिक प्रावधानों के अनुसार निरोधक अधिकारी की ऊपर दो शर्तें अधिरोपित की गई हैं, यथा निरोधक अधिकारीः-

(I) निरोधक अधिकारी, याची के विरुद्ध पारित निरुद्धि आदेश हेतु, तथ्य व साक्ष्य आदि जिनके आधार पर, निरोधादेश पारित किया गया है, याची को यथाशीघ्र संसूचित करेगा।

(II) याची को उक्त निरुद्धि आदेश के विरुद्ध याची को अपना प्रतिवेदन प्रस्तुत करने का शीघ्रतम अवसर प्रदान करेगा।"

54. पत्रावली में उपलब्ध शपथ पत्रों व प्रपत्रों का परिशीलन करने से यह परिलक्षित होता है कि प्रतिपक्षी संख्या 4/ जिला मजिस्ट्रेट ने निरुद्धि आदेश, निरुद्धि के आधार व प्रकरण से संबंधित प्रपत्रों की प्रति प्रतिपक्षी संख्या 6 को, दिनांक 08.02.2023 को ही प्रेषित कर दिया था, जिसे प्रतिपक्षी संख्या 6 ने याची को दिनांक 08.02.2023 को ही उपलब्ध करा दिया था और जिसकी पावति (Receiving) भी प्रतिपक्षी संख्या 6 द्वारा अपने प्रति शपथ पत्र दिनांकित 5/7.07.2023 के साथ बतौर संलग्नक 1, पत्रावलित की गई है। इस प्रकार से भारतीय संविधान के अनुच्छेद 22(5) व अधिनियम की धारा 8 का सम्यक अनुपालन किए जाने में निरोधक अधिकारी। प्रतिपक्षी संख्या 4 के द्वारा किसी चूक का किया जाना परिलक्षित नहीं होता है।

55. प्रतिपक्षी संख्या 4 ने दिनांक 08.02.2023 को ही उक्त निरुद्धि आदेश अपनी टिप्पणी व अन्य प्रपत्रों के साथ प्रतिपक्षी संख्या 1/ उत्तर प्रदेश शासन को प्रेषित कर दिया था। इस प्रकार से अधिनियम की धारा 3(4) का सम्यक रूप से अनुपालन प्रतिपक्षी संख्या 4 द्वारा कर दिया गया था।

56. राज्य सरकार द्वारा निरुद्ध के आदेश का अनुमोदन दिनांक 14.02.2023 को कर दिया गया है जो अधिनियम की धारा 3(4) में वर्णित सम्यावधि 12 दिवस के अंदर है।

57. प्रतिपक्षी संख्या 1 द्वारा अपने उक्त अनुमोदन आदेश दिनांक 14.02.2023 को दिनांक 16.02.2023 को (विहित मियाद सात

दिवस के अंदर) केंद्र सरकार/प्रतिपक्षी संख्या 2 को प्रेषित कर दिया गया था, जो अधिनियम की धारा 3(5) के अनुसार है।

58. विपक्षी संख्या 1/ उत्तर प्रदेश शासन द्वारा परामर्शदात्री परिषद (Advisory Board) को दिनांक 16.02.2023 को ही अपने अनुमोदन आदेश के साथ-साथ अन्य प्रपत्रों को प्रेषित कर दिया था जो कि अधिनियम के धारा 10 में नियत समयावधि (निरुद्धि की तिथि से तीन सप्ताह) के अंदर था। इस प्रकार से प्रतिपक्षी संख्या 1 द्वारा अधिनियम की धारा 10 का सम्यक अनुपालन भी किया जाना भी परिलक्षित होता है।

उपरोक्त के अलावाः-

(क) निरुद्धि करण आदेश दिनांक 08.02.2023 का अनुमोदन आदेश प्रतिपक्षी संख्या 1 द्वारा 17.02.2023 को, प्रतिपक्षी संख्या 6 के जरिए याची को संसूचित कर दिया गया था।

(ख) याची द्वारा, प्रतिपक्षी संख्या 4/ जिला मजिस्ट्रेट को प्रस्तुत प्रतिवेदन को प्रतिपक्षी संख्या 4 द्वारा दिनांक 22.02.2023को (दो दिवस के अंदर) निरस्त कर दिया गया था और जिसे उसी दिन याची को संसूचित कर दिया गया था।

(ग) प्रतिपक्षी संख्या 1/राज्य सरकार द्वारा याची के प्रतिवेदन को दिनांक 01.03.2023 को निरस्त कर दिया गया था जो याची को दिनांक 02.03.2023 को संसूचित कर दिया गया था।

(घ) परामर्शदात्री परिषद (Advisory Board) द्वारा अपने पत्र दिनांक 21.03.2023 के द्वारा प्रतिपक्षी संख्या 1 को संसूचित किया गया है कि याची के प्रतिवेदन को परिषद द्वारा सुनवाई के उपरांत निरस्त कर दिया गया था।

(च) केंद्र सरकार/प्रतिपक्षी संख्या 2 द्वारा याची के प्रतिवेदन को दिनांक 17.03.2023 को निरस्त कर दिया गया था जो दिनांक 22.03.2023 को प्रतिपक्षी संख्या 6 के जरिए याची को संसूचित कर दिया गया था।

(छ) याची के निरुद्धि आदेश को तीन माह तक की अवधि के लिए विस्तारित किए जाने का आदेश दिनांक 27.03.2023, प्रतिपक्षी संख्या 1/ राज्य सरकार द्वारा पारित किया गया है जो उसे उसी दिन याची को प्रतिपक्षी सं०6 द्वारा संसूचित कर दिया गया था। उक्त आदेश का फार्मल आदेश याची को दि० 01.04.2023 को संसूचित किया गया।

(ज) याची की निरुद्धि को छः माह तक विस्तारित करने का आदेश पूर्व अवधि के समापन की तिथि के पूर्व, दिनांक 01.05.2023 को, प्रतिपक्षी द्वारा जिला कारागार को प्रेषित कर दिया गया था जो उसी दिन प्रतिपक्षी सं० 6 द्वारा याची को संसूचित कर दिया गया था।

(झ) याची के निरुद्धि की अवधि को दिनांक 02.08.2023 को 9 माह की अवधि तक विस्तारित किए जाने का प्रतिपक्षी सं० 1 द्वारा प्रेषित रेडियोग्राम, जेल में दिनांक 31.07.2023 को प्राप्त हुआ था, जिसे भी याची को उसी दिन अर्थात दिनांक 31.07.2023 को संसूचित कर दिया गया था।

59. उपरोक्त प्रकार से याची को निरोधादेश के अनुमोदन, प्रतिवेदन के प्रतिपक्षीगण सं 1, 2 व 4 द्वारा निरस्तीकरण के आदेशों एवं निरोध की तिथि के विस्तारण के आदेशों को सम्यक तत्परता से प्रतिपक्षी सं० 6 के जरिए संसूचित कर दिए गए थे। तत्संबंधित पत्र प्राप्त होने व आदेश पारित होने व आदेशों को याची को संसूचित किए जाने में लगने वाली समयावधि को राज्य सरकार व केंद्र सरकार के कार्यालयों के कामकाज को "Rules Of Business" के नियम से संचालित होने के तथ्य को विचार में लेते हुए तथा पत्रों को डाक द्वारा भेजे जाने में लगने वाली समयावधि को भी विचार में लेते हुए यह निष्कर्षित होता है कि याची को आवश्यक सूचनाएं यथाशीघ्र व बिना किसी अनावश्यक विलम्ब के संबंधित प्रतिपक्षीगण द्वारा उपलब्ध करा दी गई हैं। इस बिंदु पर याची द्वारा प्रस्तुत विधि व्यवस्था **Sarabjeet Singh Mokha vs. District Magistrate, Jabalpur and others, reported in 2021 SCC Online SC 1019** के तथ्य हस्तगत याचिका के तथ्यों से भिन्न होने के कारण लागू नहीं होते हैं। उक्त विधि व्यवस्था में तथ्यानुसार निरुद्ध बंदी द्वारा प्रस्तुत प्रत्यावेदन दिनांक 18.05.2021 दिनांक 15.07.2021 को निरस्त किया गया था जो अत्यधिक विलम्ब से व विधि के प्रावधानों के विरुद्ध तथा माना गया था, तथा उक्त वाद में प्रतिपक्षीगण द्वारा आदेशों के बाबत बंदी को सम्यक संसूचना का साक्ष्य भी नहीं था, जबकि हस्तगत वाद में याची के प्रतिवेदन यथाशीघ्र निस्तारित किए गए हैं व प्रतिपक्षीगण द्वारा पारित आदेशों को याची को संसूचित किए गए हैं।

60. याची की याचिका में एक आधार यह भी लिया गया है, कि याची को बिना सुनवाई के निरोधादेश दिनांक 08.02.2023 के द्वारा जेल में निरुद्ध किया गया है, जिससे संविधान द्वारा मौलिक अधिकार के रूप में प्रदत्त उसकी व्यक्तिगत स्वतंत्रता अवरोधित हो रही है, अतः उक्त निरुद्धि आदेश को निरस्त किया जावे।

61. उपरोक्त बिन्दु पर याची के विद्वान अधिवक्ता द्वारा प्रस्तुत तर्क विधिक रूप से बलशाली प्रतीत नहीं होते है, क्योंकि संविधान के अनुच्छेद 21 में किसी नागरिक को प्रदत्त दैहिक स्वतंत्रता का मौलिक अधिकार उसे आत्यंतिक **(Absolutely)** रूप से प्रदत्त नहीं किया गया है, वरन यह स्वतंत्रता विधि के प्रावधानों से शासित होती है। माननीय उच्चतम न्यायालय ने **Mohd. Subrati Alias Mohd. Karim vs State Of West Bengal (1973) 3 SCC 250** के प्रस्तर 7 में इसे निम्न प्रकार से विवेचित किया हैः-

"No doubt, the right to personal liberty of an individual is jealously protected by our Constitution but this liberty is not absolute and is not to be understood to amount to licence to indulge in activities which wrongfully and unjustly deprive the community or the society of essential services and supplies. The right of the society as a whole is, from its very nature, of much greater importance than that of an individual. In case of conflict between

the two rights, the individual's right is subjected by our Constitution to reasonable restrictions in the larger interests of the society."

62. इसी अनुक्रम में **State of Maharastra and Others Vs. Bhaurao Punjabrao Gawande (2008) 3 SCC 613** के प्रस्तर 36 में माननीय उच्चतम न्यायालय ने यह धारित किया है किः-

"36. Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. The framers of the Constitution were conscious of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on the one hand and security and safety of the country and interest of the society on the other hand. Security of State, maintenance of public order and services essential to the community, prevention of smuggling and blackmarketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life."

63. हस्तगत प्रकरण में याची ने अपने सहयोगियों के साथ, सार्वजनिक स्थल पर, दिन के प्रकाश में, समाज के बहुसंख्यक वर्ग द्वारा उनकी धार्मिक मान्यताओं व आस्था के अन्तर्गत आराधित भगवान राम के, जीवन के घटनाक्रम से संबंधित धर्म ग्रंथ रामचरित मानस का जिस प्रकार से अपमान किया है, उससे समाज में आक्रोश व गुस्से का उत्पन्न होना स्वाभाविक है, समाज में धार्मिक उन्माद व आक्रोश फैलने की स्थिति का परिदृश्य में आ सकना, वर्तमान स्थिति में विशेषकर जहां मोबाइल फ़ोन व सोशल मीडिया से समाज का लगभग प्रत्येक व्यक्ति जुड़ा हुआ है, स्वाभाविक प्रतीत होता है। अतः ऐसी स्थिति में जबकि आसन्न खतरे को देखते हुए कार्यपालिका/प्रशासन द्वारा याची को निरुद्धि आदेश दिनांक 08.02.2023 के जरिए निरुद्ध किया गया है, इसे याची के व्यक्तिगत स्वतंत्रता का अयुक्तियुक्त व विधि विरुद्ध प्रतिबंध नहीं माना जा सकता है।

इस प्रकार से प्रकरण के तथ्य व परिस्थितियों एवं पत्रावली में उपलब्ध साक्ष्य की विधि के प्राविधानों व मा० उच्चतम न्यायालय द्वारा प्रतिपादित विधिक सिद्धांतों के परिपेक्ष्य में उपरोक्तानुसार विवेचना के उपरांत इस न्यायालय के सुविचारित निष्कर्षानुसार हस्तगत याचिका बलहीन होने के कारण निरस्त होने योग्य है।

64. तदनुसार, याचिका **निरस्त** की जाती है।

(2024) 1 ILRA 531
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Habeas Corpus Writ Petition No. 220 of 2023

Suresh Singh Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ram Pratap Yadav

Counsel for the Respondents:
G.A., A.S.G.I., Ishan Baghel

(अ) फौजदारी कानून - भारतीय दंड प्रक्रिया संहिता ,1973 - धारा 161, भारतीय दंड संहिता, 1860 - धारा 120-B, 142, 143, 153-A, 295, 295-A, 298, 504, 504 (2) एवं 506 - राष्ट्रीय सुरक्षा अधिनियम, 1980 - धारा 3(2),3(4),3(5),4,5,12(1) - संविधान के अनुच्छेद 21 में किसी नागरिक को प्रदत्त दैहिक स्वतंत्रता का मौलिक अधिकार उसे आत्यंतिक (Absolutely) रूप से प्रदत्त नहीं किया गया है, वरन यह स्वतंत्रता विधि के प्रावधानों से शासित होती है - Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. Security of State, maintenance of public order and services essential to the community, prevention of smuggling and blackmarketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life. (पैरा - 59,60)

(ब) भारत का संविधान, 1950 - किसी व्यक्ति की व्यक्तिगत स्वतंत्रता का अधिकार हमारे संविधान द्वारा ईर्ष्या से संरक्षित है, लेकिन यह स्वतंत्रता निरपेक्ष नहीं है और इसे ऐसी गतिविधियों में लिप्त होने के लिए लाइसेंस के रूप में नहीं समझा जाना चाहिए जो समुदाय या समाज को आवश्यक सेवाओं और आपूर्ति से गलत और अन्यायपूर्ण रूप से वंचित करती हैं - समग्र रूप से समाज का अधिकार, अपनी प्रकृति से, किसी व्यक्ति के अधिकार की तुलना में बहुत अधिक महत्वपूर्ण है - दोनों अधिकारों के बीच टकराव के मामले में, व्यक्ति के अधिकार को हमारे संविधान द्वारा समाज के व्यापक हित में उचित प्रतिबंधों के अधीन किया जाता है।(पैरा - 59)

आपराधिक षडयंत्र - सार्वजनिक स्थल पर रामचरित मानस की प्रतियां फाड़कर व उन्हें पैरों से कुचलते हुए जला दिया गया - रामचरित मानस व रामचरित मानस के अनुयायियों पर अभद्र टिप्पणी भी की गई - जिनसे आम जनमानस में अत्यंत आक्रोश फैल गया व लोक व्यवस्था छिन्न-भिन्न हो गई (पैरा - 2,3,4,)

निर्णय:- याची ने अपने सहयोगियों के साथ, सार्वजनिक स्थल पर, दिन के प्रकाश में, समाज के बहुसंख्यक वर्ग द्वारा उनकी धार्मिक मान्यताओं व आस्था के अन्तर्गत आराधित भगवान राम के, जीवन के घटनाक्रम से संबंधित धर्म ग्रंथ रामचरित मानस का जिस प्रकार से अपमान किया है, उससे समाज में आक्रोश व गुस्से का उत्पन्न होना स्वाभाविक है, समाज में धार्मिक उन्माद व आक्रोश फैलने की स्थिति का परिदृश्य में आ सकना, वर्तमान स्थिति में विशेषकर जहां मोबाइल फ़ोन व सोशल मीडिया से समाज का लगभग प्रत्येक व्यक्ति जुड़ा हुआ है, स्वाभाविक प्रतीत होता है। अतः ऐसी स्थिति में जबकि आसन्न खतरे को देखते हुए कार्यपालिका/प्रशासन द्वारा याची को निरुद्धि आदेश दिनांक 08.02.2023 के जरिए निरुद्ध किया गया है, इसे याची के व्यक्तिगत स्वतंत्रता का अयुक्तियुक्त व विधि विरुद्ध प्रतिबंध नहीं माना जा सकता है।(पैरा - 61)

याचिका निरस्त की जाती है। (E-7)

उद्धृत मामलों की सूची :-

1. महाराष्ट्र राज्य और अन्य बनाम भाऊराव पंजाबराव गवांडे, (2008) 3 एससीसी 613

2. अरुण घोष बनाम पश्चिम बंगाल राज्य, 1970.1 एससीसी 1998

3. राम रंजन चटर्जी बनाम पश्चिम बंगाल राज्य, (1975) 4 एससीसी 143

4. इंद्रदेव महतो बनाम पश्चिम बंगाल राज्य, (1973) 4 एससीसी 4

5. इब्राहिम नजीर बनाम तमिलनाडु राज्य और दूसरा, (2006) 6 एससीसी 64

6. खुदीराम दास बनाम पश्चिम बंगाल राज्य, (SCC pp. 90-91, para 8)

7. सूरज पाल साहू बनाम महाराष्ट्र राज्य और अन्य, (1986) 4 एससीसी 378

8. भारत संघ बनाम अरविंद शेरगिल, (2000) 7 एससीसी 601

9. मगन गोप बनाम पश्चिम बंगाल राज्य, (1975) 1 एससीसी 415

10. पंजाब राज्य बनाम सुखपाल सिंह, (1990) 1 एससीसी 35

11. सरबजीत सिंह मोख बनाम जिला मजिस्ट्रेट, जबलपुर और अन्य, 2021 एससीसी ऑनलाइन एससी 1019

(Delivered by Hon'ble Narendra Kumar Johari, J.)

1. हस्तगत याचिका में याची सुरेश सिंह यादव द्वारा अपने पैरोकार/पत्नी सीता देवी के द्वारा निम्नलिखित अनुतोष के साथ प्रस्तुत की गई है:-

"(i) issue a writ Habeas Corpus in the nature of Habeas Corpus directing the respondents to release the petitioner/detenue forthwith.

(ii) issue a writ Habeas Corpus in the nature of Certiorari quashing the impugned detention order dated 16.2.2023 passed by the District Magistrate, Lucknow i.e. opposite party No. 4 as well as order dated 24.2.2023 and 27.3.2023 passed by the opposite party No. 3 as contained in Annexure No. 1,2 & 3 respectively and rejection order dated 28.2.2023 passed by the District Magistrate, Lucknow i.e. opposite party No. 4 as contained in Anexure No. 7 to this writ petition as well as the entire consequential proceedings and orders with respect to the detention of the petitioner

(iii) issue a writ, order or direction in any nature which this Hon'ble Court may deem fit and proper under the circumstances of the case.

(iv) allow the writ petition with cost in favour of the petitioner/detenue."

2. संक्षेप में प्रकरण के तथ्य निम्नवत हैं:-

दिनांक 29.01.2023 को समय 23:47 बजे वादी सतनाम सिंह लवी ने थाना पी०जी०आई लखनऊ में प्रथम सूचना रिपोर्ट अन्तर्गत धारा 120-B, 142, 143, 153-A, 295, 295-A, 298, 504, 504 (2) एवं 506 भारतीय दण्ड संहिता इस आशय से अंकित करवाई की, आज दिनांक 29.01.2023 को समय लगभग 9:00 बजे, पूर्व सुनियोजित योजना के अनुसार व एक आपराधिक षडयंत्र के अन्तर्गत स्वामी प्रसाद मौर्य के द्वारा रामचरित मानस के प्रति किए गए अपमानजनक टिप्पणी के समर्थन में व उनकी शह पर देवेंद्र प्रताप यादव, यशपाल सिंह लोधी, सतेन्द्र कुशवाहा, महेन्द्र प्रताप यादव, सुजीत यादव, नरेश सिंह, एस.एस यादव, संतोष वर्मा, सलीम व अन्य कुछ अज्ञात व्यक्तियों द्वारा, आवास विकास ऑफिस सेक्टर-9 के पास, नई

रोडवेज गेट पर रामचरित मानस की प्रतियां फाड़कर सार्वजनिक स्थान पर पैरों से कुचलते हुए जला दिया गया व स्वामी प्रसाद मौर्या के समर्थन में नारेबाजी की गई तथा रामचरित मानस व इसके अनुयायियों पर अभद्र टिप्पणी की गई, जिससे वहाँ आक्रोश फैल गया व अगल-बगल के लोग आक्रोशित होकर इकट्ठा होने लगे। अग्रेतर वादी प्रथम सूचनाकर्ता ने यह भी अंकित किया है कि "मैं भी मौके पर मौजूद था तथा मैंने भी आपत्ति किया था, लेकिन ये लोग नहीं माने और मुझे भी धमकाया।"

उपर्युक्त लोगों के द्वारा एक समुदाय की भावना को आहत करने, साम्प्रदायिक दंगे, वर्ग-विद्वेष फैलाने, हिंसा के लिए उकसाने, लखनऊ तथा राज्य की लोक व्यवस्था व कानून व्यवस्था को खराब करने व माहौल बिगाड़ने के लिए जानबूझकर उक्त कृत्य किया गया है जिससे आम जनमानस में अत्यंत आक्रोश व्याप्त है। अग्रेतर वादी ने यह भी कथन किया है कि, "मैंने पुलिस को भी सूचना दी है। इन लोगों के द्वारा उक्त कृत्य देश व समाज के अमन व भाईचारे के पूर्णतः प्रतिकूल है व अराजकता फैलाने के उद्देश्य से किया गया है। अतः समुचित कार्यवाही की जाए।"

3. तत्पश्चात पुलिस द्वारा सक्रिय होकर व तत्परता से याची देवेंद्र प्रताप यादव व यशपाल सिंह व अन्य तीन अभियुक्तगण को गिरफ्तार किया गया। दिनांक 01.02.2023 को विवेचक द्वारा अभियुक्त/याची देवेंद्र प्रताप यादव के घर से व उसकी निशानदेही पर घटना से संबंधित एक मोबाइल फोन (Samsung) को कब्ज़े में लिया गया साथ ही उक्त दिनांक 01.02.2023 को ही पुलिस द्वारा याची/अभियुक्त की निशानदेही पर "अनंत स्टेशनरी" वृन्दावन सेक्टर-2 स्थिति दुकान से एक रेडमी मोबाइल फोन, जिसके सम्बंध में कहा गया है कि उक्त मोबाइल फोन पर मंगवाए गए रामचरित मानस की प्रतियों को उक्त दुकान से प्रिंट कराया गया था एवं पुलिस ने सम्बंधित प्रिंटर को भी उक्त दुकान से अपने कब्ज़े में लिया तथा इन सब बरामद वस्तुओं की फर्द बरामदगी (Recovery memo) भी तैयार की।

4. याची/अभियुक्त द्वारा किये गये उक्त कृत्य के संबंध में दिनांक 16.02.2023 को प्रभारी निरीक्षक, थाना पी०जी०आई० लखनऊ ने पुलिस उपायुक्त (पूर्वी) लखनऊ को अपनी आख्या प्रस्तुत की, जिसमें यह अंकित किया गया है कि याची सुरेश सिंह यादव, देवेंद्र प्रताप यादव, यशपाल सिंह व अन्य के द्वारा आवास विकास ऑफिस सेक्टर-9 के पास, सार्वजनिक स्थल पर रामचरित मानस की प्रतियां फाड़कर व उन्हें पैरों से कुचलते हुए जला दिया गया तथा रामचरित मानस व रामचरित मानस के अनुयायियों पर अभद्र टिप्पणी भी की गई, जिनसे आम जनमानस में अत्यंत आक्रोश फैल गया व लोक व्यवस्था छिन्न-भिन्न हो गई। जब भीड़ इकट्ठा होने लगी तब उक्त लोग धमकी देते हुए एवं नारेबाजी करते हुए भाग गए। अभियुक्तगण ने सुनियोजित योजना के

अन्तर्गत लखनऊ कमिश्नरेट व प्रदेश को हिंसा की आग में झोंकने के लिए उक्त कृत्य को कारित करते हुए, उनका वीडियो भी बनाया था, ताकि उसे प्रसारित कर प्रदेश को हिंसा की आग में झोंक सकें। प्रभारी निरीक्षक ने अग्रेतर यह भी अंकित किया है कि, समय लगभग 13:34 बजे के आसपास सोशल मीडिया पर उक्त वीडियो वायरल होने लगी। वीडियो प्रसारित होने पर एक समुदाय में आक्रोश और क्षुब्धता बढ़नी शुरू हो गयी थी। तथ्य की जानकारी होने पर प्रभारी निरीक्षक द्वारा उप-निरीक्षक चन्द्रभान वर्मा को थाने से रवाना किया गया। रात होते-होते माहौल काफी गर्म हो गया था। लोग तरह-तरह की चर्चाएं करने लगे थे। ऐसा लग रहा था कि इस कृत्य में कोई गहरा षडयंत्र व साज़िश है। अभियुक्तों को चिह्नित करने के लिए अलग-अलग थाने से पुलिसबल की टीमें रवाना की गईं व सभी चौकी प्रभारियों व थाने की फोर्स को सतर्कता बरतने हेतु क्षेत्र में भेजा गया व सतर्क रहने के निर्देश भी दिए गए। क्षेत्र की पालीगान को भी लोगों को समझाने बुझाने में लगाया गया। देर रात होते-होते अभियुक्तों द्वारा किए गए इस कृत्य के वायरल वीडियो से उक्त थाना क्षेत्र में चारों तरफ सनसनी व तनाव का माहौल व्याप्त हो गया व सामान्य जनजीवन अस्त-व्यस्त हो गया। थाना क्षेत्र में संवेदनशीलता लगातार बढ़ती जा रही थी, जिस पर अगल-बगल के थानाध्यक्षों को क्षेत्र में पहुँचने व फोर्स भेजने व अतिरिक्त सतर्कता बरतने के लिए अनुरोध किया गया।

5. घटना वाले दिन रात में ही याची सुरेश सिंह यादव व अन्य अभियुक्तगण देवेंद्र प्रताप यादव व सतेंद्र कुशवाहा आदि को गिरफ्तार किया गया। थाना प्रभारी ने यह भी कथन किया है कि पुलिस द्वारा किसी प्रकार से स्थिति को नियंत्रण में लाया जा सका था, लेकिन तनाव लगातार बरकरार रहा है। आवंटित अतिरिक्त पुलिस फोर्स को एस०पी० कार्यालय कैंट में रोका गया था। क्षेत्र में भारी पुलिस बल का पैदल मार्च भी संवेदनशील स्थानों पर कराया गया। आख्या में थाना प्रभारी ने अग्रेतर यह भी अंकित किया है कि, मैं व उच्चाधिकारीगण भ्रमण पर रहकर लोगों को समझाते बुझाते रहे। अभी-भी क्षेत्र में तनाव बना हुआ है। विभिन्न समाचारपत्रों तथा इलेक्ट्रानिक चैनलों ने भी उक्त खबर को लगातार प्रमुखता से प्रसारित किया है। पुलिस के द्वारा एक्सपर्ट के माध्यम से भी वीडियो का प्रसारण/परिचालन को रोकने का प्रयास किया गया। याची व अन्य सह अभियुक्तगण अपना जुर्म स्वीकार करते हुए उक्त जघन्य कृत्य को आगे भी जारी रखने की बात कह रहे हैं। प्रकरण में राज्य व देश के अमनचैन में खलल डालने वाली बाहरी एजेंसियों के संलिप्तता की भी सम्भावना दिख रही है और यदि पुलिस द्वारा तात्कालिक तौर पर तत्परतापूर्वक कार्रवाई न की गई होती तो देश व प्रदेश दंगे की चपेट में भी आ सकता था। थाना प्रभारी ने यह भी अंकित किया है कि, याची/अभियुक्त सुरेश सिंह यादव ने उक्त अपराध संख्या 75 सन 2023 में जमानत हेतु मुख्य न्यायिक मजिस्ट्रेट लखनऊ

के समक्ष जमानत प्रार्थना पत्र प्रस्तुत किया था जो न्यायालय द्वारा निरस्त कर दिया गया है, परन्तु याची ने पुनः सत्र न्यायालय में जमानत प्रार्थना पत्र प्रस्तुत कर दिया है और जमानत पर छूटने का हर सम्भव प्रयास कर रहा है। उसके जमानत पर छूटने की प्रबल सम्भावना है। यह भी सुनिश्चित है कि जमानत पर छूटने पर वह पुनः इसी प्रकार के आपराधिक कृत्यों में लिप्त हो जाएगा। अतः अभियुक्त सुरेश सिंह यादव को राष्ट्रीय सुरक्षा अधिनियम की धारा 3(2) के अन्तर्गत निरुद्ध करने हेतु निरोधात्मक प्राधिकारी/जिला मजिस्ट्रेट लखनऊ से अनुरोध करने की कृपा की जाए।

6. तत्क्रम में सहायक पुलिस आयुक्त, (कैंट) कमिश्नरेट, लखनऊ के द्वारा भी प्रभारी निरीक्षक थाना पी०जी०आई० लखनऊ की उक्त आख्या दिनांकित 16.02.2023 से सहमत होते हुए उक्त आख्या को पुलिस उपायुक्त (पूर्वी) लखनऊ को दिनांक 16.02.2023 को ही अग्रसारित कर दिया।

7. पुलिस उपायुक्त (पूर्वी) लखनऊ ने भी प्रभारी निरीक्षक थाना पी०जी०आई० की आख्या दिनांक 16.02.2023 से सहमत होते हुए याची सुरेश सिंह यादव को राष्ट्रीय सुरक्षा अधिनियम की धारा 3(2) के अन्तर्गत निरुद्ध किये जाने हेतु, निरोधादेश पारित करने के अनुरोध के साथ अपनी आख्या दिनांकित16.02.2023जिला मजिस्ट्रेट लखनऊ को प्रेषित कर दिया, जिसमें पुलिस उपायुक्त (पूर्वी) लखनऊ ने याची सुरेश सिंह यादव व उसके सहयोगियों द्वारा किए गए कृत्य, वायरल कराए गए वीडियो व इस घटना का जनमानस पर असर पड़ने के तथ्य व लोक व्यवस्था छिन्न-भिन्न होने की स्थिति को देखते हुए, पुलिस के व्यापक प्रबंध के तथ्य को विस्तृत रूप से अंकित, करने के साथ ही साथ यह भी अंकित किया है कि उक्त सुरेश सिंह यादव न्यायिक अभिरक्षा में है और उसने जमानत हेतु प्रार्थना पत्र भी प्रस्तुत कर रखा है, जिसके शीघ्र ही स्वीकार किए जाने की सम्भावना है और यदि वह जमानत पर निर्मुक्त हो गया तो पुनः इसी प्रकार की आपराधिक गतिविधियों में लिप्त हो जाएगा।

8. जिला मजिस्ट्रेट लखनऊ ने प्रभारी निरीक्षक थाना पी०जी०आई० व पुलिस उपायुक्त की आख्याओं का सम्यक परिशीलन व परीक्षण करते हुए अपनी संतुष्टि को, विस्तार से, निरुद्धि के आधार दिनांक 16.02.2023 में उल्लेख करते हुए याची सुरेश सिंह यादव को राष्ट्रीय सुरक्षा अधिनियम (जिसे अग्रेतर 'अधिनियम' अंकित किया गया है) की धारा 3 (2) के अन्तर्गत जिला कारागार लखनऊ में निरुद्ध किए जाने हेतु निरोधादेश दिनांक 16.02.2023 को पारित कर दिया।

9. जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 ने उक्त दिनांक 16.02.2023 को ही निरोधादेश, निरुद्धि के आधार, व प्रकरण से संबंधित समस्त प्रलेखिय साक्ष्य बतौर

संलग्नक सूची, कागजात क्रमांक 1 से 15 (जिसे याची ने अपनी याचिका में 'संलग्नक' के तौर पर संलग्न किया है), याची पर तामीली हेतु प्रतिपक्षी संख्या 6/जेल अधीक्षक लखनऊ को प्रेषित किया, जहां याची अपराध संख्या 75 सन 2023 में निरुद्ध था। प्रतिपक्षी संख्या 6/जेल अधीक्षक लखनऊ ने उक्त आदेश व अन्य संलग्न प्रपत्र, याची को दिनांक 16.02.2023 को ही उपलब्ध करा दिए तथा उनकी पावती पत्र दिनांकित 16.02.2023, भी जिला मजिस्ट्रेट लखनऊ को प्रेषित कर दिया।

10. प्रकरण में यह तथ्य भी दर्शित किया गया है कि याची के विरुद्ध दिनांक 29.01.2023 को अंकित कराई गई प्रथम सूचना रिपोर्ट मुकदमा अपराध संख्या 0075 सन 2023 अन्तर्गत धारा 120B, 142, 143, 153A, 295, 295A, 298, 504, 505(2) व 506 भा०दं०वि० में, याची का जमानत प्रार्थना पत्र, विशेष न्यायाधीश पी०सी० एक्ट प्रथम लखनऊ द्वारा दिनांक 23.02.2023 को स्वीकार कर लिया गया व याची अभियुक्त को रु० 1,00,000/- के दो स्थानीय जमानतों व समान धनराशि के व्यक्तिगत बंधपत्र पर सशर्त जमानत पर निर्मुक्त करने का आदेश पारित कर दिया गया।

11. निरोधादेश दिनांक 16.02.2023 को अनुमोदित किए जाने हेतु निरोधादेश, निरुद्धि के आधार, संबंधित प्रलेखीय साक्ष्य व उपरोक्त के संदर्भ में अपनी आख्या, प्रतिपक्षी संख्या 4 जिला मजिस्ट्रेट लखनऊ द्वारा दिनांक 16.02.2023 को ही उत्तर प्रदेश शासन लखनऊ/प्रतिपक्षी संख्या 1 को, अनुमोदनार्थ प्रेषित कर दिया गया था, जिसे प्रतिपक्षी संख्या 1 के सम्बंधित विभाग (Section) द्वारा दिनांक 17.02.2023 को प्राप्त किया गया। तत्पश्चात प्रतिपक्षी संख्या-1 के द्वारा दिनांक 22.02.2023 को विपक्षी संख्या 4 द्वारा पारित निरोधादेश को अनुमोदित कर दिया गया। इस स्तर पर, पाँच दिवस का समय अनुमोदन में लगने के बिंदु पर, मौखिक तर्कों, में विद्वान शासकीय अधिवक्ता द्वारा यह बताया गया कि चूंकि विपक्षी सं०1 के कार्यालय (सचिवालय) के कार्य 'Rules of Business' के नियमानुसार संचालित होते हैं, तथा सचिवों के विभिन्न स्तरों (समीक्षाधिकारी, अनुसचिव, विशेष सचिव, सचिव व अपर मुख्य सचिव) पर प्रकरण का अवलोकन व परीक्षण होता है, अतः पाँच दिवस का समय लगना अनावश्यक नहीं है और किसी भी अन्य सूरत में, उक्त अनुमोदन चूंकि अधिनियम की धारा 3(4) में अधिनियमित ,12दिवस की विहित अवधि के अंदर ही किया गया है, अतः विपक्षी संख्या 1 के द्वारा याची के निरोधादेश को अनुमोदित करने में प्रतिपक्षी संख्या 1 के स्तर से, न तो कोई अनावश्यक विलंब कारित किया गया है और न अधिनियम के धारा 3 (4) का कोई उल्लंघन ही कारित किया गया है। प्रतिपक्षी संख्या 1 द्वारा, प्रतिपक्षी संख्या 4 को, अपने उक्त 'अनुमोदन आदेश' को रेडियोग्राम द्वारा याची को संसूचित करने हेतु, दो दिवस के अंदर

ही अर्थात दिनांक 24.02.2023 को, प्रतिपक्षी संख्या 4 के माध्यम से, प्रतिपक्षी संख्या 6 को प्रेषित कर दिया गया था, जिसे दिनांक 24.02.2023 को प्रतिपक्षी संख्या 6 द्वारा याची को नियमानुसार संसूचित कर दिया गया था तथा संसूचना/पावती की आख्या दिनांक 24.02.2023 भी प्रतिपक्षी संख्या 4 को प्रेषित कर दिया था।

12. विपक्षी संख्या 1 के द्वारा, निरुद्धि आदेश दिनांक 16.02.2023, निरुद्धि के आधार दिनांक 16.02.2023, प्रकरण से सम्बंधित प्रपत्र जो उन्हें जिला मजिस्ट्रेट लखनऊ के द्वारा प्रेषित किया गया था तथा निरुद्धी आदेश को अपने स्तर से अनुमोदन के आदेश दिनांकित 22.02.2023 की प्रतियों सहित पत्र दिनांक 24.02.2023, गृह सचिव भारत सरकार/प्रतिपक्षी संख्या 2 को भी रजिस्टर्ड पत्र दिनांक 01.03.2023 के द्वारा प्रेषित कर दिया गया था। (न्यायालय द्वारा आहूत किए गए मूल रिकॉर्ड के परिशीलन से यह परिलक्षित होता है कि अनुमोदन आदेश पारित होने की तिथि दिनांक 22.02.2023को नियमानुसार अपवर्जित करते हुए गणना किए जाने पर तथा दिनांक 01.03.2023 को प्रतिपक्षी संख्या-1 द्वारा उक्त अनुमोदन सम्बंधी प्रपत्र प्रतिपक्षी सं०2गृह सचिव भारत सरकार को अनुमोदन कि तिथि से 7 वें दिवस को प्रेषित किए जाने हेतु डाक से भेज दिए जाने के तथ्य पर विचार किए जाने पर यह परिलक्षित होता है कि प्रतिपक्षी संख्या-1 द्वारा अधिनियम की धारा 3 (5) का उल्लंघन नहीं किया गया है।)

13. निरोधात्मक आदेश के विरुद्ध याची द्वारा अपना प्रतिवेदन दिनांकित 24.02.2023, जिला मजिस्ट्रेट लखनऊ, उत्तर प्रदेश शासन, परामर्शदात्री परिषद (निरुद्धी) व केंद्र सरकार को प्रेषित किए जाने हेतु प्रतिपक्षी संख्या 6/जेल अधीक्षक लखनऊ को दिनांक 24.02.2023 को प्राप्त कराया गया। प्रतिपक्षी संख्या 6 द्वारा दिनांक 24.02.2023को ही, याची के उक्त प्रतिवेदन व उसकी प्रतियों को सम्बंधित प्रतिपक्षीगण को प्रेषित किए जाने हेतू प्रतिपक्षी संख्या 4 को प्रेषित कर दिया गया था, तथा प्रेषण संबंधी आख्या दिनांक 24.02.2023 भी जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 को प्रेषित कर दिया गया।

14. जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 द्वारा याची के उक्त प्रतिवेदन दिनांक 24.02.2023 पर, सम्यक विचार करते हुए, उसे अपने आदेश दिनांक 28.02.2023 के द्वारा निरस्त कर दिया गया तथा प्रतिवेदन के निरस्तीकरण आदेश की प्रति को जेल अधीक्षक लखनऊ/ प्रतिपक्षी संख्या 6 को दिनांक 02.03.2023 को प्राप्त हुई, जिसे जेल अधीक्षक लखनऊ/प्रतिपक्षी संख्या 6 द्वारा दिनांक 02.03.2023को ही, याची को नियमानुसार संसूचित कर दिया गया।

15. जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 द्वारा प्रेषित याची का प्रतिवेदन दिनांक 24.02.2023मय सम्बंधित कागज़ात व प्रस्तरवार आख्या, विपक्षी संख्या 1 को

03.03.2023 को प्राप्त हुई, जिसका परीक्षण, अंडर सेक्रेटरी (अनु सचिव) एवं विशेष सचिव द्वारा दिनांक 06.03.2023 को किया गया। दिनांक 07.03.2023 व 08.03.2023 अवकाश के दिवस थे, तत्पश्चात सचिव उत्तर प्रदेश शासन द्वारा दिनांक 09.03.2023 को व प्रमुख सचिव (गृह) उत्तर प्रदेश शासन द्वारा दिनांक 10.03.2023 को याची के प्रतिवेदन का परीक्षण किया गया। तत्पश्चात पत्रावली को उत्तर प्रदेश शासन के उच्चाधिकारियों के अवलोकन व अंतिम आदेश हेतु प्रस्तुत की गई। 11.03.2023 व 12.03.2023को अवकाश था। उपरोक्त स्तर से प्रकरण पर सम्यक विचारण के पश्चचात, उत्तर प्रदेश शासन/प्रतिपक्षी संख्या 1 द्वारा याची के प्रतिवेदन दिनांक 24.02.2023 को, दिनांक 13.03.2023 को निरस्त कर दिया गया। निरस्तीकरण के उक्त आदेश को प्रतिपक्षी संख्या 1 ने प्रतिपक्षी संख्या 6 को e-mail दिनांक 14.03.2023 के द्वारा प्रेषित कर दिया, जिसे प्रतिपक्षी संख्या 6 द्वारा याची को, दिनांक 14.03.2023 को ही संसूचित कर दिया गया।

16. प्रतिपक्षी संख्या 1/उत्तर प्रदेश शासन को प्रतिपक्षी संख्या 4 द्वारा प्रकरण से संबंधित जो प्रपत्र व आख्या दिनांक 03.03.2023 को उन्हें उपलब्ध कराया गया था, उन्हें अपने पत्रों दिनांकित 03.03.2023 के द्वारा प्रतिपक्षी संख्या 1 ने प्रतिपक्षी संख्या 2/ केन्द्रीय सरकार व अध्यक्ष परामर्शदात्री परिषद, (निरुद्धियां) लखनऊ को प्रेषित कर दिया गया था।

17. उत्तर प्रदेश परामर्शदात्री परिषद (Advisory Board) लखनऊ ने प्रकरण की सुनवाई करने की तिथि दिनांक 17.03.2023 नियत किया और प्रतिपक्षी संख्या 1 के माध्यम से संसूचित करते हुए, याची से यह वांञ्छा की कि वह सुनवाई के समय व्यक्तिगत रूप से अथवा अपने वाद मित्र के द्वारा सुनवाई में उपस्थित रहना चाहता है। परामर्शदात्री परिषद लखनऊ द्वारा, याची को संसूचित किए जाने हेतु, अपने पत्र दिनांकित 13.03.2023 के जरिए, प्रतिपक्षी संख्या 1 को प्रेषित किया, जिसे प्रतिपक्षी संख्या 6 के जरिए, समयान्तर्गत याची को संसूचित कर दिया गया। ततक्रम में नियत तिथि पर याची ने उ०प्र० परामर्शदात्री परिषद के समक्ष प्रस्तुत होकर अपना पक्ष रखा, जिसे सुनवाई व विचारण के पश्चचात परिषद द्वारा निरस्त करते हुए अपनी आख्या मय प्रकरण से सम्बंधित प्रपत्र, अपने पत्र दिनांकित 21.03.2023 के साथ प्रतिपक्षी संख्या 1/उत्तर प्रदेश शासन को भेजा जो विपक्षी संख्या 1 के सम्बंधित विभाग (Section) को दिनांक 23.03.2023 को प्राप्त हुआ। उपरोक्त प्रकार से परामर्शदात्री परिषद द्वारा, याची के प्रत्यावेदन का निस्तारण, करके आख्या निरोधादेश के पारित होने की तिथि से 7 सप्ताह के अंदर ही शासन को प्रेषित कर दिया गया था। अतः उत्तर प्रदेश परामर्शदात्री परिषद द्वारा भी याची के प्रतिवेदन के निस्तारण किए जाने में, अधिनियम के धारा 11(1) के प्राविधान का कोई अननुपालन किया जाना परिलक्षित नहीं होता है।

18. उपरोक्त के अनुक्रम में, प्रतिपक्षी संख्या 1 द्वारा, याची के प्रतिवेदन मय प्रस्तरवार आख्या व सम्बंधित अभिलेख, जो प्रतिपक्षी सं० 2को जरिए पत्र दि० 03.03.2023 भेजा गया था, वह केंद्र सरकार के केंद्रीय रजिस्ट्री कार्यालय में दिनांक 16.03.2023 को प्राप्त हुआ। दिनांक 17.03.2023 को अंडर सेक्रेटरी (अवर सचिव) द्वारा प्राप्त (परिशीलन/परीक्षण) किया गया। दिनांक 18.03.2023 व 19.03.2023को अवकाश था। तत्पश्चात प्रतिवेदन को दिनांक 20.03.2023 को विहित डायरी में अंकित किया गया और जिसे दिनांक 21.03.2023 को गृह सचिव के समक्ष प्रस्तुत किया गया। गृह सचिव द्वारा प्रतिवेदन व सम्बंधित परिपत्रों का अवलोकन व परीक्षण करने के उपरांत याची के प्रत्यावेदन को दिनांक 26.03.2023 को निरस्त कर दिया गया जिसे वापस, विभाग/(Section) में दिनांक 27.03.2023को भेजा गया जहां से निरस्तीकरण का यह आदेश की सूचना वायरलेस मैसेज के जरिए दिनांक 28.03.2023 को प्रतिपक्षी सं० 1 के पास भेजा गया, जिसे दि० 30.03.2023 को, याची को, प्रतिपक्षी संख्या 6 द्वारा संसूचित कर दिया गया।

19. प्रतिपक्षी संख्या 1/उत्तर प्रदेश शासन द्वारा, प्रकरण से सम्बंधित समस्त प्रपत्रों का अवलोकन करते हुए, अपने आदेश दिनांक 27.03.2023 के जरिए याची के निरुद्धिकरण का आदेश, निरुद्धि की तिथि से अनन्तिम रूप से तीन माह तक की अवधि कि लिए विस्तारित कर दिया गया तथा इस आदेश को जरिए रेडियोग्राम प्रतिपक्षी संख्या 6/जेल अधीक्षक को याची के सूचनार्थ उसी दिन प्रेषित भी कर दिया गया, जिसे प्रतिपक्षी संख्या 6 ने दिनांक 27.03.2023 को ही याची को संसूचित कर दिया और इसके फार्मल आदेश की प्रति, दिनांक 01.04.2023 को, प्रतिपक्षी सं० 6 को प्राप्त होने पर, इसे भी याची को संसूचित करा दिया गया।

20. याची के निरोधादेश को आदेश की तिथि से अनन्तिम रूप से छः माह तक विस्तारित किए जाने के आदेश का रेडियोग्राम दिनांक 01.05.2023 को व इसका फार्मल आदेश दिनांक 09.05.2023 को प्रतिपक्षी संख्या 6 को प्राप्त हुआ था, जिसे प्रतिपक्षी संख्या 6 द्वारा प्राप्त होने की उक्त तिथियों पर ही याची को नियमानुसार संसूचित कर दिया गया।

21. उत्तर प्रदेश शासन द्वारा पुनः याची के निरोधादेश को निरुद्धि की तिथि से अग्रतर 9 माह की अवधि के लिए विस्तारित करते हुए विस्तारण आदेश की प्रति को जरिए रेडियोग्राम दिनांक 02.08.2023, प्रतिपक्षी संख्या 4 के माध्यम से, विपक्षी संख्या 6/जेल अधीक्षक लखनऊ को भेजा गया, जिसे प्रतिपक्षी संख्या 6 ने याची को उसी दिन संसूचित कर दिया। तत्पश्चात उक्त विस्तारण आदेश का फार्मल आदेश प्राप्त होने पर इसे भी प्रतिपक्षी संख्या 6 द्वारा याची को संसूचित कर दिया गया था।

22. याचिका में याचिका के आधार के समर्थन में प्रस्तुत शपथ पत्र के प्रत्युत्तर में, प्रतिपक्षीगण द्वारा प्रत्युत्तर शपथ पत्र (Counter Affidavit) प्रस्तुत किया गया है, जिसके अनुक्रम में, प्रतिपक्षी संख्या 1 व 3 की तरफ से प्रत्युत्तर शपथ पत्र दिनांक 29.08.2023 को, प्रतिपक्षी संख्या 2 की तरफ से प्रत्युत्तर शपथ पत्र दिनांक 28.10.2023 को व प्रतिपक्षी संख्या 4 की तरफ से दिनांक 29.08.2023 को तथा प्रतिपक्षी संख्या 6 की तरफ से दिनांक 29.08.2023 को अपने-अपने प्रत्युत्तर शपथ पत्र (Counter Affidavits) प्रस्तुत किए गए। उपरोक्त प्रत्युत्तर शपथ पत्रों के पश्चात प्रतिपक्षी संख्या 6 द्वारा अनुपूरक प्रत्युत्तर शपथ पत्र (Supplementary Counter Affidavit) दिनांक 31.10.2023 को न्यायालय में प्रस्तुत किया गया है।

23. याची के विद्वान अधिवक्ता द्वारा मौखिक तर्कों में यह कथन किया गया है कि जिला मजिस्ट्रेट लखनऊ द्वारा याची को गलत व विधि विरुद्ध तरीके से आदेश पारित करके निरुद्ध किया गया है जो संविधान द्वारा प्रदत्त अनुच्छेद 21 के प्राविधानों का उल्लंघन है। जिला मजिस्ट्रेट के समक्ष उनके व्यक्तिपरक संतुष्टि (Subjective Satisfaction) हेतु व प्रश्नगत आदेश पारित किए जाने हेतु समुचित तथ्य व साक्ष्य उपलब्ध नहीं थे। इस प्रकार से जिला मजिस्ट्रेट लखनऊ/प्रतिपक्षी संख्या 4 द्वारा संविधान के अनुच्छेद 19, 21 व 22 का उल्लंघन किया गया है। जबकि प्रथम सूचना रिपोर्ट के तथ्यों के अनुसार लोक व्यवस्था भंग होने की कोई स्थिति, परिदृश्य में नहीं थी। अतः प्रश्नगत आदेश निरस्त होने योग्य है।

24. तर्क के उपरोक्त बिन्दु के संदर्भ में सर्वप्रथम राष्ट्रीय सुरक्षा अधिनियम 1980 के तत्संबंधी प्राविधान, धारा 3 का, परिशीलन करना समीचीन होगा-

"3. Power to make orders detaining certain persons. - (1) The Central Government or the State Government may,-

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of Public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied

that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section:

Provided..

(4).....

(5)....

25. उपरोक्त प्राविधानों के अनुसार, किसी व्यक्ति के निरुद्धिकरण का आदेश, केंद्र सरकार अथवा राज्य सरकार अथवा जिला मजिस्ट्रेट अथवा पुलिस आयुक्त के द्वारा दोषी व्यक्ति के विरुद्ध, उसके समाज के हित के विरुद्ध हानिकारक कृत्य करने या लोक व्यवस्था को बनाए रखने के विरुद्ध कार्य करने अथवा भारत की सुरक्षा के प्रतिकूल कार्य करने से रोकने के लिए व उस कृत्य के परिणामस्वरूप सम्बंधित क्षेत्र में उत्पन्न हुई स्थिति, अथवा पैदा हो सकने वाली स्थिति, के परिप्रेक्ष्य में अपनी सम्यक व्यक्तिपरक संतुष्टि (Subjective Satisfaction) के उपरांत पारित किया जा सकता है।

26. प्रकरण के तथ्यानुसार याची द्वारा अपने सहयोगियों के साथ दिनांक 29.01.2023 को सार्वजनिक स्थल पर समय लगभग प्रातः 9:00 बजे धार्मिक ग्रंथ रामचरित मानस की प्रतियों को फाड़कर व उन्हें पैरों से कुचलते हुए जला दिया गया तथा नारेबाजी की गई व रामचरितमानस के अनुयायीयों के विरुद्ध अभद्र टिप्पणियां की गई थी। साथ ही उक्त कृत्य का वीडियो बनाकर उसे सोशल मीडिया पर परिचालित भी किया गया, जिसकी सूचना मिलने पर तात्कालिक तौर पर थाना पी०जी०आई० लखनऊ के प्रभारी निरीक्षक, जिसके कार्य क्षेत्र में घटनास्थल आता है, ने सर्वप्रथम घटनास्थल पर पहुँचकर आवश्यक कार्यवाही की। जिसके संदर्भ में प्रभारी निरीक्षक ने अपने अनुरोध पत्र दिनांक 16.02.2023 में विस्तार से यह भी अंकित किया है कि याची व उसके सहयोगियों के उक्त कृत्य से आम जनमानस में अत्यंत आक्रोश फैल गया, लोक व्यवस्था छिन्न-भिन्न हो गई और जैसे ही याची के कृत्यों का वीडियो परिचालित हुआ एक समुदाय में और क्षुब्धता बढ़नी शुरू हो गई। रात होते-होते माहौल काफी गर्म हो गया,लोग चर्चाओं में मशगूल हो गए। देर रात होते-होते याची व उसके सहयोगियों द्वारा किए गए कृत्य का वीडियो हर तरफ वायरल हो गया, जिससे उक्त थाना क्षेत्र में चारों तरफ सनसनी व तनाव का माहौल व्याप्त हो गया। सामान्य जन जीवन भी अस्तव्यस्त हो गया था। थाना प्रभारी द्वारा भेजी गई पुलिसकर्मियों की टीमें क्षेत्र में लोक व्यवस्था के अनुरक्षण में लगी रहीं, फिर भी क्षेत्र में संवेदनशीलता बढ़ती जा रही थी। जिस पर, प्रभारी निरीक्षक थाना पी०जी०आई०, लखनऊ ने उच्चाधिकारियों से अतिरिक्त फोर्स भेजने का अनुरोध किया, जिस पर घटना वाले दिन व उसके अगले दिन भी, थाना आशियाना, कैंट व आलमबाग के प्रभारी निरीक्षकगण मय भारी फोर्स के संवेदनशील स्थानों पर मौजूद रहे और लोगों को समझाने-बुझाने व प्रतिकूलता की स्थिति के निवारण हेतु लगे रहे। रिजर्व/आवंटित फोर्स भी तैयार स्थिति में

ए०सी०पी० कार्यालय कैंट में उपस्थित रहीं। क्षेत्र में भारी पुलिस बल का पैदल मार्च, संवेदनशील स्थानों पर कराया गया। अग्रतर प्रभारी निरीक्षक ने यह भी दर्शित किया है कि थाना की पुलिस ने घटना वाले दिन ही याची के साथ-साथ उसके सहयोगियों सतेंद्र कुशवाहा, देवेन्द्र प्रताप यादव, मोहम्मद सलीम व यशपाल सिंह कुल पाँच नफर अभियुक्तों को तत्परता के साथ गिरफ्तार भी कर लिया था। जिससे अन्य कोई प्रतिकूलता की स्थिति उत्पन्न नहीं हो पाई, परन्तु क्षेत्र में तनाव अभी-भी कायम है व आम जनता अज्ञात आशंकाओं से अभी-भी सशंकित है। दिनांक 29.01.2023 के उक्त घटनाक्रम को इलेक्ट्रानिक चैनलों व समाचार पत्रों ने भी प्रमुखता से लगातार, प्रसारित किया है। प्रभारी निरीक्षक ने अपने अनुरोध पत्र में यह भी अंकित किया है कि अभियुक्तगण गिरफ्तारी में रहते हुए भी अपने अपराध को स्वीकार करके उक्त कृत्य को आगे भी जारी रखने के लिए कह रहे हैं। पुलिस छानबीन से यह तथ्य भी उजागर हुए कि अभियुक्तों की योजना प्रदेश के विभिन्न जिलों में रामचरित मानस की प्रतियाँ जलाकर देश व प्रदेश के विभिन्न समुदायों में दंगा फैलाने की थी और यदि तत्परतापूर्वक पुलिस ने परिस्थितियों को संभालने की कार्यवाही न की होती तो, देश व प्रदेश दंगे की चपेट में आ सकता था। प्रभारी निरीक्षक ने उक्त घटना में बाहरी एजेंसियों के शामिल होने की आशंका को भी जाहिर किया है तथा यह भी कथन किया है कि याची ने उपरोक्त अपराध के संदर्भ में अपना जमानत प्रार्थना पत्र मजिस्ट्रेट के न्यायालय में प्रस्तुत किया था जो कि न्यायालय द्वारा निरस्त कर दिया गया है, परन्तु अब याची/अभियुक्त ने सत्र न्यायालय में अपना जमानत प्रार्थना पत्र प्रस्तुत कर दिया है, जिसके स्वीकार होने व उसके जमानत पर छूटने की प्रबल सम्भावना है। इस बात की भी सम्भावना है कि यदि अभियुक्तगण जमानत पर छूट जाते हैं तो वह पुनः इसी प्रकार के आपराधिक कृत्यों में लिप्त हो जाएंगे और लोक व्यवस्था की स्थिति पुनः भंग हो जाएगी।

27. जिला मजिस्ट्रेट लखनऊ ने प्रभारी निरीक्षक पी०जी०आई० लखनऊ की उक्त आख्या दिनांक 16.02.2023व उस पर पुलिस उपायुक्त (पूर्वी) लखनऊ के अभिमत से सहमति/अनुशंसा पत्र दिनांक 16.02.2023, व घटना के संदर्भ में प्रस्तुत फोटोग्राफ्स, अभियुक्तगण व साक्षीगण के द्वारा विवेचना के अनुक्रम में दिए गए बयान, मोबाइल फ़ोन व प्रिंटर के रिकवरी मेमो, घटना की विवेचना के क्रम में किता की गई केस डायरी एवं घटना वाले दिन व उसके पश्चात पुलिसकर्मियों के घटनास्थल पर नियुक्ति सम्बंधी ड्युटी चार्ट, याची/अभियुक्त के जमानत प्रार्थना पत्र को मुख्य न्यायिक मजिस्ट्रेट, लखनऊ द्वारा निरस्त किए जाने के पश्चात याची के द्वारा दिनांक 15.02.2023 को सत्र न्यायालय लखनऊ को प्रस्तुत की गई जमानत प्रार्थना पत्र की प्रति आदि साक्ष्य का सम्यक व गहनता से परीक्षण करके याची/अभियुक्त को अधिनियम

के धारा 3(2) के प्राविधान के अंतर्गत, निरुद्धि हेतु समुचित पाते हुए, याची के विरुद्ध निरुद्धिकरण आदेश दिनांक 16.02.2023 पारित कर दिया, जिसे हस्तगत याचिका में चुनौती दी गई है।

28. प्रदेश/संबंधित जिलों में, कानून व्यवस्था/लोक व्यवस्था की स्थिति का आंकलन करने व उसे अक्षुण्ण रखने का कार्य कार्यपालिका का है। अतः अधिनियम के अन्तर्गत विधायन ने समुचित परिस्थितियों में निरोधादेश पारित करने का अधिकार, कार्यपालिका के उच्चाधिकारियों को दे रखा है जो समस्त तथ्यों, परिस्थितियों व तत्सम्बंधित प्रलेखीय व अन्य साक्ष्यों व आख्याओं पर विचार करने व अपनी व्यक्तिपरक संतुष्टि (Subjective Satisfaction) के उपरांत निरोधादेश पारित करने की अधिकारिता रखते हैं वस्तुतः अधिनियम की धारा 3(2) में पारित किया जाने वाला निरोधक आदेश, दोषी व्यक्ति द्वारा किए गए कृत्य/अपराध, के संदर्भ में, की जाने वाली दाण्डिक कार्यवाहियों से पृथक व अपराध के किए जाने के परिणामस्वरूप पैदा होने, अथवा हो सकने वाली, परिस्थितियों, को रोकने यथा लोक व्यवस्था को कायम रखने में बाधक कृत्य से बचाने के अनुक्रम में, कार्यपालिका द्वारा दोषी व्यक्ति के विरुद्ध तात्कालिक रूप से की गई कार्यवाही होती है।

29. उपरोक्त बिन्दु पर माननीय उच्चतम न्यायालय ने **State of Maharastra & Others vs Bhaurao Punjabrao Gawande (2008) 3 SCC 613** में निम्नानुसार अभिमत व्यक्त किया हैः-

32. There is no authoritative definition of "preventive detention" either in the Constitution or in any other statute. The expression, however, is used in contradistinction to the word "punitive". It is not a punitive or penal provision but is in the nature of preventive action or precautionary measure. The primary object of preventive detention is not to punish a person for having done something but to intercept him before he does it. To put it differently, it is not a penalty for past activities of an Individual but is intended to preempt the person from Indulging in future activities sought to be prohibited by a relevant law and with a view to preventing him from doing harm in future.

33. In Haradhan Saha v. State of W.8.1 explaining the concept of preventive detention, the Constitution Bench of this Court, speaking through Ray, C.J. stated: (SCC p. 205, para 19)

"19. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between prosecution in a court of law and a detention order under the Act. One is a punitive action and the other is a preventive act. In one case a person is punished on proof of his guilt and the standard is proof

beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for reasons mentioned in Section 3 of the Act to prevent."

34. In another leading decision in Khudiram Das v. State of W.B.this Court stated: (SCC pp. 90-91, para 8).

"8... The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. Since preventive measure is based on the principle that a person should be prevented from. doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof, Patanjali Sastri, C.J. pointed out In State of Madras v. V. G. Row that preventive detention is 'largely precautionary and based on suspicion and to these observations may be added the following words uttered by the learned Chief Justice in that case with reference to the observations of Lord Finlay In R.v. Halliday, namely, that "the court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely, based This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in any of sub-clauses (i), (ii) and (iii) of Clause (1) of sub -section (1) of Section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is, therefore, deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made a condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose but he subjective opinion of the detaining authority, and if a subjective opinion is formed by the detaining authority as regards the necessity of detention for a specified purpose, the condition of exercise of the power of detention would be fulfilled. This would clearly show that the power of detention is not a quasi – judicial power."

35. Recently, in Naresh Kumar Goyal v. Uniort of Indial the Court said: (SCC p. 280, para 8)

"8. It is trite law that an order of detention is not a curative or reformative or punitive action, but a preventive action, avowed object of which being to prevent the anti-social and subversive elements from

imperilling the welfare of the country or the security of the nation or from disturbing the public tranquillity or from indulging in smuggling activities or from engaging in illicit traffic in narcotic drugs and psychotropic substances, etc. Preventive detention is devised to afforts protection to society. The authorities on the subject have consistently taken the view that preventive detention is devised to afford protection to society. The object is not to punish a man for having done something but to intercept before he does it, and to prevent him from doing so. It, therefore, becomes imperative on the part of the detaining authority as well as the executing authority to be very vigilant and keep their eyes skinned but not to turn a blind eye in securing the detenu and executing the detention order because any indifferent attitude on the part of the detaining authority or executing authority will defeat the very purpose of preventive action and turn the detention order as a dead letter and frustrate the entire proceedings. Inordinate delay, for which no adequate explanation is furnished, led to the assumption that the live and proximate link between. the grounds of detention and the purpose of detention is snapped. (See P.U. Iqbal v. Union of India, Ashok Kumar v. Delhi Admn. and Bhawarlal Ganeshmalji v. State of T.N.17)"

30. हस्तगत प्रकरण में पत्रावली के परिशीलन से यह परिलक्षित होता है कि निरोधक अधिकारी जिला मजिस्ट्रेट लखनऊ ने निरुद्धि के अधिकार में अभियुक्त/ याची व उसके अन्य सहयोगीगण के कृत्य व उसके परिणामस्वरूप क्षेत्र के एक वर्ग विशेष में उत्पन्न आक्रोश व तनावपूर्ण माहौल के कारण बिगड़ने व बिगड़ सकने वाली लोक व्यवस्था (Public Order) तथा इसे रोकने के लिए पुलिस बल की कार्यवाही, भविष्य की आशंका, याची व अभियुक्तगण के जमानत पर निर्मुक्त होने के पश्चात उनकी उपरोक्त कृत्य/अपराध में पुनः संलिप्तता की आशंका व इनके परिणामस्वरूप बिगड़ सकने वाली साम्प्रदायिक सौहार्दता व क्षोभित हो सकने वाली लोक व्यवस्था का गहनता से विश्लेषण करने के उपरांत तथा इस सम्बंध में उपलब्ध कराए गए दस्तावेजी साक्ष्य बशमूल अपराध की विवेचना के अनुक्रम में विवेचक द्वारा की गई कार्यवाही व संकलित साक्ष्य के प्रकाश में, जिला मजिस्ट्रेट लखनऊ द्वारा निरोधादेश दिनांक 16.02.2023 पारित किया गया है। उपरोक्त के संदर्भ निरोधक अधिकारी के व्यक्तिपरक संतुष्टि का परीक्षण इस न्यायालय द्वारा नहीं किया जा सकता है।

31. निरुद्धि के आधार का परिशीलन करने से यह परिलक्षित होता है कि याची व अन्य अभियुक्तगण के उक्त कृत्यों के परिणामस्वरूप प्रशासनिक व पुलिस अधिकारियों के समक्ष मात्र कानून व्यवस्था के ही बिगड़ने की आशंका ही नहीं थी, बल्कि लोक व्यवस्था के खतरे में पड़ने की स्थिति परिदृश्य में उभर रही थी। रामचरित मानस,जिसमें समाज के बहुसंख्यक वर्ग के आराध्य भगवान राम के जीवन काल से सम्बंधित घटनाओं का वर्णन किया गया है, एक सम्मानित धर्म ग्रंथ है जिसे विभिन्न धार्मिक स्थलों व धार्मिक उत्सवों के अवसर पर सम्मान के साथ पूजित भी किया जाता है। समाज का बहुसंख्यक वर्ग

उक्त ग्रंथ का पाठन व श्रवण आज भी अपने लौकिक एवं पारलौकिक कल्याण, पुण्य प्राप्ति, पाप मोचन व आदर्श जीवनशैली के मार्गदर्शन हेतू पूरी श्रद्धा से करता है। याची व उसके सहयोगियों, जिसमें एक अन्य वर्ग के व्यक्ति मो० सलीम का नाम भी अभियुक्त के तौर पर प्रथम सूचना रिपोर्ट में अंकित किया गया है, के द्वारा सार्वजनिक स्थल पर रामचरित मानस ग्रंथ की प्रतियों के पृष्ठ को फाड़ने, पैरों से कुचलकर अपमानित करने व जलाने व उनके अनुयायियों के प्रति अभद्र बातों के कहने से समाज के बहुसंख्यक वर्ग के मध्य आक्रोश की भावना का जागृत होना अत्यंत स्वाभाविक प्रतीत होता है। दिन के प्रकाश में सार्वजनिक स्थल पर कारित किए गए उक्त कृत्य व उसके चित्रांकन/वीडियो के परिचालित होने से अफ़वाहों व धार्मिक उन्माद का पैदा हो जाना भी स्वाभाविक रूप से सम्भावित परिलक्षित होता है। धार्मिक उन्माद के कारण, सामाजिक व साम्प्रदायिक सौहार्दता के बिगड़ने के परिणामस्वरूप, जीवन व सम्पत्ति की हानि होने व राज्य का विकास कार्य अवरूध होने की घटनाओं के अनेकानेक उदाहरण विगत समय में देश के अन्य क्षेत्र में हुई घटनाओं से देखे जा सकते हैं। ऐसी स्थिति में असामाजिक तत्व, जिनका अपना कोई धर्म व नैतिकता नहीं होती वह भी अपने स्वार्थ सिद्धि में परिस्थितियों को बद से बदतर बना देते हैं। हमारे देश में जहां सभी धर्मों के लोग आपस में मिल जुलकर सम्भाव से रहते हैं व विश्वपटल पर अनेकता में एकता का विशेष उदाहरण प्रस्तुत करते हैं, याची व उसके सहयोगियों के उपरोक्त अविवेक पूर्ण कृत्य से सामाजिक सौहार्द के मध्य आपसी वैमनस्यता के बीज अंकुरित होने की ऐसी सम्भावना व परिस्थितियों को आशंकित कर सकते हैं, जिनसे निश्चय ही समाज व राष्ट्र के विकास के मार्ग में प्रतिकूल स्थितियां उत्पन्न हो सकती थी। अतः उपरोक्त तथ्यों के प्रकाश में यह नहीं कहा जा सकता कि याची व उसके अन्य सहयोगीगण के उक्त कृत्य/अपराध मात्र कानून व व्यवस्था की स्थिति से सम्बंधित रहे हैं। माननीय उच्चतम न्यायालय ने लोक व्यवस्था के प्रभावित होने की स्थितियों का आकलन ***Arun Ghosh Vs. State of West Bengal, 1970 1 SCC 1998*** में निम्नवत किया है:-

"3. The submission of the counsel is that these are stray acts directed against individuals and are not subversive of public order and therefore the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified. In support of this submission reference is made to three cases of this Court: Dr Ram Manohar Lohia v. State of Bihar (1966) 1 SCR 709; Pushkar Mukherjee v. State of W.B. WP No. 179 of 1968, decided on November 7, 1968: (1969) 1 SCC 10 and Shyamal Chakraborty v. Commissioner of Police, Calcutta WP No. 102 of 1969, decided on August 4, 1969: (1969) 2 SCC 426. In Dr Ram Manohar Lohia case [(1966) 1 SCR 709] this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the

community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its affect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Take the case of assault on girls. A guest at a hotel may kiss or make advances to half a dozen chamber maids. He may annoy them and also the management but he does not cause disturbance of public order. He may even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. Take another case of a man who molests women in lonely places. As a result of his activities girls going to colleges and schools are in constant danger and fear. Women going for their ordinary business are afraid of being waylaid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its affect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to be causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. The French distinguish law and order and public order by designating the latter as order publique. The latter expression has been recognised as meaning something more than ordinary maintenance of law and order. Justice Ramaswami in Writ Petition No. 179 of 1968 drew a line of demarcation between the serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large from minor breaches of peace which do not affect the public at large. He drew an analogy between public and private crimes. The analogy is useful but not to be pushed too far. A large number of acts directed against persons or individuals may total up into a breach of public order. In Dr Ram Manohar Lohia case examples were given by Sarkar and Hidayatullah, JJ. They show how similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its affect upon the community.

The question to ask is: Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."

32. **Ram Ranjan Chatterjee Vs. State of West Bengal, (1975) 4 SCC 143** में भी माननीय उच्चतम न्यायालय ने कानून व्यवस्था एवं लोक व्यवस्था के मध्य अंतर को निम्नानुसार विवेचित किया हैः-

"8. It may be remembered that qualitatively, the acts which affect "law and order" are not different from the acts which affect "public order". Indeed, a state of peace or orderly tranquility which prevails as a result of the observance or enforcement of internal laws and regulations by the Government, is a feature common to the concepts of "law and order" and "public order". Every kind of disorder or contravention of law affects that orderly tranquility. The distinction between the areas of "law and order" and "public order" as pointed by this Court in Arun Ghosh v. State of West Bengal, "is one of degree and extent of the reach of the act in question on society". It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. If the contravention in its effect is confined only to a few individuals directly involved as distinguished from a wide spectrum of the public, it would raise a problem of law and order only. These concentric concepts of "law and order" and "public order" may have a common "epicentre", but it is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps distinguish it as an act affecting "public order" from that concerning "law and order"."

33. उपरोक्त बिन्दु पर **Indradeo Mahato v. State of W.B., (1973) 4 SCC 4** में भी माननीय उच्चतम न्यायालय ने यह धारित किया है किः-

"Similar acts in different situations may give rise to different problems in one set of circumstances an act may pose only a law and order problem whereas in another it may generate deep and widespread vibrations having serious enough impact on the civilized peace-abiding society so as to affect public order, one has to weigh the degree and sweep of the harm the act in question is capable of in its context. Every case has, therefore, to be considered on its own facts and circumstances."

34. जहाँ तक जिला मजिस्ट्रेट लखनऊ द्वारा पारित निरोधादेश के संदर्भ में उनके व्यक्तिपरक संतुष्टि (Subjective Satisfaction) का प्रश्न है तो यह इस तथ्य से निर्धारित होता है कि क्या उक्त निरोधक अधिकारी ने आदेश पारित करते समय अपने समक्ष प्रस्तुत "समस्त सामग्री" जिसे निरोधक आदेश को पारित करने की संस्तुति करने वाले अधिकारियों द्वारा उसके समक्ष प्रस्तुत किया गया है, वह घटना से सुसंगत है अथवा नहीं और उन सामग्रियों व घटनाक्रम के तथ्यों एवं परिस्थितियों तथा उक्त घटना के प्रतिक्रिया

स्वरूप उत्पन्न लोक व्यवस्था की स्थिति व परिस्थितियों का समुचित आंकलन निरोधक अधिकारी ने किया है अथवा नहीं अथवा प्रस्तुत सामग्रियों व साक्ष्य से किसी अन्य परिस्थितियों अथवा वर्णित परिस्थितियों से इतर कोई अन्य परिस्थितयां तो परिदृश्य में नहीं आती है।

35. हस्तगत प्रकरण में यह तथ्य भी विचारणीय होगा कि निरोधादेश पारित करने की तिथि पर याची/अभियुक्त, तत्संबंध में पंजीकृत अपराध संख्या 75 सन 2023 के अनुक्रम में कारावास में निरुद्ध था तथा उस पर अधिरोपित भारतीय दण्ड संहिता की सभी धाराऐं मजिस्ट्रेट न्यायालय द्वारा विचारणीय थीं, जिसमें अधिकतम कारावास की दंड अवधि 7 वर्ष से न्यून थी। अतः भले ही अपराध की गंभीरता को देखते हुए मुख्य न्यायिक मजिस्ट्रेट लखनऊ द्वारा याची के जमानत प्रार्थना पत्र निरस्त कर दिया गया है, मगर याची द्वारा सत्र न्यायालय लखनऊ के समक्ष जमानत प्रार्थना पत्र दिनांक 15.04.2023 को प्रस्तुत कर दिया गया था, जिसमें दण्ड के परिमाण को देखते हुए याची के जमानत पर निर्मुक्त हो जाने की आशंका को भी निरोधक अधिकारी द्वारा अपने निरुद्धि के आधार में विचार में लिया गया था। निरोधक अधिकारी द्वारा इस तथ्य की आशंका पर भी विचार किया जाना परिलक्षित होता है कि याची यदि जमानत पर निर्मुक्त होगा तो पुनः उपरोक्त प्रकृति का कृत्य पुनः कारित कर सकता है, क्या?

36. याची द्वारा विवेचना के दौरान अपने दिए बयान अन्तर्गत धारा 161 दण्ड प्रक्रिया संहिता में यह स्वीकार किया है कि "हम लोगों ने रामचरितमानस की प्रतियों को फाड़कर पैरों से कुचला व जलाया है व उसकी वीडियो रिकॉर्डिंग भी वायरल कराया है।" याची ने यह भी कथन किया है कि,"हम लोग इसे अनवरत जारी रखेंगे और हमारे लोग कल रामचरितमानस की प्रतियां फूकेंगे और कोई रोक नहीं सकता है। अभी और जिले, तहसील, ब्लॉक व मुख्यालय में प्रतियां फूंकी जाएंगी कोई कुछ नहीं कर सकता है।" पुनः याची ने पुलिस को दिए गए बयान में यह कथन किया है कि *"मुझे रामचरितमानस की कुछ पंक्तियों पर आपत्ति है जिस पर हम लोगों ने अपना विरोध करने के लिए रामचरितमानस की प्रतियाँ जलाने की योजना बनायी थी। जिसके लिए देवेन्द्र प्रताप यादव ने रामचरितमानस ग्रन्थ की फोटो कॉपी कराकर प्राप्त करायी थी। इसी रामचरितमानस ग्रन्थ की फोटो प्रति हम लोगो के द्वारा प्रदेश के विभिन्न जिलो में अपने सहयोगियों के माध्यम से फाड़कर आग लगाकर प्रदेश में आग भड़काने की योजना थी इसीलिए हम लोग न्यु बस स्टैण्ड वृन्दावन योजना में इकट्ठा होकर रामचरितमानस ग्रन्थ की प्रतियों में आग लगाकर आम जनमानस को भयभीत कर रहे थे परन्तु हम लोगो को आप पुलिसवालो द्वारा पकड़कर जेल भेज दिया गया जिसकी वजह से हम लोगों का उद्देश्य अधूरा रह गया हैं, लेकिन हमारे जो अन्य साथी बाहर हैं वे इसी तरह से रामचरितमानस की प्रतियां अन्य जिलो में भी जलाकर इसी तरह की घटना को अंजाम देंगे हम भी जेल से छूटने*

के बाद पूरे प्रदेश में आग लगाने का कार्य जरूर करेंगे लेकिन आपको बयान नही दूँगा अपने वकील से पूछकर ही बयान दूँगा।"

37. याची के विद्वान अधिवक्ता ने, याचिका के आधार में यह भी कहा है कि धारा 161 दण्ड प्रक्रिया संहिता के कथन विचारण में मान्य नहीं होते हैं, मगर यह विचारणीय होगा कि निरोधादेश, विचारण (Trial) का अंश नहीं है। याची द्वारा अपने बयान अन्तर्गत धारा 161 दं०प्र०सं० में किए गए उक्त कथन की सत्यता व समर्थन, याची के प्रतिवेदन दि०24.02.2023 के प्रस्तर 7 में किए गए कथनों से भी परिलक्षित होता है, जिसमें उसने यह भी स्वीकार किया है कि रामचरित मानस एक साहित्य है उसके किसी अंश से असहमति हो सकती है। यह असहमति व्यक्त करने पर कोई अपराध नहीं बनता है।

38. "यद्यपि कि याची ने अपनी याचिका व प्रतिवेदन में यह भी कहा है कि, वह सेना से सेवानिवृत्त व्यक्ति है और उसने कोई कथित अपराध नहीं किया है। याची वर्तमान में Ex-Army welfare corporation में सुरक्षा गार्ड है और उसे पुलिस ने गलत तरीके से गिरफ्तार किया है, मगर पत्रावली के परिशीलन से यह परिलक्षित होता है कि अपने प्रतिवेदन में याची ने प्रस्तर 7 में जहां रामचरितमानस के अंश से असहमति होने की बात कही है, वहीं याची ने यह याचिका के प्रस्तर 15 में यह भी कहा है कि, उसे पुलिस द्वारा राजनैतिक प्रतिद्वंदिता व शासन के दबाव में गिरफ्तार किया गया है। अतः याची यदि एक सेवानिवृत्त सैनिक है व सुरक्षा गार्ड के तौर पर नौकरी कर रहा है तो उससे शासन की अथवा किसी अन्य की क्या राजनैतिक दुश्मनी हो सकती है। उपरोक्त के अतिरिक्त उक्त पत्रावली में यह तथ्य भी अंकित किया गया है कि, आपराधिक केस की विवेचना के दौरान घटना के फोटो/वीडियो से व लोगों के बताने आदि पर घटना में लिप्त व्यक्तियों (जिसमें याची भी शामिल है) की शिनाख्त पुलिस द्वारा सुनिश्चित करके उन्हें गिरफ्तार किया गया है।

39. विदित हो कि, यदि याची को झूठी प्रथम सूचना रिपोर्ट में नामित किया गया होता तो उक्त प्रथम सूचना रिपोर्ट के विरुद्ध याची ने कोई रिट याचिका इस न्यायालय में प्रस्तुत की हो अथवा परीक्षण न्यायालय में अपने निर्मुक्ति (discharge) हेतू कोई प्रार्थना पत्र प्रस्तुत किया हो, इसका कोई तर्क याची के विद्वान अधिवक्ता ने न तो प्रस्तुत किया है और न कोई प्रलेखिय साक्ष्य ही इस बाबत प्रस्तुत किया है। पत्रावली के परिशीलन से यह भी स्पष्ट होता है कि निरोधक अधिकारी ने कुल 15 अदद सुसंगत प्रपत्रों पर विचार करके निरोधादेश पारित किया है और उन प्रपत्रों को निरोधादेश पारित करने वाले अधिकारी/ प्रतिपक्षी संख्या 4 ने, निरोधादेश के साथ "संलग्नक सूची" के तौर पर याची को निरोधादेश व निरुद्धि के आधार के साथ, जेल में उपलब्ध भी कराया है। उपरोक्त के अलावा निरोधक अधिकारी ने सम्बंधित

कानून, राष्ट्रीय सुरक्षा अधिनियम के सुसंगत प्राविधानों की छायाप्रति व भारतीय संविधान में वर्णित मूल अधिकारों की छायाप्रति भी याची को उपलब्ध कराई हैं तथा निरुद्धि के आधार में, अधिनियम की धारा 8 के प्रकाश में याची को यह भी बताया है कि वह निरुद्धि आदेश के विरुद्ध अपना प्रतिवेदन, निरोधक अधिकारी, राज्य सरकार, केंद्र सरकार व परामर्शदात्री परिषद को देने का अधिकार रखता है। उक्त प्रतिवेदन याची को किसके समक्ष देना होगा उसका विवरण भी अधिनियम की धारा 9, 10, 11 व 14 के परिप्रेक्ष्य में, दिए जाने हेतू उसे निर्देशित किया है। अतः उपरोक्त तथ्यों के प्रकाश में निरोधक प्राधिकारी द्वारा, याची को बिना समुचित साक्ष्य व बिना सम्यक मस्तिष्क के प्रयोग के व बगैर समुचित संतुष्टि के निरुद्ध किए जाने का तर्क, जैसा कि याची के विद्वान अधिवक्ता द्वारा प्रस्तुत किया गया है, पत्रावली में उपलब्ध सामग्री के परिशीलन से बलहीन प्रतीत होता है।

40. याची के जमानत पर निर्मुक्त होने की आशंका के बाबत निरोधक अधिकारी के व्यक्तिपरक संतुष्टि (Subjective Satisfaction) के संदर्भ में माननीय उच्चतम न्यायालय ने विधि व्यवस्था **Ibrahim Nazeer Vs. State of T.N. and another, (2006) 6 SCC 64** के प्रस्तर 7 में यह धारित किया है कि:-

"7. It has to be noted that whether prayer for bail would be accepted depends on circumstances of each case and no hard and fast rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipsi dixit of the detaining authority. On the basis of materials before it, the detaining authority came to the conclusion that there is likelihood of detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not to be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of the detenu being released on bail. It has been clearly stated that in similar cases, orders granting bail are passed by various courts. Appellant has not disputed the correctness of this statement. Strong reliance was placed by learned counsel for the appellant on Rajesh Gulati v. Govt. of NCT of Delhi. The factual scenario in that case was entirely different. In fact, five bail applications filed had been already rejected. In that background this Court observed that it was not a "normal" case. The High Court was justified in rejecting the stand of the appellant."

41. उपरोक्त बिन्दु पर माननीय उच्चतम न्यायालय ने **State of Maharastra & Others Vs Bahurao Punjabrao Gawande (Supra) के प्रस्तर 31 में Khudiram Das vs The State Of West Bengal** में की गई निम्न विवेचना को उद्धृत किया है:-

"8.... The power of detention is clearly a preventive measure. It does not partake in any manner of the nature of punishment. It is taken by way of precaution to prevent mischief to the community. Since every preventive measure is based on the principle that a person should be prevented

from, doing something which, if left free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof. Patanjali Sastri, C.J. pointed out in State of Madras v. V.G. Rowiz that preventive detention is 'largely precautionary and based on suspicion and to these observations may be added the following words uttered by the learned Chief Justice in that case with reference to the observations of Lord Finlay in R. v. Halliday, namely, that

'the court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely, based'

This being the nature of the proceeding, it is impossible to conceive how it can possibly be regarded as capable of objective assessment. The matters which have to be considered by the detaining authority are whether the person concerned, having regard to his past conduct judged in the light of the surrounding circumstances and other relevant material, would be likely to act in a prejudicial manner as contemplated in any of sub-clauses (1), (ii) and (iii) of Clause (1) of sub -section (1) of Section 3, and if so, whether it is necessary to detain him with a view to preventing him from so acting. These are not matters susceptible of objective determination and they could not be intended to be judged by objective standards. They are essentially matters which have to be administratively determined for the purpose of taking administrative action. Their determination is. deliberately and advisedly left by the legislature to the subjective satisfaction of the detaining authority which by reason of its special position, experience and expertise would be best fitted to decide them. It must in the circumstances be held that the subjective satisfaction of the detaining authority as regards these matters constitutes the foundation for the exercise of the power of detention and the Court cannot be invited to consider the propriety or sufficiency of the grounds on which the satisfaction of the detaining authority is based. The Court cannot, on a review of the grounds, substitute its own opinion for that of the authority, for what is made a condition precedent to the exercise of the power of detention is not an objective determination of the necessity of detention for a specified purpose but the subjective opinion of the detaining authority, and if a subjective opinion is formed by the detaining authority as regards the necessity of detention for a specified purpose, the condition of exercise of the power of detention would be fulfilled. This would clearly show that the power of detention is not a quasi-judicial power."

42. अग्रतर प्रस्तर 36 में यह भी निष्कर्षित किया है किः-

36. Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. The framers of the Constitution were, conscious of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on the one hand and security and safety of the country and interest of the society on the other hand. Security of State, maintenance of public order and services essential to the community, prevention of

smuggling and blackmarketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life.

43. मा० उच्चतम न्यायालय ने **Suraj Pal Sahu Vs State of Maharastra & others (1986) 4 SCC 378** में यह निष्कर्षित किया है कि:-

"The facts that a man is not in jail per se would not be determinative of the factor that order of preventive detention could not be passed against him. The fact that a man was found not guilty in a criminal trial would not also be determinative of the factors alleged therein. All these factors must be objectively considered and if there are causal connections and if bona fide belief was formed then there was nothing to prevent from serving an order of preventive detention even against a person who was in jail custody if there is imminent possibility of his being released and set at liberty if the detaining authority was duly satisfied."

44. जहाँ तक निरोधक अधिकारी के व्यक्तिपरक संतुष्टि (Subjective Satisfaction) के इस न्यायालय द्वारा परीक्षण का प्रश्न है, इस बिन्दु पर माननीय उच्चतम न्यायालय ने विधि व्यवस्था **Union of India Vs. Arvind Shergill (2000) 7 SCC 601** में यह धारित किया है कि :-

"The High Court has virtually decided the matter as if it was sitting in appeal on the order passed by the detaining authority The action by way of preventive detention is largely based on suspicion and the court is not an appropriate forum to investigate the question whether the circumstances of suspicion exist warranting the restraint on a person The language of Section 3 clearly Indicates that the responsibility for making a detention order rests upon the detaining authority which alone is entrusted with the duty in that regard and it will be a serious derogation from that responsibility if the court substitutes its judgment for the satisfaction of that authority on an investigation undertaken regarding sufficiency of the materials on which such satisfaction was grounded.

The court can only examine the grounds disclosed by the Government in order to see whether they are relevant to the object which the legislation has in view, that is, to prevent the detenu from engaging in smuggling activity The said satisfaction is subjective in nature and such a satisfaction, if based on relevant grounds, cannot be stated to be invalid. The authorities concerned have to take note of the various facts including the fact that this was a solitary incident in the case of the detenu and that he had been granted bail earlier in respect of which the application for cancellation of the same was made but was rejected by the Court In this case, there has been due application of mind by the authority concerned to that aspect of the matter as we have indicated in the course of narration of facts. Therefore, the view taken by the High Court in the circumstances of the case cannot be sustained."

45. एक्ट संख्या 26 सन 1971 (Maintenance of Internal Security Act 1971) की धारा 3 (1)(a) के प्राविधान जो कि National Security Act 1980 के धारा 3 के

समतुल्य हैं के परिप्रेक्ष्य में माननीय उच्चतम न्यायालय ने **Magan Gope Vs. State of West Bengal (1975) 1 SCC 415** के मामले में यह धारित किया है किः-

"9. It will be seen that the power can be exercised only on one or more of the grounds enumerated above. If the exercise of the power is not on the face of the order correlated to any of those grounds or concerns activities, which are not germane to any of these grounds, such exercise would be vitiated for lack of jurisdiction. Further, the satisfaction spoken of in Section 3(1)-which is the sine qua non to the exercise of the power is the subjective satisfaction of the authority which cannot be tested in court by objective standards. Ordinarily, therefore, the court cannot go behind the satisfaction expressed on the face of the order.

46. इस बिंदु पर मा० उच्चतम न्यायालय ने **State of Punjab Vs. Sukhpal Singh (1990) 1 SCC 35** के प्रस्तर 10 में निम्न निष्कर्ष अवधारित किए हैंः-

"10. It is submitted that in the instant case, there were sufficient materials to show that the detenu would act in the future to the prejudice of the maintenance of public order, security of the State and the government's effort to curb terrorism. From the nature and contents of his speeches stated in the grounds of detention there was sufficient justification for the inference that he would repeat such speeches if not eventively detained. Again when grievous crime against the community was committed it would surely be subject to the penal law and stringent sentences, but at the same time it could be considered unsafe to allow him the opportunities to repeat prejudicial acts during the period the penal process was likely to take. The learned Attorney General refers us to Giani Bakshish Singh v. Government of India, Smt. Hemlata v State of Maharashtras and Raj Kumar Singh v. State of Bihar submitting that the possibility of criminal prosecution was no bar to order any preventive detention and that the court should not substitute its decision or opinion in place of decision of the authority concerned on the question of necessity of preventive detention: [(1981) 4SCC p.656,para21]

"A prosecution or the absence of it is not absolute bar to an order of preventive detention; the authority may prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. The detaining authority is not the sole judge of what national security or public order requires. But neither is the court the sole judge of the position. When power is given to an authority to act on certain facts and if that authority acts on relevant facts and arrives at a decision which cannot be described as either irrational or unreasonable, in the sense that no person instructed in law could have reasonably taken that view, then the order is not bad and the court cannot substitute its decision or opinion in place of the decision of the authority concerned on the necessity of passing the order."

47. याची पक्ष के विद्वान अधिवक्ता द्वारा यह तर्क भी प्रस्तुत किए गए हैं कि निरुद्धि

आदेश के साथ प्रस्तुत दस्तावेजी साक्ष्यों में से कुछ प्रपत्रों की प्रतियां अपठनीय थी, परन्तु किन प्रपत्रों की प्रति अपठनीय थी इसे याची के विद्वान अधिवक्ता द्वारा नहीं बताया गया है और यह भी नहीं बताया गया है कि उक्त प्रपत्र के अपठनीय होने के कारण याची के अधिकारों पर क्या विपरीत प्रभाव पड़ा है। उपरोक्त के अलावा याची ने अपने प्रतिवेदन दिनांक 24.02.2023 में यह कहीं नहीं अंकित किया है कि उसे उपरोक्त प्रपत्र अस्पष्ट अथवा अपठनीय प्राप्त हुए हैं। अतः याची के विद्वान अधिवक्ता का यह तर्क मान्य नहीं है।

48. याची पक्ष से याचिका में एक आधार यह भी लिया गया है कि निरोधादेश दिनांक 16.02.2023 में याची की निरुद्धि की अवधि अंकित नहीं है। इस संबंध में अधिनियम की धारा 3 के 'परन्तुक' के अनुसार निरुद्धि की अवधि को नियत करने का अधिकार निरोधक अधिकारी, जिला मजिस्ट्रेट को न देकर,अधिनियम द्वारा राज्य सरकार को प्रदत्त किया गया है। विधानतः जिला मजिस्ट्रेट द्वारा पारित निरुद्धि आदेश की अवधि, राज्य सरकार द्वारा उसे अनुमोदित न किए जाने की स्थिति, में धारा 4 में दिए गए प्रावधान के अनुसार मात्र 12 दिवस की ही होती है। निरोधादेश को अनुमोदित करने का अधिकार प्रतिपक्षी संख्या 1में निहित है, अतः निरुद्धि आदेश पारित करते समय उक्त आदेश में निरुद्धि की अवधि को जिला मजिस्ट्रेट द्वारा अंकित किए जाने का कोई औचित्य ही नहीं है।

49. याची द्वारा याचिका के आधार में यह भी कहा गया है कि याची के विरुद्ध अंकित कराई गई प्रथम सूचना रिपोर्ट झूठे व अविश्वनीय आधार पर राजनैतिक विद्वेश के कारण अंकित कराई गई है। याची की गिरफ्तारी गलत दर्शाई गई है और प्रकरण में माननीय उच्चतम न्यायालय के विधि व्यवस्था के निर्देश व मानवाधिकार के नियमों का पालन नहीं किया गया है। याची घटनास्थल पर उपस्थित नहीं था। याची का अपराध 7 वर्ष से कम वर्ष के लिए दण्डनीय है। याची का रिमांड गलत व विधि विरुद्ध लिया गया है। वस्तुतः याची पक्ष द्वारा प्रस्तुत किए गए, तर्क के उक्त आधार, संबंधित आपराधिक वाद, अपराध संख्या 75 सन 2023 के परीक्षण का विषय है। यह न्यायालय न तो उक्त आपराधिक वाद का परीक्षण कर रही है और न अपीलीय क्षेत्राधिकार के अन्तर्गत आपराधिक वाद की सुनवाई कर रही है और न ही आपराधिक वाद इस याचिका की विषयवस्तु है। अतः इस तथ्य की विवेचना रिट क्षेत्राधिकार के अन्तर्गत करने का इस न्यायालय को कोई क्षेत्राधिकार हासिल नहीं है।

50. याची द्वारा अपने मौखिक तर्कों में यह भी कहा गया है कि उसका प्रतिवेदन सक्षम अधिकारी/प्राधिकारियों द्वारा शीघ्रता व तत्परता से निस्तारित नहीं किया गया है। अतः याची भारतीय संविधान के अनुच्छेद 22(5) के प्रावधानों के अनुपालन के अनुक्रम में निर्मुक्ति का अधिकारी है।

51. संविधान के अनुच्छेद 22 (5), निम्न प्रावधान विहित करता है:-

"निवारक निरोध का उपबंध करने वाली किसी विधि के अधीन किए गए आदेश के अनुसरण में जब किसी व्यक्ति को निरुद्ध किया जाता है तब आदेश करने वाला प्राधिकारी यथाशक्य शीघ्र उस व्यक्ति को यह संसूचित करेगा कि वह आदेश किन आधारों पर किया गया है और उस आदेश के विरुद्ध अभ्यावेदन करने के लिए उसे शीघ्रातिशीघ्र अवसर देगा।"

उपरोक्त संवैधानिक प्रावधानों के अनुसार निरोधक अधिकारी के ऊपर दो शर्तें अधिरोपित की गई हैं, यथा निरोधक अधिकारीः-

(I) याची के विरुद्ध पारित निरुद्धि आदेश हेतु, तथ्य व साक्ष्य आदि जिनके आधार पर, निरोधादेश पारित किया गया है, याची को यथाशीघ्र संसूचित करेगा।

(II) याची को उक्त निरुद्धि आदेश के विरुद्ध याची को अपना प्रतिवेदन प्रस्तुत करने का शीघ्रतम अवसर प्रदान करेगा।"

52. पत्रावली में उपलब्ध शपथ पत्रों व प्रपत्रों का परिशीलन करने से यह परिलक्षित होता है कि, प्रतिपक्षी संख्या 4/ जिला मजिस्ट्रेट ने निरुद्धि आदेश, निरुद्धि के आधार व प्रकरण से संबंधित प्रपत्रों की प्रति प्रतिपक्षी संख्या 6 को, दिनांक 16.02.2023 को ही प्रेषित कर दिया था, जिसे प्रतिपक्षी संख्या 6 ने याची को दिनांक 16.02.2023 को ही उपलब्ध करा दिया था और जिसका पावति (Receiving) पत्र भी प्रतिपक्षी संख्या 6 द्वारा अपने प्रति शपथ पत्र दिनांकित 29.08.2023 के साथ बतौर संलग्नक CA(2), पत्रावलित की गई है। इस प्रकार से भारतीय संविधान के अनुच्छेद 22(5) व अधिनियम की धारा 8 का सम्यक अनुपालन किए जाने में निरोधक अधिकारी। प्रतिपक्षी संख्या 4 के द्वारा किसी चूक का किया जाना परिलक्षित नहीं होता है।

53. प्रतिपक्षी संख्या 4 ने दिनांक 16.02.2023 को ही उक्त निरुद्धि आदेश अपनी टिप्पणी व अन्य प्रपत्रों के साथ प्रतिपक्षी संख्या 1/ उत्तर प्रदेश शासन को अनुमोदनार्थ प्रेषित कर दिया था। इस प्रकार से अधिनियम की धारा 3(4) का सम्यक रूप से अनुपालन प्रतिपक्षी संख्या 4 द्वारा कर दिया गया था।

54. राज्य सरकार द्वारा निरुद्ध के आदेश का अनुमोदन दिनांक 22.02.2023 को कर दिया गया है जो अधिनियम की धारा 3(4) में वर्णित सम्यावधि 12 दिवस के अंदर है।

55. प्रतिपक्षी संख्या 1 द्वारा अपने उक्त अनुमोदन आदेश दिनांक 22.02.2023 को दिनांक 1.03.2023 को (विहित मियाद सात दिवस के समाप्ति अंदर) केंद्र सरकार/प्रतिपक्षी संख्या 2 को प्रेषित कर दिया गया था, जो अधिनियम की धारा 3(5) के अनुसार है।

56. विपक्षी संख्या 1/ उत्तर प्रदेश शासन द्वारा परामर्शदात्री परिषद (Advisory Board) को दिनांक 24.02.2023 को अपने अनुमोदन आदेश के साथ-साथ अन्य प्रपत्रों को प्रेषित कर दिया था जो कि अधिनियम के धारा 10 में नियत समयावधि (निरुद्धि की तिथि से तीन सप्ताह) के अंदर था। इस प्रकार से प्रतिपक्षी संख्या 1 द्वारा अधिनियम की धारा 10 का सम्यक अनुपालन भी किया जाना भी परिलक्षित होता है।

उपरोक्त के अलावाः-

(क) निरुद्धि करण आदेश दिनांक 16.02.2023 का अनुमोदन आदेश, प्रतिपक्षी संख्या 1 द्वारा 24.02.2023 को, प्रतिपक्षी संख्या 6 के जरिए याची को संसूचित कर दिया गया था।

(ख) याची द्वारा, प्रतिपक्षी संख्या 4/ जिला मजिस्ट्रेट को प्रस्तुत प्रतिवेदन को प्रतिपक्षी संख्या 4 द्वारा दिनांक 28.02.2023को निरस्त कर दिया गया था और जिससे दि० 02.03.2023 को, याची को संसूचित कर दिया गया था।

(ग) प्रतिपक्षी संख्या 1/राज्य सरकार द्वारा याची के प्रतिवेदन को दिनांक 13.03.2023 को निरस्त कर दिया गया था जो याची को दिनांक 14.03.2023 को संसूचित कर दिया गया था।

(घ) परामर्शदात्री परिषद (Advisory Board) द्वारा अपने पत्र दिनांक 21.03.2023 के द्वारा प्रतिपक्षी संख्या 1 को संसूचित किया गया है कि याची के प्रतिवेदन को परिषद द्वारा सुनवाई के उपरांत निरस्त कर दिया गया था।

(च) केंद्र सरकार/प्रतिपक्षी संख्या 2 द्वारा याची के प्रतिवेदन को दिनांक 26.03.2023 को निरस्त कर दिया गया था जो वायरलेस संदेश दिनांक 27.03.2023, प्रतिपक्षी संख्या 6 के जरिए याची को दि० 30.03.2023 के संसूचित कर दिया गया था।

(छ) याची के निरुद्धि आदेश को तीन माह तक की अवधि के लिए विस्तारित किए जाने का आदेश दिनांक 27.03.2023, प्रतिपक्षी संख्या 1/ राज्य सरकार द्वारा पारित किया गया है जो उसे उसी दिन याची को प्रतिपक्षी सं०6 द्वारा संसूचित कर दिया गया था। उक्त आदेश का औपचारिक आदेश (Formal Order) याची को दि० 01.04.2023 को संसूचित किया गया।

(ज) याची की निरुद्धि को छः माह तक विस्तारित करने का आदेश पूर्व अवधि के समापन की तिथि के पूर्व, दिनांक 01.05.2023 को, प्रतिपक्षी द्वारा जिला कारागार को प्रेषित कर दिया गया था जो उसी दिन प्रतिपक्षी सं० 6 द्वारा याची को संसूचित कर दिया गया था।

(झ) याची के निरुद्धि की अवधि को दिनांक 02.08.2023 को 9 माह की अवधि तक विस्तारित किए जाने का प्रतिपक्षी सं० 1 द्वारा प्रेषित रेडियोग्राम, जेल में दिनांक 2.08.2023 को प्राप्त हुआ था, जिसे भी याची को उसी दिन अर्थात दिनांक 2.08.2023 को संसूचित कर दिया गया था।

57. उपरोक्त प्रकार से याची को निरोधादेश के अनुमोदन, प्रतिवेदन के प्रतिपक्षीगण सं 1, 2 व 4 द्वारा निरस्तीकरण के आदेशों एवं निरोध की

तिथि के विस्तारण के आदेशों को सम्यक तत्परता से प्रतिपक्षी सं० 6 के जरिए संसूचित कर दिए गए थे। तत्संबंधित पत्र प्राप्त होने व आदेश पारित होने व आदेशों को याची को संसूचित किए जाने में लगने वाली समयावधि को राज्य सरकार व केंद्र सरकार के कार्यालयों के कामकाज को "Rules Of Business" के नियम से संचालित होने के तथ्य को विचार में लेते हुए तथा पत्रों को डाक द्वारा भेजे जाने में लगने वाली समयावधि को विचार में लेते हुए यह निष्कर्षित होता है कि याची को आवश्यक सूचनाएं यथाशीघ्र व बिना किसी अनावश्यक विलम्ब के संबंधित प्रतिपक्षीगण द्वारा उपलब्ध करा दी गई हैं। इस बिंदु पर याची द्वारा प्रस्तुत विधि व्यवस्था **Sarabjeet Singh Mokha vs. District Magistrate, Jabalpur and others, reported in 2021 SCC Online SC 1019** के तथ्य हस्तगत याचिका के तथ्यों से भिन्न होने के कारण लागू नहीं होते हैं। उक्त विधि व्यवस्था में तथ्यानुसार निरुद्ध बंदी द्वारा प्रस्तुत प्रत्यावेदन दिनांक 18.05.2021 दिनांक 15.07.2021 को निरस्त किया गया था जो अत्यधिक विलम्ब से व विधि के प्रावधानों के विरुद्ध तथा माना गया था, तथा उक्त वाद में प्रतिपक्षीगण द्वारा आदेशों के बाबत बंदी को सम्यक संसूचना का साक्ष्य भी नहीं था, जबकि हस्तगत वाद में याची के प्रतिवेदन यथाशीघ्र निस्तारित किए गए हैं व प्रतिपक्षीगण द्वारा पारित आदेशों को याची को संसूचित किए गए हैं।

58. याची की याचिका में एक आधार यह भी लिया गया है, कि याची को बिना सुनवाई के निरोधादेश दिनांक 16.02.2023 के द्वारा जेल में निरुद्ध किया गया है, जिससे संविधान द्वारा मौलिक अधिकार के रूप में प्रदत्त उसकी व्यक्तिगत स्वतंत्रता अवरोधित हो रही है, अतः उक्त निरुद्धि आदेश को निरस्त किया जावे।

59. उपरोक्त बिन्दु पर याची के विद्वान अधिवक्ता द्वारा प्रस्तुत तर्क विधिक रूप से बलशाली प्रतीत नहीं होते है, क्योंकि संविधान के अनुच्छेद 21 में किसी नागरिक को प्रदत्त दैहिक स्वतंत्रता का मौलिक अधिकार उसे आत्यंतिक (Absolutely) रूप से प्रदत्त नहीं किया गया है, वरन यह स्वतंत्रता विधि के प्रावधानों से शासित होती है। माननीय उच्चतम न्यायालय ने **Mohd. Subrati Alias Mohd. Karim vs State Of West Bengal (1973) 3 SCC 250** के प्रस्तर 7 में इसे निम्न प्रकार से विवेचित किया हैः-

"No doubt, the right to personal liberty of an individual is jealously protected by our Constitution but this liberty is not absolute and is not to be understood to amount to licence to indulge in activities which wrongfully and unjustly deprive the community or the society of essential services and supplies. The right of the society as a whole is, from its very nature, of much greater importance than that of an individual. In case of conflict between the two rights, the individual's right is subjected by our Constitution to reasonable restrictions in the larger interests of the society."

60. इसी अनुक्रम में **State of Maharastra and Others Vs. Bhaurao**

Punjabrao Gawande (2008) 3 SCC 613 के प्रस्तर 36 में माननीय उच्चतम न्यायालय ने यह धारित किया है किः-

"36. Liberty of an individual has to be subordinated, within reasonable bounds, to the good of the people. The framers of the Constitution were conscious of the practical need of preventive detention with a view to striking a just and delicate balance between need and necessity to preserve individual liberty and personal freedom on the one hand and security and safety of the country and interest of the society on the other hand. Security of State, maintenance of public order and services essential to the community, prevention of smuggling and blackmarketing activities, etc. demand effective safeguards in the larger interests of sustenance of a peaceful democratic way of life."

61. हस्तगत प्रकरण में याची ने अपने सहयोगियों के साथ, सार्वजनिक स्थल पर, दिन के प्रकाश में, समाज के बहुसंख्यक वर्ग द्वारा उनकी धार्मिक मान्यताओं व आस्था के अन्तर्गत आराधित भगवान राम के, जीवन के घटनाक्रम से संबंधित धर्म ग्रंथ रामचरित मानस का जिस प्रकार से अपमान किया है, उससे समाज में आक्रोश व गुस्से का उत्पन्न होना स्वाभाविक है, समाज में धार्मिक उन्माद व आक्रोश फैलने की स्थिति का परिदृश्य में आ सकना, वर्तमान स्थिति में विशेषकर जहां मोबाइल फ़ोन व सोशल मीडिया से समाज का लगभग प्रत्येक व्यक्ति जुड़ा हुआ है, स्वाभाविक प्रतीत होता है। अतः ऐसी स्थिति में जबकि आसन्न खतरे को देखते हुए कार्यपालिका/प्रशासन द्वारा याची को निरुद्धि आदेश दिनांक 16.02.2023 के जरिए निरुद्ध किया गया है, इसे याची के व्यक्तिगत स्वतंत्रता का अयुक्तियुक्त व विधि विरुद्ध प्रतिबंध नहीं माना जा सकता है।

इस प्रकार से प्रकरण के तथ्य व परिस्थितियों एवं पत्रावली में उपलब्ध साक्ष्य की विधि के प्राविधानों व मा० उच्चतम न्यायालय द्वारा प्रतिपादित विधिक सिद्धांतों के परिपेक्ष्य में उपरोक्तानुसार विवेचना के उपरांत इस न्यायालय के सुविचारित निष्कर्षानुसार हस्तगत याचिका बलहीन होने के कारण निरस्त होने योग्य है।

62. तदनुसार, याचिका **निरस्त** की जाती है

(2024) 1 ILRA 560
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.11.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Rera Appeal No. 266 of 2019

Lucknow Development Aurhority ...Appellant

Versus

Smt. Upasana Duggal ...Respondent

Counsel for the Appellant:
Ratnesh Chandra

Counsel for the Respondent:
Ashish Chaturvedi

A. RERA Appeal – Dismissal of Challenge to Interest Award – The appellant challenged the Real ESt. Appellate Tribunal's order dated 26.02.2019, directing payment of 15% per annum interest for delayed possession under Section 18 of the Real ESt. (Regulation and Development) Act, 2016 – Held, the Tribunal's order was upheld as it aligned with the Act's provisions and Supreme Court precedent, with no infirmity found. (Paras 12, 19, 28)

B. Section 2(za) of RERA Act – Reciprocal Interest Rate – The Tribunal modified the RERA's order granting interest at MCLR + 1% to 15% per annum, based on the brochure's clause charging allottees 15% interest for payment defaults – Held, as per Section 2(za), the promoter is liable to pay the same interest rate to the allottee for delay in possession, justifying the Tribunal's decision. (Paras 10, 11, 12, 27)

C. Retrospective Application of RERA Act – The appellant argued that pre-2016 contractual terms (4% interest for delay) should override RERA's provisions – Held, relying on *M/s Newtech Promoters and Developers Pvt. Ltd. Vs St. of U.P.*, the RERA Act applies retroactively to ongoing projects without completion certificates, and contractual terms do not override statutory liabilities. (Paras 24, 25, 28)

D. Compensatory Nature of Interest under Section 18 – The interest under Section 18 for delayed possession is compensatory, not penal – Held, as per *Neelkamal Realtors Suburban Pvt. Ltd. Vs U.O.I.*, the retrospective levy of interest for delays prior to 2016 is valid and does not violate constitutional rights. (Paras 24, 25)

E. Delay Beyond Promoter's Control – The appellant cited delays due to farmers' agitation and contractor issues – Held, the Tribunal noted the appellant's failure to provide reasons for not delivering possession within the stipulated 24 months, justifying the interest liability under the RERA Act. (Paras 7, 26)

Appeal Dismissed.

List of Cases cited:

1. M/s Newtech Promoters & Developers Pvt. Ltd. Vs St. of U.P., Civil Appeal No. 6745–6749 of 2021, decided on 11.11.2021

2. Neelkamal Realtors Suburban Pvt. Ltd. Vs U.O.I., 2017 SCC OnLine Bom 9302

3. Abati Bezbaruah Vs Director General, Geological Survey of India, (2003) 3 SCC 148

4.Alok Shanker Pandey Vs U.O.I., (2007) 3 SCC 545

5. Jay Mahakali Rolling Mills Vs U.O.I. (not fully cited in the judgment)

6. Shanti Conductors Pvt. Ltd. Vs Assam St. Electricity Board, (2016) 15 SCC 13

7. Vineeta Sharma Vs Rakesh Sharma (not fully cited in the judgment)

8. Vijay Vs St. of Maharashtra, (2006) 6 SCC 289

9. Virender Singh Hooda Vs St. of Haryana, (2004) 12 SCC 588

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

1. Heard Shri Ratnesh Chandra, learned counsel for the appellant as well as Shri Ashish Chaturvedi, learned counsel appearing on behalf of respondents.

2. The controversy in brief is with regard to the delay in handing over the possession of the flat which was sought to be constructed by the petitioner while developing apartments known as Smriti Apartments, Sector J Extension, Sitapur Raod Scheme, Jankipuram, Lucknow.

3. In the brochure published by the petitioner it was stated that the flats would be handed over within a period of 24 months as per clause 2.4 of the said brochure and as per clause 11.1 it was provided that in case possession is not

given then the allottee shall be at liberty to seek refund of the entire money along with interest at the rate of 4% per annum.

4. It is stated that for certain reasons beyond the control of the petitioner construction activities could not commence and, hence, there was delay in completion of the said project. In the meanwhile the Real Estate Regulation & Development Act, 2016 came into operation and the said project was registered by the petitioner with the concerned authorities and further the date of delivery of possession was extended till 31.12.2019.

5. In light of the fact that the petitioner did not complete the project within the stipulated time, the respondent filed a complaint before the Real Estate Regulatory Authority, Uttar Pradesh seeking interest on the delay in completion of the said project as provided under Section 18 and also sought a direction to the petitioner for expediting the possession of the said flat.

6. In the application it was stated that in pursuance to the application made by the respondent he was allotted a flat no. D/1407/C which was valued at Rs.13,00000/- and by 13.12.2013 he had paid an amount of Rs.14,18,886/-. It was further stated by him that as per the registration booklet the possession was to be given within 24 months and, accordingly, he should have got possession by 01.10.2013 and till filing of the said application before authority, i.e., some time in 2018 the possession had not been given to the respondent/ allottee and hence prayed for quahing the order dated 26.2.2019 passed by Chairman, Real Estate Appellate Tribubnal, U.P., Lucknow in Appeal No.87 of 2018 (Smt. Upasand Duggal Vs. Lucknow Development Authority).

7. The petitioner had put in appearance before the Authority and objected to the claim made by the respondent/ allottee. The petitioner had admitted that the possession was to be handed over by 01.10.2013 but due to certain dispute and delay by the construction agency who was given the contract of constructing the said flats there was delay in completion of the said project. It was further stated that there was difficulty and delay in obtaining the possession of the said land due to farmers' agitation and it is only when settlement was arrived at, the possession was given to the petitioners and, accordingly, submitted that the delay was beyond the control of the petitioners and, consequently, prayed that the interest as claimed by the petitioner does not deserve to be granted in peculiar facts of the present case.

8. Another objection made with regard to the claim of the allottee was that as per the brochure he was entitled only for refund of the entire amount with interest @ 4% and as per the settled terms and conditions there was no provision for grant of interest on the delay in completion of the said project and, consequently, stated that the prayer made by the allottee before the Authority could not be admitted/ allowed.

9. Considering the arguments the Real Estate Regulatory Authority was of the considered view that the petitioner had delayed in handing over the possession of the said flat despite there being agreement in this regard and once there is a breach of the said agreement the allottee was entitled for interest for the delay in completion of the said project, and, accordingly, awarded

interest @ MCLR +1% per year for the delayed period commencing from 01.12.2013. The said amount was directed to be paid within 45 days and further the petitioner was directed to hand over the possession expeditiously.

10. The allottee/ respondent being aggrieved of the said order has moved an appeal before the Real Estate Appellate Tribunal. He was aggrieved only with regard to the interest granted by the RERA on the delay in handing over the said possession. It was contended that as per provision of Section 2 (za) of the Act of 2016 it was provided that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

11. In this regard it was submitted that as per the agreement between the petitioner and allottee the rate of interest prescribed for delay in payment of the consideration of the said flat was determined at 15% by the petitioner himself. It was stated that in the brochure published by the petitioner in Clause 2.1 it has been specifically stated that in case allottee does not pay the amount of consideration for the flat or the instalments, the same shall be payable along with interest @ 15% per annum.

12. The Appellate Tribunal considered the contention of the allottee as well as of the petitioner and also the provisions of Section 2 (za) of the Act of 2016 and, accordingly, was of the considered view that the order of the Authority cannot be said to have been passed in accordance with the provision of the Act of 2016 and, accordingly, modified the order and directed the petitioner to make payment of interest @ 15% per annum on the deposited amount with effect from 01.12.2013 within a period of 45 days and continue to make payment till the date of handing over of actual physical possession of the flat in question.

13. It has been submitted by learned counsel for the petitioner that the Authority under the Act of 2016 can pass orders and give benefit to the allottees only in case there is violation of the terms and conditions stated before the Authority itself. He states that in the application for registration the petitioner himself has stated the date of completion of the project was till 31.12.2019, and, accordingly, any modification of the order would be impermissible.

14. I have heard the learned counsel for the parties and perused the record.

15. Undisputed facts of the case are that the respondent is an allottee who had made application to the petitioner for allotment of the flat in the Smriti Apartments being constructed by the petitioner.

16. The brochure was published by the petitioners some time in the year 2011 pursuant to which the respondent had made an application and he was allotted Flat No.D/1407/C on 26.11.2011. His contention that the flat was not delivered to him till 2018 and, accordingly, he moved an application before the RERA seeking compensation for the delay in handing over the possession as provided for under Section 18 of the Act of 2016.

17. The Authority considered the claim of the petitioner as well as the respondent and was of the view that in light

of the fact that the petitioner/ promoter had not fulfilled his promise and did not deliver the possession over the said flat within the time prescribed by him as per the agreement between the parties he was liable to pay interest @ MCLR + 1% w.e.f. 01.12.2013 till the date of possession of the said apartments.

18. At this stage it is relevant to consider the fact that no appeal against the said order dated 11.7.2018 was filed by the petitioner but an appeal was filed only by the allottee before the Real Estate Appellate Tribunal.

19. The only ground raised was with regard to the rate of interest awarded by the Authority. It was the case of the allottee that as per the definition of interest provided for under Section 2 (za) of the Act of 2016 he was entitled to same rate of interest which is chargeable by the promoter on delay in payment of the instalments or consideration of the said flat. In the present case he was able to demonstrate that as per the brochure and specially in terms of the Clause 2.1, the petitioner was charging 15% interest from the allottees for the delay in payment of their instalment/ sale consideration towards the apartments/ flats and, consequently, any interest which is payable under Section 18 will commensurate with the rate of interest chargeable by the promoter and, accordingly, prayed that the order of the Authority requires interference and the promoter should be directed to pay interest at the rate of 15 %.

20. By means of the impugned order dated 26.02.2019 the appellate tribunal has allowed the appeal preferred by the allottee.

21. The order of the Appellate Tribunal dated 26.02.2019 has been impugned in the present appeal on the ground that once the Act of 2016 has come into operation, then only the conditions prescribed in the said Act or any declaration made before the Authority can be implemented, and the terms and conditions stated in the brochure which was published in 2011, cannot be implemented after coming of the Act of 2016.

22. In the brochure published by the promoter it was provided that the rate of interest chargeable from the allottee for the delay in payment of the consideration for the flat/apartment would be 15%, while the regulatory authority had allowed the application of the allottee granting him interest for the delay in giving of possession at MCLR+1%, while the appellate Tribunal has bound the promoter to pay interest for the delay in giving of the possession @ 15% per annum.

23. The promoter has questioned the judgement of the appellate tribunal stating that the Tribunal committed error by binding the promoter to pay the rate of interest which was as per the agreement which was entered prior to coming into force of the act of 2016 and, hence, the order is without jurisdiction.

24. This aspect of the matter has been duly considered by the Supreme Court in the case of ***M/S Newtech Promoters and Developers Private Limited Vs State of U.P*** (civil appeal No. 6745 – 6749 of 2021 decided on 11/11/2021). Supreme Court after due analysis has laid down the following:-

"45. At the given time, there was no law regulating the real estate sector, development works/obligations of promoter and allottee, it was badly felt that such of

the ongoing projects to which completion certificate has not been issued must be brought within the fold of the Act 2016 in securing the interests of allottees, promoters, real estate agents in its best possible way obviously, within the parameters of law. Merely because enactment as prayed is made retroactive in its operation, it cannot be said to be either violative of Articles 14 or 19(1)(g) of the Constitution of India. To the contrary, the Parliament indeed has the power to legislate even retrospectively to take into its fold the pre-existing contract and rights executed between the parties in the larger public interest."

46. The consequences for breach of such obligations under the Act are prospective in operation and in case ongoing project, of which completion certificate is not obtained, are not to be covered under the Act, there is every likelihood of classifications in respect of underdeveloped ongoing project and the new project to be commenced.

47. The legislative power to make the law with prospective/retrospective effect is well recognized and it would not be permissible for the appellants/promoters to say that they have any vested right in dealing with the completion of the project by leaving the allottees in lurch, in a helpless and miserable condition that at least may not be acceptable within the four corners of law.

48. The distinction between retrospective and retroactive has been explained by this Court inJay Mahakali Rolling Mills v. Union of India, which reads as under:—

"8. "Retrospective" means looking backward, contemplating what is past, having reference to a statute or things existing before the statute in question. Retrospective law means a law which looks backward or contemplates the past; one, which is made to affect acts or facts occurring, or rights occurring, before it comes into force. Retroactive statute means a statute, which creates a new obligation on transactions or considerations or destroys or impairs vested rights."

49. Further, this Court in Shanti Conductors Private Limited v. Assam State Electricity Board, held as under:—

"67. Retroactivity in the context of the statute consists of application of new rule of law to an act or transaction which has been completed before the rule was promulgated.

68. In the present case, the liability of buyer to make payment and day from which payment and interest become payable under Sections 3 and 4 does not relate to any event which took place prior to the 1993 Act, it is not even necessary for us to say that the 1993 Act is retroactive in operation. The 1993 Act is clearly prospective in operation and it is not necessary to term it as retroactive in operation. We, thus, do not subscribe to the opinion dated 31-8-2016 [Shanti Conductors (P) Ltd. v. Assam SEB, (2016) 15 SCC 13] of one of the Hon'ble Judges holding that the 1993 Act is retroactive."

50. In the recent judgment of this Court rendered in the case of Vineeta Sharma v. Rakesh Sharma wherein, this Court has interpreted the scope of Section 6(1) of the Hindu Succession Act, 1956, the law of retroactive statute held as under:—

"61. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that

arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended Section 6, since the right is given by birth, that is, an antecedent event, and the provisions operate concerning claiming rights on and from the date of the Amendment Act."

51. Thus, it is clear that the statute is not retrospective merely because it affects existing rights or its retrospection because a part of the requisites for its action is drawn from a time antecedent to its passing, at the same time, retroactive statute means a statute which creates a new obligation on transactions or considerations already passed or destroys or impairs vested rights.

52. The Parliament intended to bring within the fold of the statute the ongoing real estate projects in its wide amplitude used the term "converting and existing building or a part thereof into apartments" including every kind of developmental activity either existing or upcoming in future under Section 3(1) of the Act, the intention of the legislature by necessary implication and without any ambiguity is to include those projects which were ongoing and in cases where completion certificate has not been issued within fold of the Act.

53. That even the terms of the agreement to sale or home buyers agreement invariably indicates the intention of the developer that any subsequent legislation, rules and regulations etc. issued by competent authorities will be binding on the parties. The clauses have imposed the applicability of subsequent legislations to be applicable and binding on the flat buyer/allottee and either of the parties, promoters/home buyers or allottees, cannot shirk from their responsibilities/liabilities under the Act and implies their challenge to the violation of the provisions of the Act and it negates the contention advanced by the appellants regarding contractual terms having an overriding effect to the retrospective applicability of the Authority under the provisions of the Act which is completely misplaced and deserves rejection.

54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.

The quantum of interest payable by the promoter when there is a delay in handing over the possession is the bone of contention in the present appeal. Do so the said controversy we will have to advert to the definition of "Interest" as per section 2 (za) of the act of 2016 which is as under:-

(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation.—For the purpose of this clause—

i. the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

ii. the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the

allottee defaults in payment to the promoter till the date it is paid;

The issue pertaining to payment of interest for the past contractual rights was also duly considered by the Bombay High Court in the case of Neelkamal Realtors Suburban Pvt Ltd vs Union of India and others 2017 SCC Online Bom 9302 wherein paragraph No. 137-142 of the said judgement it was observed:-

137. The another plea raised is as to why a promoter shall pay interest for the past contractual rights, in case of failure to complete the project after registration under RERA, till the possession is handed over. Under the scheme of the RERA it is clear by now that a promoter has to self assess and declare time period during which he would complete the project. But in case, inspite of making genuine efforts, a promoter fails to complete the project, then the concerned authorities, adjudicators, forums, tribunals would certainly look into genuine cases and mould their reliefs accordingly. We do not find that on that count the provisions of Section 18(1)(a) are to be declared as contrary and violative of Articles 14 and 19(1)(g). Considering the scheme of the RERA and the provisions of Section 18(1)(b), we are of the view that the same are not contrary to Articles 14 and 19(1)(g) of the Constitution. The provisions cannot be struck down on the ground of challenge that its operation is retroactive in nature. Neither the provisions of Section 18(1)(a) and (b) violate Article 20 of the Constitution. The payment of interest under Section 18 is compensatory in nature [Abati Bezbaruah v. Director General, Geological Survey of India-(2003) 3 SCC 148 (para 18) and Alok Shanker Pandey v.UOI-(2007) 3 SCC 545(para 9)].

138.The provisions of Section 18 must be read with Sections 71 and 72. The adjudicator would consider each case on its merits and unless such cases emerge and decisions are taken by the authority, it would not be appropriate at this stage to hypothetically consider a situation and decide constitutional validity of statutory provisions.

139.It was submitted on behalf of the Union that MOFA provides for interest to be paid in certain cases (Section 8) and the constitutional courts too had granted interest to flat purchasers in case of defaults by the promoters.

140.The requirement to pay interest under Section 18 is not penal since payment of interest is compensatory in nature due to delay suffered by the flat purchasers (Alok Shanker Pandeyv.Union of India (Supra). Even assuming that the interest is penal in nature, levy of interest is not retrospective but is only based on antecedent facts; it operates prospectively.

141. The interest payable under Section 18 is as per the definition of "interest" under Section 2(za) Explanation (ii), the same interest that would have been payable by the flat purchaser for delay in payment. Therefore, the payment of interest payable cannot be said to be penal in nature.

142. The legislature has power to make laws with retrospective effect. Therefore, even assuming that RERA or any part thereof operates retrospectively, such retrospective operation would not render it unconstitutional, unless the retrospectivity is shown to be excessive or harsh which injuriously affects a substantive or vested right. The inhibition against retrospective construction of a statute is not a rigid rule and has been held not to apply to a curative statute or a law enacted for the benefit of the community as a whole, which may be held to be retrospective even in the absence of any provision : (Vijay v. State of Maharashtra-(2006) 6 SCC 289-paras 10,

12 and Virender Singh Hooda v.State of Haryana-(2004) 12 SCC 588-para 35. RERA is enacted to protect the interest of consumer in the real estate sector. It was enacted in the public interest."

25. Considering the aforesaid judgements it is clear that the levy of interest as provided for in section 18 of the Act of 2016 is compensatory in character, and therefore can operate retrospectively, and therefore if provisions of section 2(za) of the Act of 2016 are deployed for levying interest for the delay which occurred even prior to coming into force of the said Act, cannot be said to be illegal and arbitrary. The levying of interest at the rate of 15% per annum for the delay in handing over possession has been made applicable from 2013 which is prior to coming into force of Act of 2016 and in view the Newtech Promoter's case, the promoter cannot shirk from the responsibilities/ liabilities under the Act and the contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act.

26. The Tribunal while allowing the appeal preferred by the respondent has duly noticed the fact that the appellant had admitted the entire cost of the flat in question received from the allottee and also admitted that the flat in question was to be delivered by it within 24 months from the date of allotment letter but no reason was mentioned for not providing possession of the flat in question within 24 months from the date of allotment letter.

27. Tribunal also considered the fact that as per the terms of the agreement, the allottee has been made liable to make payment of interest at the rate of 15% per annum in default of payment of amount of arrears to the appellant and, therefore, as per section 2 (za) (ii) of the Act of 2016, the appellant is also liable to make payment of interest at the rate of 15% per annum to the allottee if the appellant has defaulted in providing possession of the flat in question to the allottee in the stipulated period.

28. Considering the impugned order of the Tribunal as well as the arguments of the parties, this Court is of the considered view that there was no infirmity in the impugned order. The issues raised have already been determined and answered by the Supreme Court in the case of ***M/S Newtech Promoters and Developers Private Limited Vs State of U.P*** (supra) and, consequently, no substantial question arises in the present appeal which is accordingly **dismissed.**

(2024) 1 ILRA 568
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Second Appeal No. 599 of 2023

Shrivatsa Goswami ...Appellant
Versus
Anand Prasad Singh & Anr. ...Respondents

Counsel for the Appellant:
Sri Tarun Agrawal

Counsel for the Respondents:
Sri Dinesh Kumar Misra, Anita Singh, Sri Ishir Sripat, Sri Ajay Kumar Singh, Sri Rahul Sripat (Sr. Advocate)

A. Civil Law - Civil Procedure Code,1908- Section 100 - Order VII Rule 11-rejection of plaint-where an order rejecting a plaint

under Order VII Rule 11 is affirmed in appeal, it would be subject to a further remedy of second appeal under section 100, if the appellate court reverse the order of rejection of plaint, the remedy would be to file an 'appeal against an order' under Order XLIII Rule 1(u)-In the present case, order passed by the trial court rejecting the plaint has been reversed with a direction to restore the suit to its original number and proceed to determine the suit, cannot be held to be a 'decree' amenable to a second appeal under section 100 of the Code-Therefore, appellant is permitted to convert the present appeal filed under section 100 to 'an appeal against an order' under section 104 read with Order XLIII Rule 1(u) of the Code.(Para 56 to 60)

The appeal is directed to modify. (E-6)

List of Cases cited:

1. St. Aubyn Vs Attny. Gen. (1952) AC 15 (HL)

2. Hunter Douglas Australia Pty Vs Perma Blinds (1970) 44 Aust LJR 257

3. Narayanan Vs Kumaran & ors.(2004) 4 SCC 26

4. Gegannathan Vs Raju Sigamani & anr. (2012) 5 SCC 540

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

1. A seminal question has arisen as regards the legal remedy available against an order passed in an appeal arising out of an order of rejection of plaint passed under Order VII Rule 11 of the Civil Procedure Code, 19081.

2. It has been pointed out that there is considerable obfuscation on the issue with no clear enunciation of law on the point.

3. Heard Sri Tarun Agrawal, learned counsel for the appellant and Sri Rahul Sripat, learned Senior Counsel appearing along with Sri Ishir Sripat for the respondents. Sri Ajay Kumar Singh, learned counsel has also been heard.

4. The present appeal is directed against the judgment and order dated 07.04.2023 passed by the Additional District Judge, Court No. 8, Mathura in Civil Appeal No. 67 of 2022 (Anant Prasad Singh Vs. Shrivatsa Goswami and Another), whereby the appeal has been allowed and the earlier order dated 22.11.2022 passed by the trial court rejecting the plaint under Order VII Rule 11 of the Code, has been set aside.

5. The facts giving rise to the aforesaid controversy emanates from an original suit being O.S. No. 83 of 2022 instituted by the plaintiff-respondent, seeking to declare as null and void a registered gift deed dated 25.05.1986 executed in favour of the predecessor-in-interest of the defendant as well as the subsequently registered gift deed dated 17.10.1987 executed in favour of the father of the defendant-appellant herein.

6. The suit having been instituted in the year 2022, years after the first gift deed registered on 25.05.1968, the defendant moved an application under Order VII Rule 11(d) for rejection of the plaint as being barred by limitation.

7. The trial court allowed the application under Order VII Rule 11 and held the suit to be barred by limitation and accordingly rejected the plaint.

8. The decree dated 22.11.2022 passed by the trial court rejecting the plaint, was assailed by the plaintiff-respondents in Civil Appeal No. 67 of 2023.

9. The aforesaid appeal has been allowed by an order dated 07.04.2023 setting aside the earlier order of rejection of the plaint dated 22.11.2022, with a direction to the trial court to restore the suit to its original number, re-register the Original Suit No. 83 of 2020, invite objections/written statements from the defendants, in addition to other issues, frame an issue regarding limitation and after taking evidence give a decision on all the issues that have been framed. The lower appellate court, also fixed a date for appearance of the parties before the trial court and directed that the records of the case be remitted to the trial court for proceeding with the case.

10. It is against the aforesaid order dated 06.03.2023 passed by the lower appellate court in Civil Appeal No. 67 of 2022, that the defendant-appellant has preferred the instant appeal under Section 100 of the Code.

11. The question with regard to the maintainability of the appeal has been raised on behalf of the plaintiff-respondent by pointing out that the order dated 07.04.2023 passed by the lower appellate court being an order of remand under Order XLI Rule 23/23-A of the Code, the same would be amenable to an appeal from an order as described under Order XLIII Rule 1(u) of the Code read with Section 104(1)(i).

12. It is submitted that the trial court having disposed of the suit on the preliminary issue of limitation and the lower appellate court having set aside the aforesaid judgment/decree passed by the trial court with a direction to decide the suit on the said preliminary issue after framing other issues, the order passed by the lower appellate court would be referable to its powers under Order XLI Rule 23 of the Code. The order would be amenable to an appeal under Order XLIII Rule 1(u) and cannot be subjected to a Second Appeal under Section 100 of the Code. The present appeal would therefore not be maintainable and is liable to be dismissed.

13. An objection has been raised by the Stamp Reporter, also, with regard to the maintainability of the appeal.

14. Learned counsel for the appellant while responding to the aforesaid objections regarding maintainability of the appeal, has sought to point out that the lower appellate court while allowing the appeal has directed the issue of limitation to be decided after receiving evidence. In the last paragraph of the order the appellate court has further directed that the matter be sent back to the trial court to decide the suit in terms of the directions given.

15. It is submitted that it is the last paragraph of the order that has perhaps given rise to a confusion as to the nature of the order dated 06.04.2023, on the basis whereof the plaintiff-respondent has questioned the maintainability of the present second appeal on the ground that the impugned order is, in fact, an order of remand under Order XLI Rule 23 of the Code against which an appeal from order, under Order XLIII Rule 1(u), would lie.

16. It is pointed out that the trial court has allowed the appeal by holding that the issue of limitation being a mixed question of law and fact could not be decided without receiving evidence. The question was, therefore, left open to be decided after framing of issues and receiving evidence. The application of the plaintiff under Order

VII Rule 11 of the Code has been rejected for the reason that the parameters of consideration at this stage would be entirely different from those available after the framing of issues.

17. It is submitted that while deciding the application under Order VII Rule 11 of the Code, the court can only consider the allegations made in the plaint; however, while deciding the issue of limitation, the court would necessarily have to consider the averments made in the plaint and the written statement as well as the evidence led by the parties. The directions contained in the impugned order being tantamount to rejection of the application under Order VII Rule 11 of the Code, there was no requirement for the lower appellate court to issue any further direction to the trial court, and the directions in this regard by the lower appellate court are superfluous.

18. It is contended that the remand contemplated under Order XLI Rule 23 of the Code, requires an exercise of judicial discretion on part of the appellate authority, and therefore the matter could be remanded only where the appellate court while reversing or setting aside the decree considered it in the interest of justice to remand the case. While passing an order referable under Order XLI Rule 23 of the Code, revival of proceedings before the trial court is not automatic but contingent upon the exercise of judicial discretion on part of the appellate authority. In the present case, the revival of the suit is not seen to be contingent upon exercise of any judicial discretion on part of the lower appellate court regarding the demands of interest of justice. Once the decree was reversed the revival of the suit before the trial court was automatic, and was not contingent upon any further determination on part of the lower appellate court regarding the necessity to remand the case.

19. It is sought to be urged that an appeal under Order XLIII Rule 1(u) of the Code, in a case of such nature, would be a futility inasmuch as it would not be open to the appellant to question the exercise of discretion by the appellate authority in remanding the case as the revival of the suit is automatic and not contingent upon any judicial discretion.

20. It is further urged that Order XLI Rule 23 of the Code, applies only in a situation where the suit has been disposed of upon a preliminary point. A 'preliminary point' being distinct from a 'preliminary issue', the court may, after framing the issues, decide any issue as a preliminary point. In the present case, the issues having yet not been framed, there was no question of the impugned judgment having been passed on a preliminary point.

21. It is also submitted that the scope of examination while deciding an 'issue' is entirely different inasmuch as at that stage the trial court is required to take into account the averments made in the plaint and the written statement as also the evidence led by the parties; accordingly, while deciding an application under Order VII Rule 11 of the Code, the trial court does not dispose the suit on a preliminary point as this stage can only arise after framing of issues. The judgment of the lower appellate court reversing the decree is, therefore, not referable to Order XLI Rule 23 of the Code.

22. In order to appreciate the controversy at hand, the relevant statutory provisions of the Civil Procedure Code, 1908, are being extracted hereinbelow:

"Section 2(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include--

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.---A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

96. Appeal from original decree.--- (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.

100. Second appeal.--- (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

104. Orders from which appeal lies.--- (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-

(ff) an order under Section 35-A;

(ffa) an order under Section 91 or section 92 refusing leave to institute a suit of the nature referred to in Section 91 or Section 92, as the case may be;

(g) an order under Section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such

arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.

(2) No appeal shall lie from any order passed in appeal under this section.

Order VII Rule 11:

11. Rejection of plaint.--The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails comply with the provision of Rule 9;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

Order XLI Rule 23:

Remand of case by Appellate Court.--Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Order XLIII Rule 1(u):

Appeals from orders.---An appeal shall lie from the following orders under the provisions of Section 104, namely:--

(a) …

…

(u) an order under Rule 23 or Rule 23-A of Order XLI remanding a case, where an appeal would lie from the decree of the Appellant Court;

..."

23. It would also be relevant to refer to the Notification dated Allahabad, April 27, 1957 published in the U.P. Gazette, Part II, dated June 1, 1957, whereby the High Court of Judicature at Allahabad had made certain amendments in the First Schedule of the Code of Civil Procedure, 1908, in exercise of powers under Section 122 and with the previous approval of the Government of the State as required by

Section 126 of the Code. The amendment relating to Order XLI Rule 23 is as follows:

"(i) Insert the following after the words "and the decree is reversed in appeal", namely: "or where the Appellate Court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it"; and

(ii) Delete the words "the Appellate Court" occurring thereafter and delete also the words "if it thinks fit", occurring after the words "may"."

24. The term 'decree' has been defined under Section 2(2) of the Code, wherein it has been provided that the rejection of the plaint shall be deemed to be included within the definition of the term.

25. The Code has defined the term 'decree' under Section 2(2) to include the determination of any preliminary matter and the said definition is extended to an order rejecting a plaint even though it may not be a decision on merits and the rights of the parties may not have been adjudicated finally.

26. The order, aforementioned, by reason of Section 2(2), would be deemed to be a 'decree' and hence would be appealable under Section 96 as an appeal from original decree. It is to be treated as a decree as the effect of the order is denial of the reliefs sought, and therefore a virtual dismissal of the suit.

27. An order rejecting a plaint, even otherwise, would have to be held to be a decree, as it amounts to refusal of any relief to the plaintiff in the particular suit. This would lead to dismissal of the suit, and would, therefore, be a decree within the main part of the definition under Section 2(2) also.

28. The distinction which is sought to be borne in mind is that under the deeming clause of Section 2(2), what is held to be a 'decree' is not the 'order', which may be of an interlocutory nature, but its effect in the ultimate or final dismissal of the suit, which, under law, disposes of the suit, though by a decision on a particular issue, as distinguished from an adjudication on all the issues.

29. A deeming provision is generally utilised in statutory enactment to deem what is not there in reality, thereby requiring the subject matter to be treated as if it were. There are, however, authorities to show that a deeming fiction can also be used to put beyond doubt a particular construction that might otherwise be uncertain or to give to the statutory language a comprehensive description so that it includes what is obvious.

30. **Stroud's Judicial Dictionary of Words and Phrases**[2], defines 'deemed' as follows:

"'Deemed' – as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote", is often a convenient device for reducing the verbiage or an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or things has—the way in which it is to be adjudged; this need not import artificiality or fiction;

it may simply be the statement of an indisputable conclusion."

31. The meaning of word 'deemed' as used in statutory definitions, has been explained by **Lord Radcliffe in St. Aubyn Vs. Attorney General**[3], in the following words:

"… The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

32. The use of the word "deemed" in statutory definitions was explained by **Windener, J., in Hunter Douglas Australia Pty. v. Perma Blinds**4, by stating:-

"14. 'Deemed', as used in statutory definitions [is meant]

'to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient devise for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words "deem" and "deemed" when used in a statute thus simply state the effect or meaning which some matter or thing has — the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion'."

33. It may, therefore, be inferred that the use of a deeming clause in a statutory enactment is not always for the purpose of creating a fiction but, at times, to state something which follows as an obvious consequence. The rejection of a plaint has a natural consequence of the reliefs being denied. It is possibly for this reason that the rejection of a plaint has been held to be a 'decree' in terms of the deeming clause under Section 2(2) of the Code.

34. Order VII Rule 11 relates to rejection of the plaint, on the grounds specified therein. The conditions precedent to exercise of the said power are stringent, and the power to reject the plaint can be exercised only upon fulfilment of the conditions provided therein. In order to ascertain whether any of the grounds specified under Order VII Rule 11 are attracted, the court has to read averments in conjunction with documents relied upon in the plaint as a whole without addition or subtraction of any word. In substance, what is to be seen at that stage are only the averments made in the plaint, and the pleadings of the defendants in the written statement would be wholly irrelevant for the purpose.

35. The effect of rejection of a plaint is drastic, as in a way, it results in the conclusion of the proceedings. It is perhaps for this reason that an order rejecting the plaint has been held to be a 'deemed decree' under Section 2(2) of the Code.

36. The rejection of plaint under Order VII Rule 11 having been held to be covered within the definition of a 'decree' under Section 2(2), under its deeming clause, the said order becomes amenable to appeal under Section 96 of the Code which provides for an appeal from original decree.

37. Although, an order rejecting a plaint is neither an adjudication on merits nor it conclusively determines the rights of the party with regard to all or any of the matters in controversy in the suit, yet insofar as the court passing the order is concerned, it amounts to rejection of the case sought to be set up by the plaintiff and resultantly the right of the plaintiff to pursue the case stands exterminated. The order rejecting a plaint, thus, in a way, can be held to have a conclusive effect on the right of the plaintiff to prosecute that particular suit any further. The conferment of the status of a decree, adds a finality to the said order. It makes it binding upon the parties.

38. In the instant case, the trial court, by means of the order under Order VII Rule 11, rejected the plaint as being barred by law, i.e. limitation. Therefore, the order can be seen as conclusively determining the rights of the parties with regard to one of the matters in controversy in the suit, i.e. limitation. Although, it was not an order passed after framing an issue, at the same time, there was adjudication on the question as to whether the suit was barred by limitation. The deeming clause under sub-section (2) of Section 2 of the Code, thus, becomes attracted, and the order passed by the trial court would have to be held to be a 'decree' within the meaning of the term as defined under the sub-section.

39. It is this order of the trial court rejecting the plaint, which was carried in appeal under Section 96 of the Code, and the said appeal has been allowed in terms of the order dated 07.04.2023, against which the present appeal has been filed.

40. If, it were a situation where the appeal filed against the order rejecting the plaint under Order VII Rule 11, had been dismissed, it would be effectively an order determining the rights of the parties and concluding the proceedings. The order passed in the appeal would, therefore, again be a 'decree' within the meaning of the Section 2(2), and the same would be subject to a further appeal under Section 100 of the Code.

41. However, in the present case, the appeal filed against the order of the trial court rejecting the plaint under Order VII Rule 11, having been allowed, and the matter having been remitted to the trial court for fresh adjudication, a question has arisen as to whether the order passed in the appeal, can be held to be a 'decree' within the meaning of Section 2(2), so as to be amenable to a further appeal under Section 100, or it would have to be held to be an order of remand referable to the provisions under Order XLI Rule 23 so as to be subject to an 'appeal from an order' under Section 104 read with Order XLIII Rule 1(u) of the Code.

42. The order passed by the lower appellate court allowing the appeal and setting aside the order passed by the trial court rejecting the plaint under Order VII Rule 11 with a further direction to re-register the suit, invite objections from the defendants for framing issues and after taking evidence give a decision on all the issues, cannot be held to be a judicial determination conclusively determining the rights of the parties. The order, therefore, cannot be held to be a 'decree' so as to amenable to a further appeal under Section 100 of the Code.

43. The question which remains for consideration is as to whether the order passed by the lower appellate court can be

held to be an order of remand so as to be amenable to an appeal in terms of the provisions of Section 104 of the Code read with Order XLI Rule 23.

44. Rule 23 of Order XLI, as it reads consequent to the Allahabad Amendment, is as under:

"Remand of case by Appellate Court.--Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal or where the appellate court while reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case, it may, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send the copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidenced during the trial after remand."

45. A plain reading of the aforesaid provision indicates that Rule 23 (as amended by the Allahabad Amendment), contemplates a remand in the following two situations:

I. where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal; or

II. where the appellate court while reversing or setting aside a decree under appeal considers it necessary in the interest of justice to remand the case.

46. The Allahabad Amendment to Order XLI Rule 23 of the Code has thus widened the scope of the provision, whereas formerly a remand could be made only in a case where the decree of the lower court disposing the case had proceeded on a preliminary point, the position consequent to the amendment is that a remand order can also be passed in a case where the court considers it necessary in the interest of justice to do so. In other words, a remand order can be passed in a case which was disposed of on a preliminary point as also in a case where the court is of the opinion that the interest of justice requires remand of the case.

47. Under the unamended provision, a remand could be made where the suit had been decided on a preliminary issue and there was no adjudication in respect of the other pleas, whereas in a case covered by the amended provision a remand can also be made where there has been an adjudication on all the pleas by lower court and the court considers it necessary in the interest of justice to remand the case for rehearing.

48. The first appellate court while reversing a decree arising out of a preliminary point must as of necessity remand the case. This power to remand the case flows from sub-section (1)(b) of Section 107 of the Code, as also from Order XLI Rule 23, as referred above.

49. The contention that rejection of the application under Order VII Rule 11 of the Code, at the appellate stage, would result in automatic restoration of the suit without the appellate court being required to pass any specific order of remand, suffers from an inherent fallacy which is not difficult to fathom.

50. The trial court becomes functus officio once it passes a decree. An order rejecting the plaint is a decree by virtue of the deeming clause under Section 2(2) of the Code. Therefore, the trial court, having once passed the decree, would not automatically regain seisin over the matter unless it is remanded back to it. This possibly explains the insertion of Rule 26-A under Order XLI, by the Amending Act of 1976, requiring the appellate court to fix a date for the appearance of the parties before the trial court consequent to the remand. This also flows from the language of Order XLI Rule 43, which requires the appellate court to issue directions to the trial court to re-admit the suit under its original number in the register of civil suits and proceed to determine the suit. This leaves no room for doubt that there is no automatic revival or restoration of the suit unless an order of remand is passed. Thus, whenever a decree of the trial court is reversed by the appellate court, unless there is any express order of remand, the trial court would not regain seisin of the matter and would continue to remain functus officio in that regard.

51. There being no provision in the Code providing automatic revival of the suit, the order of the appellate court directing re-admission of the suit, cannot be said to be superfluous; rather the direction to re-admit the suit under its original number in the register of civil suits and to proceed to determine the suit, would be necessary together with the order of remand.

52. In every case where a decree on a preliminary point is reversed, the matter would, as of necessity, have to be returned to the court below for completion of the trial. It is for this reason that Order XVI Rule 23 contemplates an order of remand. If the resumption of the suit were automatic, a provision of remand may not have been necessary under Rule 23 of Order XLI.

53. To address the question which has fallen for consideration regarding the maintainability of the present second appeal, it would be necessary to examine the remedies available consequent to an order being passed by the civil court under the provisions of the Code. A close reading of the provisions of the Code would lead to an inference that the remedies available under the Code would be the following:

(i) where the order is a 'decree' as defined under Section 2(2) of the Code, it would be subject to an appeal under Section 96, with a further remedy of a second appeal under Section 100 of the Code;

(ii) where the order is not a 'decree' but is an order of the nature as described under Section 104 read with Rule 1 of Order XLIII, it would be subject to an appeal as an appeal from an order under Section 104 read with Order XLIII Rule 1 of the Code, without any provision for a further second appeal.

(iii) where the order is neither a 'decree' nor an 'appealable order' as specified under Section 104 read with Order XLIII Rule 1, it may be subject to a revision under Section 115, subject to fulfilment of the requirements of the section.

54. A noticeable difference between a 'decree appealable under Section 96' and an order 'appealable under Section 104' is that the remedy of a second appeal is available against a decree passed in an appeal under Section 96, whereas no further appeal lies

from an order in an appeal under Section 104 read with Order XLIII Rule 1 of the Code.

55. The position which emerges from the foregoing discussion, in regard to the remedies available against an order passed in an appeal arising out of an order rejecting a plaint under Order VII Rule 11 of the Code, may thus be summarised in the following manner:

I. In a case where the application under Order VII Rule 11 has been allowed by the trial court and as a consequence the suit has been dismissed, and the said order is affirmed in appeal, the order of the first appellate court assumes the character of a 'decree' in terms of Section 2(2) of the Code, and a second appeal under Section 100 would lie against such a decree.

II. Alternatively, where in an appeal filed against an order of the trial court rejecting the plaint under Order VII Rule 11, the first appellate court reverses the order thereby restoring the suit to be tried on merits, it would in effect be an order of remand referable to Order XLI Rule 23, and would be subject to an appeal under Order XLIII Rule 1(u).

The appeal in latter case, though not a second appeal under Section 100, would nonetheless be required to be admitted and heard on a substantial question of law and on grounds on which a second appeal is heard under Section 100, as has been laid down in **Narayanan Vs. Kumaran and Others**[5] and **Gegannathan Vs. Raju Sigamani and Another**[6].

56. Putting it succinctly, it may be stated as a legal proposition that where an order rejecting a plaint under Order VII Rule 11 is affirmed in appeal, it would be subject to a further remedy of second appeal under Section 100, alternatively, if the appellate court reverses the order of rejection of the plaint, the remedy would be to file an 'appeal against an order' under Order XLIII Rule 1(u).

57. Applying the aforestated legal principles, to the facts of the present case, leads to the inference that the order dated 07.04.2023 passed in Civil Appeal No. 67 of 2022 in terms of which the order dated 22.11.2022 passed by the trial court rejecting the plaint under Order VII Rule 11 of the Code, has been reversed with a direction to restore the suit to its original number and proceed to determine the suit, cannot be held to be a 'decree' amenable to a second appeal under Section 100 of the Code.

58. The order in question would have to be held a 'remand order' covered under Order XLI Rule 23 of the Code (as read in terms of the Allahabad Amendment), and it would be subject to the remedy of an 'appeal from an order' under Section 104 read with Order XLIII Rule 1(u) of the Code.

59. The objection of the Stamp Reporter, in this regard, therefore, cannot be held to be unsustainable.

60. Counsel for the appellant is permitted to convert the present appeal filed under Section 100 to 'an appeal against an order' under Section 104 read with Order XLIII Rule 1(u) of the Code.

61. A week's time is granted to the appellant to file a fresh memorandum of appeal, if so required.

62. Office is directed to re-register the appeal as an 'appeal from an order' under

Section 104 read with Order XLIII Rule 1(u) of the Code, and **place it as fresh, before the appropriate Bench, on 30.01.2024.**

(2024) 1 ILRA 580
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Sale/Trade Tax Revision No. 39 of 2018

M/S Rajansh Marble House Gomti Nagar Lko. ...Petitioner
Versus
The Commissioner Commercial Tax & Anr. ...Respondents

Counsel for the Petitioner:
Rajesh Kumar Shukla Dr.

Counsel for the Respondent:
C.S.C.

Civil Law – The U.P. Value Added Tax Rules, 2008 - Section 57(8) -Challenge to Commercial Tax Tribunal's judgment dated 19.03.2018 - Non-compliance with Rule 63(5) of U.P. VSA.T. Rules, 2008 and Section 57(8) of U.P. VSA.T. Act, 2008 - Tribunal failed to St. points for determination, decision, and reasons - Judgment set aside as non-compliant with mandatory provisions - Matter remitted for fresh decision within three months.

List of Cases cited:

1. Ved Ram Vs Harish Chandra & anr., 2005 (23) LCD 604

2. Smt. Damyanti Devi Vs Brindaban, 1979 AWC 687 : (1979 All LJ (NOC) 110)

3. Keluni Dei Vs Kanhei Sahu, AIR 1972 Orissa 28

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard Dr R. K. Shukla, learned counsel for the revisionist and Shri Sanjay Sarin, learned counsel for the respondents no.1 and 2.

2. The instant revision has been filed raising a challenge to judgement and order dated 19.03.2018 passed by learned Commercial Tax Tribunal, Lucknow, U.P. to the extent it relates to Second Appeal No. 68 of 2017 (A.Y. 2011-12) filed by the revisionist. Substantial questions of law have been set forth in the revision.

3. This Court vide the order dated 03.05.2018 had admitted the revision on two substantial questions of law namely:

"(1) Whether, the judgement & order dated 19.3.2018 passed by learned Commercial Tax Tribunal in Second Appeal No. 68 of 2017 (2011-12) is vitiated due to non-compliance of the mandatory provisions laid down under Rule 63(5) of the U.P. V.A.T. Rules, 2008 read with Section 57(8) of the U.P. V.A.T. Act, 2008.

(5) the principle of best judgement assessment can be resorted to on the basis of presumption and surmises, without any material on record."

4. The Court heard learned counsel for the revisionist on the first substantial question of law which is:

"(1) Whether, the judgement & order dated 19.3.2018 passed by learned Commercial Tax Tribunal in Second Appeal No. 68 of 2017 (2011-12) is vitiated due to non-compliance of the mandatory provisions laid down under Rule 63(5) of the U.P. V.A.T. Rules, 2008 read with Section 57(8) of the U.P. V.A.T. Act, 2008."

5. Learned counsel for the revisionist contends that Section 57(8) of the U.P. V.A.T. Act, 2008 (hereinafter referred to as the Act 2008) provides that the Tribunal may, if it has not already dismissed the appeal under Section 57(7) of the Act 2008, after calling for and examining relevant records and after giving the parties reasonable opportunities of being heard or as the case may be after following the procedures prescribed under Section 57(5) (a) confirm the order, (b) set aside the order and (c) order such amount of tax to be refunded.

6. Section 56(5) of the Act, 2008 provides the manner and procedure of summary disposal of appeal to be as may be prescribed.

7. Rule 63(5) of the U.P. V.A.T. Rules, 2008 (hereinafter referred to as the Rules, 2008) provides that a judgement and appeal shall be in writing and shall state (a) the points for determination, (b) the decision thereon and (c) the reason for such decision.

8. Placing reliance on the judgement of this Court in the case of **Ved Ram Vs Harish Chandra and another, 2005 (23) LCD 604** the contention of learned counsel for the revisionist is that the provisions of Rule 63(5) of the Rules, 2008 are akin to Order 41 Rule 31 Code of Civil Procedure, 1908 which have been held to be mandatory by this Court in the case of **Ved Ram (Supra)**.

9. Drawing attention of this Court towards the judgment of learned Tribunal, a copy of which is annexure 1 to the revision, the argument of learned counsel for the revisionist is that learned Tribunal has neither indicated the points for determination nor given any decision after noting the said points for determination or the reasons for such decision and consequently the impugned judgement would be against mandatory provisions of Section 57(8) read with 57(5) of the Act, 2008 and Rule 63(5) of the Rules 2008.

10. On the other hand, Shri Sanjay Sarin, learned Additional Chief Standing Counsel has supported the judgement and order passed by learned Tribunal.

11. Heard learned counsels for the parties and perused the record.

12. From a perusal of record it emerges that the appeal filed by the revisionist namely Second Appeal No. 68 of 2017 for the Assessment Year 2011-12 has been dismissed by learned Tribunal vide its judgement and order dated 19.03.2018.

13. As per the learned counsel for the petitioner, the provisions of Section 57(8), Section 57(5) of the Act, 2008 and Rule 63(5) of the Rules 2008 the judgment of learned Tribunal in appeal has to state the points for determination, the decision thereon and the reason for such decision.

14. For the sake of convenience, the provisions of Section 57 of the Act, 2008 are reproduced below:

"57. Tribunal.- *(1) There shall be [a Tribunal to be known as Commercial Tax Tribunal] consisting of such members including a President as the State Government may, from time to time, deem it necessary to appoint from amongst-*

(a) the persons who are qualified to be the judge of the High Court;

(b) the persons belonging to the Uttar Pradesh Trade Tax Services or the Uttar Pradesh Commercial Tax Services who hold or have held a post not below the rank of Joint Commissioner.

Provided that-

(i) where the Tribunal consists of one or more persons who is or are member or members of the U.P. Higher Judicial Service, then he or senior most amongst them shall be appointed as the President;

(ii) no person shall be appointed from amongst the advocate unless-

(A) he has paid Income Tax on his income from his legal profession in each of ten consecutive years preceding such appointment;

(B) he has attained the age of fifty years on the date of appointment;

(C) such Members from amongst Advocates shall be appointed for a term of three years from the date of appointment or till he attains the age of 60 years whichever is earlier.

(2) The State Government may prescribe such other qualification or conditions for the appointment of the President and the other members of the Tribunal as it may deem fit.

(3) The provisions of Rule 56 of the U.P. Fundamental Rules shall continue to apply to every member of the Tribunal including the President whether appointed under the erstwhile Act or under this Act on or after the date of the commencement of this Act, as they apply to any other Government servant.

(4) Any person aggrieved by [an order passed under Section 42, Section 55] Section 56, a decision under Section 59 or a direction under the proviso of sub-section (7) of Section 48 may, within ninety days from the date of service of the copy of such order, decision or direction on him, prefer an appeal to the Tribunal.

Provided that where order passed by the appellate authority under Section 55 is an order in respect of demand of any security, not being security demanded for release of goods seized under any provisions of this Act, appeal under this section may be filed only after furnishing security, fixed by the appellate authority under section 55:

Provided further that where the disputed amount of tax, fee or penalty does not exceed two thousand rupees and no question of law is involved, the appellant may, at his option, request the Tribunal in writing for summary disposal of his appeal, whereupon the Tribunal may decide the appeal accordingly.

Explanation. *- For the purposes of this sub-section, the expression 'any person' in relation to any order passed by an authority other than the Commissioner includes the Commissioner and, in relation to any order passed by the Commissioner includes the State Government;*

(5) The manner and procedure of summary disposal of appeal shall be such as may be prescribed.

(6) Section 5 of the Limitation Act, 1963 shall apply to appeals or other applications under this section.

(7) The Tribunal may at any stage, after giving the appellant a reasonable opportunity of being heard, dismiss the appeal.

(8) The Tribunal may, if it has not already dismissed the appeal under sub-section (7), after calling for and examining the relevant records, and after giving the parties a reasonable opportunity of being heard or, as the case may be, after following the procedure prescribed under sub-section (5):

(a) confirm, cancel or vary such order, or

(b) set aside the order and direct the assessing or appellate or revising authority

or the Commissioner as the case may be, to pass a fresh order after such further enquiry, if any, as may be specified , or

(c) order such amount of tax, fee or penalty or other money as may have been realized in excess of the due amount to be refunded according to the provisions of this Act.

(9) Where an appeal under this section has been filed, the Tribunal may, on the application of the appellant moved along with the memorandum of such appeal after giving the parties a reasonable opportunity of being heard, stay the operation of the order appealed against or the recovery of the disputed amount of any tax, fee or penalty payable, or refund of the amount due, or proceeding for re-assessment under the order appealed against till the disposal of the appeal:

Provided that-

(i) where appellate authority under section 55 has set aside an order of assessment or penalty and has remanded the case to the assessing authority, for decision afresh, and the appellant under this section is a person other than the Commissioner or the State Government, for the purpose of this section, disputed amount of tax or penalty shall be deemed to be the same which had been before appellate authority under section 55; and

(ii) subject to the provision under sub clause (i) where order appealed against does not involve any dispute about quantum of tax, fee or penalty, on the application of the appellant the Tribunal may stay the operation of such order till the disposal of appeal subject to such conditions including a condition of furnishing of a security in cash within the time allowed;

Provided further that-

(a) no application for stay of recovery of any disputed amount of tax, fee or penalty shall be entertained unless the applicant has furnished satisfactory proof of the payment of not less than one third of such disputed amount in addition to the amount required to be deposited under sub-section (3) of Section 55.

(b) the Tribunal may, for special and adequate reasons to be recorded in writing, waive or relax the requirement of clause (a) regarding payment of the one-third of such disputed amount.

(10) Where the Tribunal passes an order under this section for the stay of recovery of any tax, fee or penalty or for the stay of the operation of any order appealed against and such order of the Tribunal results in the stay of recovery of any tax, fee or penalty, such stay order of the Tribunal shall not remain in force for more than thirty days unless the appellant furnishes adequate security to the satisfaction of the assessing authority concerned for the payment of the outstanding amount.

(11) The members of the Tribunal shall sit in such benches of one, two or more members, as may be constituted from time to time, and do such work of the Tribunal as may, subject to sub-section (12) and the rules framed under this Act, be allotted to them, by order or in accordance with the directions of the President of Tribunal.

(12) (a) An appeal against the order of appellate authority under Section 55 shall be heard and disposed of-

(i) [by a bench of two members, where in such order, not being an order passed on the application of the appellant for stay, the amount of tax, fee or penalty in dispute exceeds two lakh rupees or such amount not exceeding three lakh rupees as may be determined by the State Government from time to time.]

(ii) by a single member bench, in any other case.

[(b) An appeal against a direction given under the proviso to sub-section (7) of Section 48 shall be heard and disposed of by a bench of two members;

(c) an appeal against an order under Section 56 shall be heard and disposed of by a bench of two members.]

(d) An appeal against [an order passed by the Commissioner under section 42 or a decision given under section 59], shall be filed before the President and shall be heard and disposed of by a bench of three members.

(e) The President may, if he so thinks fit,-

(i) direct an appeal to be heard and decided by a larger bench;

(ii) transfer an appeal from one bench to another bench.

(f) In a case before a bench consisting of two or more members any order other than an order finally disposing of the case may be passed by any one of the members constituting the bench:

Provided that an appeal against an order passed on an application for stay, may be disposed of finally by a single member bench.

(13) All appeals arising out of the same cause of action in respect of an assessment year shall, as for as possible, be heard and decided together:

Provided that where anyone or more of such appeals have been heard and decided earlier, if the bench hearing the remaining appeals considers that such decision may be a legal impediment in giving relief in such remaining appeals, it may, if the earlier decision was given-

(a) by a smaller bench or a bench of equal strength, recall such earlier decision and proceed to decide all the appeals together;

(b) by a larger bench, refer such remaining appeals to such larger bench having jurisdiction and thereafter such larger bench may recall such earlier decision and proceed to decide all the appeals together.

(14) The place of sitting and procedure of, and the manner of presenting appeals and other documents to the Tribunal shall, subject to the rules framed under this Act, be such as the Tribunal may deem fit to adopt.

(15) The decision, of case heard by a bench, shall be in accordance with opinion of the majority. Where the members are equally divided the President of the Tribunal may,-

(a) if he was not a member of such bench, give his own opinion or refer the case for the opinion of another member, whereupon the case shall be decided in accordance with such opinions; or

(b) form a larger bench."

15. For the sake of convenience, the provisions Rule 63 of the Rules, 2008 are reproduced below:

"63. Disposal of appeal.- *(1) The appeal shall be heard on the date to be fixed by the appellate authority or the Tribunal, as the case may be.*

(2) The appellate authority or the Tribunal, as the case may be, shall cause a notice of the date fixed to be served well in time on parties to the appeal at the addresses mentioned in the memorandum of appeal, or on their lawyer or authorized agent.

(3) The notice for cases fixed for hearing in a week shall be fixed on the notice board of the appellate authority or the Tribunal, as the case may be, on the last working day of the preceding week.

(4) On the date of hearing, if all the relevant records of appeal have been received, the parties shall be given reasonable opportunity of being heard and the appellate authority or the Tribunal, as the case may be, may after examining all the relevant records, decide the appeal:

Provided that if, despite proper service of the notice either party is not present, the appeal may be heard and decided ex parte.

(5) The judgment in appeal shall be in writing and shall state -

(a) the points for determination,

(b) the decision thereon, and

(c) the reasons for such decision.

(6) Cross appeals arising out of the same case, admitted by the Tribunal shall, as far as possible, be heard and decided together.

(7) Copy of every order under Section 55 and Section 57 shall be delivered to, or served on the parties concerned free of charge. Copies of such order other than the first copy shall be given to the parties concerned on application and on furnishing copying folio of the value of twenty rupees.

(8) Any applicant or opposite-party shall be entitled to have his case argued before the appellate authority or the Tribunal by a lawyer or an accountant or a State Representative, as the case may be.

(9) The provisions of Rule 72 shall, mutis mutandis apply to service of notice, summons, order, etc. under this rule:

Provided that the service, on the State Representative, shall be deemed to be the service on the Commissioner."

16. For the sake of convenience, the provisions of Order 41 Rule 31 Code of Civil Procedure are reproduced below:

"31. Contents, date and signature of judgment.- The judgment of the Appellate Court shall be in writing and shall state-

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

17. From perusal of Section 57 of the Act, 2008 it emerges that the same pertains to Commercial Tax Tribunal. Section 57(5) of the Act 2008 provides that the manner and procedure of summary disposal of appeal shall be as may be prescribed. Section 57(8) of the Act, 2008 provides that the Tribunal after calling for and examining the relevant records and after giving the parties reasonable opportunity of being heard or as the case may be after following the procedure prescribed in Section 57(8)(a) of the Act, 2008 may confirm, cancel or vary such order or (b) set aside the order and direct the assessing or appellate or revising authority or the Commissioner to pass a fresh order or (c) order such amount of tax, fee etc realized in excess to be refunded.

18. Rule 63 of the Rules 2008 provides the procedure for disposal of appeal. Rule 63(5) of the Rules 2008 stipulates that the judgement in appeal shall be in writing and shall state (a) the points for determination, (b) the decision thereon and (c) the reasons for such decision.

19. Order 41 Rule 31 of the Code of Civil Procedure provides that the judgement of the appellate court shall be in writing and shall state (a) the points for determination, (b) the decision thereon, (c) the reasons for the decision and (d) whether

the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

20. From perusal of the aforesaid it is apparent that the provisions of Order 41 Rule 31 Code of Civil Procedure are akin to Rule 63(5) of the Rules 2008.

21. As already indicated above Section 57(8) of the Act, 2008 stipulates that the manner and procedure of summary disposal of appeal shall be such as may be prescribed and Rule 63 of the Rules, 2008 stipulates the manner and procedure of summary disposal of appeal.

22. Again, as per the Rule 63(5) of the Rules, 2008 the judgement in appeal has to state the points for determination, the decision thereon and the reasons for such decision which, as already indicated above, is akin to Order 41 Rule 31 Code of Civil Procedure.

23. The provisions of Order 41 Rule 31 Code of Civil Procedure have been held to be mandatory in the case of **Ved Ram (supra)** wherein this Court has held as under:

"6. The only point involved in the present appeal is whether substantial compliance has been made by the first appellate Court of Order 41, Rule 31 of the Code of Civil Procedure. Order 41, Rule 31, CPC states as under :

"31. Contents, date and signature of judgment. The judgment of the Appellate Court shall be in writing and shall state -

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellants is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

7. The provisions of Order 41, Rule 31 of the Code of Civil Procedure are mandatory. The first appellate Court while delivering the judgment is required to set out the points for determination, record the decision thereof and give its own reasons for the said decision. Looking at the plain language of the section, it is clear that failure to comply with this provision would not be a mere irregularity but would render the judgment nugatory. The first appellate Court being the last fact finding Court cannot run away from its onerous duties of recording the finding of fact and discussing the evidence and recording the findings of fact. In 1979 AWC 687 : (1979 All LJ (NOC) 110), Smt. Damyanti Devi v. Brindaban it was held-

"Where the judgment of the appellate Court is of reversal, the appellate Court should consider all the relevant and material evidence on record and thereafter give reasons for the said decision."

8. In Keluni Dei v. Kanhei Sahu, AIR 1972 Orissa 28, it was held -

"It is incumbent upon the final Court of fact, particularly in the case of reversing decision this is an instance of reversal as all the material findings were being reversed to meet the reasonings of the trial Court and indicate its own reasons for the conclusions to be reached."

9. In my view, the judgment of the first appellate Court cannot be said to be a judgment within the meaning of Order 41, Rule 31, CPC. The appellate Court has neither discussed the evidence or has given any reason for reversing the decision given by the trial Court on various issues. It was the duty of the appellate Court to discuss the entire evidence afresh, take notice of the

features which were noticed by the trial Court and then give its own independent reason. The lower appellate Court has failed to discharge its duties as a final Court of fact. The appellate Court has shirked its duties and has not discussed the evidence brought on record. On several occasions the appellate Court has only criticised the efforts made by the trial Court in issuing various commission in order to identify the land. The appellate Court instead of giving a finding of various issues framed by the trial Court has allowed the appeal on the ground that the plaintiff had failed to establish that the disputed land belonged to him. This finding given by the appellate Court, in my opinion, is based on no reason or evidence. The appellate Court has omitted to take stock of the entire material and failed to take a cumulative view from the material evidence on record."

24. From perusal of the judgement of this Court in the case of **Ved Ram (supra)** it emerges that this Court has held the provisions of Order 41 Rule 31 Code of Civil Procedure to be mandatory and that the first appellate court while delivering the judgement is required to set out the points for determination, record the decision thereon and give its own reason for the said decision.

25. This Court has further held that failure to comply with these provisions would not be a mere irregularity but would render the judgement nugatory.

26. Accordingly, when the impugned judgement of learned Tribunal is seen in the context of the law laid down by this Court in the case of **Ved Ram (supra)** vis a vis the provisions of Section 57(8) and Section 57(5) of the Act, 2008 read with Rule 63(5) of the Rules, 2008 it clearly emerges that learned Tribunal has patently erred in neither noting the points for determination nor giving the reason for such decision thereon. Even though certain reasons are indicated in the impugned judgement, as emerge from a perusal of the said judgement, yet without determining the points for determination and the reasons for such decision thereon, it cannot be said that the judgement of learned Tribunal complies with the provisions of Rule 63(5) of the Rules, 2008.

27. Keeping in view the aforesaid discussion, the revision is **allowed**. The order impugned dated 19.03.2008, a copy of which is annexure 1 to the revision, is set aside so far as it pertains to Second Appeal No. 68 of 2017 in re: **Sarvshri Sarvshri Rajansh Marble House vs Commissioner of Commercial Tax, Lucknow.**

28. The matter is remitted to learned Commercial Tax Tribunal, Lucknow, U.P. to pass a fresh decision in accordance with law complying with the provisions of Section 57 of the Act, 2008 and Rule 63 of the Rules, 2008.

29. Let such an order be passed in accordance with law within a period of three months from the date of receipt of certified copy of this order.

(2024) 1 ILRA 587
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 441 of 2021

Rakesh Kumar ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Yogendra Kumar Mishra, Ajey Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – Assistant Teacher in primary school – Appointment – Qualification – Petitioner possessed training qualification of B.P.Ed., not of B.Ed. – Entitlement – Held, order passed by the District Inspector of Schools, wherein it has been observed that the B.P.Ed., degree is not recognized for Primary Schools, is perfect. Consequently, no interference is required in the impugned order passed by the learned Single Judge wherein it has been observed that the petitioner lacks essential qualification as prescribed under the Statute for appointment as Assistant teacher in the attached school of the Institution inasmuch as B.P.Ed. Degree is not an alternate qualification prescribed for B.T.C. etc., he cannot claim to be qualified. (Para 24)

Special Appeal dismissed. (E-1)

List of cases cited:

1. Special Appeal No. 1247 of 2012; Amal Kishore Singh Vs St. of U.P. & ors. decided on 10.10.2018

(Delivered by Hon'ble Attau Rahman Masoodi, J.
&
Hon'ble Om Prakash Shukla, J.)

(1) Heard Sri Yogendra Kumar Mishra, learned Counsel for the appellant and Sri Anil Kumar Singh Visen, learned Standing Counsel for the State-respondents.

(2) The instant Special Appeal has been filed under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 assailing the order dated 04.10.2021 passed in *Writ Petition No. 1301 (SS) of 2017, Rakesh Kumar v. State of U.P. and others*, whereby the writ petition filed by the appellant-petitioner has been dismissed on the ground that since the appellant/petitioner lacks essential qualification as prescribed under the Statute for appointment as Assistant Teacher in the attached Primary School of the Institution inasmuch as B.P.Ed. degree is not an alternate qualification prescribed for B.T.C., he cannot claim to be qualified.

(3) Facts necessary for disposal of the appeal, which lies in narrow compass, need mention infra to appreciate the controversy involved in the appeal.

(4) Swami Vivekanand Inter College, Gonda (here-in-after referred to as 'the institution' for the sake of brevity) is a recognized and Government aided institution imparting education upto Intermediate classes. The institution is governed under the provisions of Intermediate Education Act, 1921 and Uttar Pradesh High Schools and Intermediate Colleges (Payment and Selection of Teachers and other Employees) Act, 1971.

(5) On 17.03.2010, the Committee of Management got published advertisements for appointment of Assistant Teachers in the daily newspapers 'Swatantra Bharat' and 'Trigut'. Subsequently, the Committee of Management appointed Rakesh Kumar (appellant/petitioner), Shailendra Kumar Singh and Ms. Poonam Devi and the relevant papers were sent by the Manager of the Committee of Management to the District Inspector of Schools for approval on 16.04.2010. However, the District Inspector of Schools vide his order dated 05.05.2010 disapproved the selection and appointments made on three posts of Assistant Teachers in the Primary Section

of the Institution by the Committee of Management.

(6) Aggrieved by the order of District Inspector of Schools dated 05.05.2010 disapproving the selection of three persons including the appellant/petitioner, Writ Petition No. 2981 (SS) of 2010, *Km. Poonam Devi and others v. State of U.P. and others* was filed before this Court. While disposing of the writ petition vide order dated 09.08.2010, the District Inspector of Schools, Gonda was directed to send the matter alongwith complete record to the State Government for its approval and liberty was granted to the State Government to examine the matter independently and take a decision either way for requisitioning the Committee of Management. The decision so taken within two months was directed to be communicated to the Committee of Management.

(7) Assailing the order dated 09.08.2010, Km. Poonam Devi and others filed Special Appeal No. 607 of 2010 before a Division Bench of this Court which was disposed of vide order dated 17.04.2012 modifying the order dated 09.08.2010 to the extent that the primary section concerned should not make appointment beyond the sanctioned strength available and, further that once sanction in respect of appointment has already been granted at any state in respect of vacancy, against the said vacancy no fresh sanction would be required to fill up the post. In case the appellants have been appointed against sanctioned posts, it would be inappropriate on the part of the authority to insist upon a seeking a fresh sanction.

(8) Thereafter, the District Inspector of School passed an order dated 17.07.2012 for payment of salary to the aforesaid three persons with the stipulation that if any adverse material pertaining to the appointment of these three persons would come to his notice, the order would be cancelled. To this effect, appointment authority and the concerned teacher would be responsible. When the three Teachers submitted their testimonials for making entries in the service books, it was found that the date of entry of Km. Poonam Devi was different, to which she was unable to give proper and satisfactory explanation. As stated above, relying on the order dated 17.07.2012, the Manager stopped the payment of salary to Km. Poonam Devi vide order dated 13.07.2013. When she preferred a representation before the District Inspector of Schools, he has ordered for conducting the inquiry into the selection and appointment of the appellant/petitioner and two others. For this purpose, the District Inspector of Schools appointed Principal, F.A.A. Government Inter College, Gonda vide his order dated 12.09.2013 who, in turn, has submitted his inquiry report on 12.11.2013 stating therein that the appellant/petitioner and other two persons were selected only on the basis of the marks secured in the interview and despite the persons having B.Ed. Degree available, two persons holding B.P.Ed., degree were selected. In these circumstances, it was held by the Inquiry Officer that stoppage of payment of salary to the appellant/petitioner and other persons would not be proper.

(9) Considering the report of the Inquiry Officer, the District Inspector of Schools had withheld the salary of the aforesaid three Teachers vide order dated 29.11.2013. Out of them, one Teacher Shailendra Kumar Singh had submitted a representation for reconsidering the matter, on which the then Finance and Accounts

Officer (Secondary Education), Gonda had directed to re-consider the matter vide his order dated 28.06.2014. Before completion of the proceedings, he was transferred. In the meantime, vide order dated 27.06.2014, the Committee of Management had decided to terminate the aforesaid three Teachers and forwarded the papers to the office of District Inspector of Schools. After giving an audience to all three Teachers, the District Inspector of Schools approved the decision taken by the Committee of Management vide his order dated 27.09.2014 and thereafter, the services of all three teachers were terminated vide order dated 20.10.2014 by the Committee of Management.

(10) Assailing the order passed by the District Inspector of Schools dated 27.09.2014, whereby the District Inspector of Schools had approved the decision taken by the Committee of Management terminating the services of three Teachers, the appellant-petitioner filed Writ Petition No. 6517 (SS) of 2014 on the ground of passing sketchy order passed by the District Inspector of Schools, wherein the Writ Court vide order dated 14.09.2016, while remanding the matter to the District Inspector of Schools for passing a fresh order, after giving an audience to the appellant-petitioner, allowed the writ petition filed by the appellant-petitioner with a direction that the appellant-petitioner shall continue on the post of Assistant Teacher and till a decision is taken by the District Inspector of Schools, the appellant-petitioner is entitled for salary as and when it would fall due.

(11) Pursuant to the order passed by the Writ Court, the appellant-petitioner preferred a representation dated 28.10.2016 annexing therewith a copy of order dated 14.09.2016 passed by the Writ Court. The District Inspector of Schools after hearing the appellant-petitioner, representative of the Committee of Management and Principal of the Institution, passed the impugned order dated 27.12.2016 rejecting the representation of the appellant/petitioner with the stipulation that the appellant possesses the degree of B.P.Ed., which is not recognized.

(12) In the aforesaid backdrop, the appellant-petitioner has filed Writ Petition No. 1301 (SS) of 2017 which was dismissed vide impugned judgment and order dated 04.10.2021 on the grounds enumerated in para – 2 of the order.

(13) The contention of the learned Counsel for the appellant-petitioner is that the qualification prescribed for the Assistant Teacher is 'trained graduate' as mentioned in the advertisement dated 17.03.2010. Since the appellant- petitioner is B.P.Ed., the order passed by the District Inspector of Schools rejecting the representation of the appellant-petitioner is patently illegal.

(14) He next contended that the training qualification B.P.Ed., is equivalent to B.Ed., L.T./C.T. and therefore, he ought not to have been terminated by the authorities concerned and in support of this contention, he has relied upon the Full Bench judgment of this Court dated 10.10.2018 rendered in ***Special Appeal No. 1247 of 2012, Amal Kishore Singh vs. State of U.P. and others***.

(15) His further submission is that the learned Single Judge has also not considered aforesaid facts and dismissed the petition filed by the appellant-petitioner. Hence, the Special Appeal filed

by the appellant-petitioner is liable to be allowed and the impugned order is liable to be set aside.

(16) On the other hand, learned Standing Counsel appearing for the opposite parties submits that the essential qualification required for the Assistant Teachers in Primary School is graduation with C.T./B.T.C./H.T.C. or equivalent qualification and if the candidates having the aforesaid qualification are not available, persons with B.Ed., degree would be appointed. Since the qualification acquired by the appellant-petitioner is B.P.Ed., and it is not a recognized qualification for appointment to the post of Assistant Teacher in the Primary Section of Intermediate Colleges, the order passed by the learned Single Judge whereby the writ petition filed by the appellant-petitioner has been dismissed is perfectly legal and no need to interfere in the impugned order.

(17) Considered the submissions made by the learned Counsel for the parties and perused the record available on record with the Special Appeal.

(18) Admittedly, pursuant to the advertisements for appointment of Assistant Teachers in the daily newspapers 'Swatantra Bharat' and 'Trigut' dated 17.03.2010, Rakesh Kumar (appellant/ petitioner), Shailendra Kumar Singh and Ms. Poonam Devi had applied and selected for the post of Assistant Teacher. The qualification mentioned in the advertisement is 'trained graduate' (Annexure No.19) and the appellant being a trained graduate applied for the post of Assistant Teacher in Primary School having the qualification of graduation with B.P.Ed., training and after considering the qualification of B.P.Ed. training, the appellant had been appointed on 13.04.2010 (Annexure No.20). On conclusion of selection proceedings, the papers were sent to the District Inspector of Schools on 16.04.2010 for approval, who in turn has refused to grant the approval. The disapproval of the District Inspector of Schools dated 05.05.2010 was assailed before Writ Court in Writ Petition No. 2981 (SS) of 2010 which was disposed of vide order dated 09.08.2010

(19) Thereafter, when the aforesaid order was assailed in Special Appeal No. 607 of 2010, the order passed by the Writ Court was modified with certain stipulations. Truly it is stated that the orders passed by the Writ Court as also passed by the superior Court were complied with. However, when the salary to Km. Poonam Devi vide order dated 13.07.2013 was stopped, she preferred a representation before the District Inspector of Schools, who in turn has ordered for conducting the inquiry into the selection and appointment of the appellant/petitioner and two others.

(20) In the inquiry report submitted by the Inquiry Officer, it is revealed that though the candidates acquiring the qualification of B.Ed., are available, yet two persons who are having the qualification of B.P.Ed., have been recommended for appointment on the post of Assistant Teacher in the Primary School.

(21) Since much emphasis has been laid by the appellant-petitioner that the B.P.Ed., qualification is equivalent to B.Ed., and in support of this, he has relied upon paragraphs 45, 46 and 47 of judgment of Full Bench in ***Amal Kishore Singh (supra),*** it is necessary to have a look into the aforesaid paragraphs which are reproduced hereunder for ready reference:-

"45. We now proceed to examine the stand of the State Government in respect of the controversy in hand. In this regard we would allude to an affidavit filed by Principal Secretary, Secondary Education, U.P. Lucknow dated 18th May, 2017 wherein the State Government has also accepted the position that B.P.Ed. qualification is equivalent to other teaching qualifications enumerated in Paragraph 2 of Appendix-A and it reads thus:-

"8. That in Appendix in reference of Regulation-1 Chapter-II of U.P. Intermediate Education Act, does not refer specifically the B.P.Ed. Course. After the Regulation 2001 came into force. It has been adopted by the State as equivalent to 'trained' for which a necessary amendment is required to be incorporated I the Schedule. As a principal, the B.P.Ed. Degree is treated to be equivalent to a 'trained' as referred in para-2 of Appendix-A.

9. That in view of the above, the B.P.Ed. Course is equivalent to that of B.Ed., L.T., B.T./C.T. It is further clarified that the necessary amendment is to be incorporated in the schedule."

46. In view of the foregoing discussion and having regard to the stand of the State Government on the issue, we are unable to subscribe to the view taken by Division Bench in Vindhyachal Yadav that B.P.Ed. could not be equated with other teaching qualifications prescribed under Appendix-A of Regulation 1 of Chapter-II of the regulations framed under the U.P. Intermediate Education Act, 1921 and accordingly, we overrule the same as well as all other judgements of this Court taking a contrary view.

47. We, thus, answer question (i) in affirmative and question (iii) by holding that Vindhyachal Yadav does not lay down the correct law. However, question (ii) has to be answered, subject to certain riders. A B.P.Ed. degree being a post graduate training qualification, would entitle a person to hold post of Headmaster of a recognised High School but not that of Principal of an Intermediate college. The reason is that under Regulations, 2001 as well as under Minimum Qualification Regulations, 2014 framed by NCTE, B.P.Ed. is recognised as eligibility qualification for teaching Classes IX - X (Secondary/ High School) but not for Classes XI - XII (Senior Secondary/ Intermediate). For teaching Intermediate classes, the person should possess M.P.Ed. degree of at least two years duration from any National Council for Teacher Education recognised institution. These regulations do not prescribe any separate qualification for Head of institution and thus the qualification prescribed for a teacher of Intermediate classes (Senior-Secondary) would also apply to Head of such an institution. We have already held above that the qualifications prescribed by NCTE would be binding on the State, therefore, the qualifications prescribed by Minimum Qualification Regulations, 2014 have to be read alongwith Appendix-A and thus, a teacher possessing B.P.Ed. degree, would not be eligible to hold post of Principal of an Intermediate College."

(22) A perusal of the aforesaid paragraphs indicates that a teacher possessing B.P.Ed., degree is eligible to be appointed as Headmaster of a High School, but not as Principal of an Intermediate College.

(23) Admittedly, the appellant-petitioner is having the qualification of B.P.Ed., and has applied for Assistant Teacher in Primary School and as per verdict of the Full Bench of this Court, as

mentioned above, it is not applicable in the case of the appellant-petitioner.

(24) Relying upon the judgment of Full Bench of **Amal Kishore Singh (supra)**, the order passed by the District Inspector of Schools, wherein it has been observed that the B.P.Ed., degree is not recognized for Primary Schools, is perfect. Consequently, no interference is required in the impugned order passed by the learned Single Judge wherein it has been observed that the petitioner lacks essential qualification as prescribed under the Statute for appointment as Assistant teacher in the attached school of the Institution inasmuch as B.P.Ed. Degree is not an alternate qualification prescribed for B.T.C. etc., he cannot claim to be qualified.

(25) For all the reasons stated above, the Special Appeal, being bereft of any merit, is **dismissed**.

(26) There shall be no order as to costs.

(2024) 1 ILRA 593
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2021

BEFORE

THE HON'BLE RAJESH BINDAL, C.J.
THE HON'BLE PIYUSH AGRAWAL, J.

Special Appeal Defective No. 647 of 2021

Shimla Devi ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Lal Chandra Srivastava

Counsel for the Respondents:
Sri Ankit Gaur (State Law Officer)

A. Service law – Constitution of India – Article 226 – Writ – Limitation – Maintainability – Direction to decide 5 years belated appeal filed against dismissal order sought for – Charge of unauthorized absence of over 678 days – Writ court was approached after 25 years – Submission of representation, how far alive the stale claim – *Shiv Charan Singh Bhandari's case* relied upon – Held, even if there is no period prescribed for filing the writ petition under Article 226, yet it should be filed within a reasonable time – The doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same – The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not – Even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. (Para 6 and 8)

Special Appeal dismissed. (E-1)

List of cases cited:

1. St. of Uttaranchal & anr. Vs Sri Shiv Charan Singh Bhandari & ors.; 2013 (6) SLR 629

2. U.O.I.& ors. Vs Chaman Rana; 2018(5) SCC 798

3. U.O.I.& ors. Vs C. Girija & ors.; 2019 (3) SCALE 527

4. Chennai Metropolitan Water Supply and Sewerage Board & ors. Vs T. T. Murali Babu; 2014 (4) SCC 108

5. Bal Krishan Vs St. of Pun. & ors.; 2013(2) RSJ 18, (P&H)

6. U.O.I.& ors. Vs M.K. Sarkar; 2010(2) SCC 59

7. Vijay Kumar Kaul & ors. Vs U.O.I.& ors.; 2012 (7) SCC 610

8. Prabhakar Vs Joint Director Sericulture Department & anr.; (2015) 15 SCC 1

9. St. of Jammu & Kashmir Vs R. K. Zalpuri & ors.; 2015 (15) SCC 602

10. U.O.I.& ors. Vs Chaman Rana; (2018(5) SCC 798

11. Senior Divisional Manager, Life Insurance Corp. Vs Shree Lal Meena; (2019)4 SCC 479

12. Civil Appeal No. 1009 of 2020; Bharat Coking Coal Ltd. & ors. Vs Shyam Kishore Singh decided on 5.2.2020

13. LPASW No. 192 of 2017; St. of J&K & ors. Vs S. Bhupinder Singh decided on 30.12.2017

14. LPA No.210 of 2019; Farooq Ahmad Vs St. of J&K & ors. decided on 21.8.2019

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

1. The present intra-court appeal has been filed against the order dated July 7, 2021 passed by the learned Single Judge whereby the writ petition filed by the appellant was dismissed. The appellant had approached this Court by filing the writ petition seeking a direction to the respondents to consider and decide the appeal dated December 30, 1995 filed by her late husband, who was dismissed from service. The writ petition was dismissed on account of delay and laches.

2. The learned counsel for the appellant submitted that appellant is an illiterate lady. Late husband of the appellant was dismissed from service illegally merely on account of unauthorised absence. The family is practically starving. The only prayer made before the learned Single Judge was for disposal of statutory appeal filed by her late husband. The prayer being innocuous, interference of this Court was required as the appellate authority had failed to discharge its duty.

3. After hearing the learned counsel for the appellant, we do not find any error in the order passed by the learned Single Judge. A perusal of the impugned order passed by the learned Single Judge shows that the late husband of the appellant was dismissed from service on account of his unauthorised absence of over 678 days, vide order dated December 21, 1990. The appeal was stated to have been filed against the order of dismissal more than 5 years thereafter on December 30, 1995 in case the same was filed at that time. There is nothing on record to show that the appeal was ever pursued by the late husband of the appellant till such time he was alive. The case of the appellant is that her husband died in the year 1999. It is also apparent from the record that the representation dated December 05, 1999 was filed by the appellant to the then Chief Minister of the State which was followed by another representation dated August 08, 2018. The aforesaid facts also, even if taken on their face value, show that late husband of the appellant and the appellant herself were moving at their own sweet will and not pursuing the remedy available to them at the relevant time. Firstly, there was huge delay in filing of appeal in case it was filed and secondly keeping mum for a period of about 25 years before this Court was approached.

4. The learned Single Judge has dismissed the writ petition on account of delay and laches.

5. Different facets of issue regarding delay and laches in filing the petition had been subject matter of consideration before Hon'ble the Supreme Court on number of occasions, wherein it has been consistently opined that the party can be denied relief if he sleeps over the matter.

6. In **State of Uttaranchal and another v. Sri Shiv Charan Singh Bhandari and others**[1], Hon'ble the Supreme Court, while considering the issue regarding delay and laches and referring to earlier judgments on the issue, opined that repeated representations made will not keep the issues alive. A stale or a dead issue/dispute cannot be got revived even if such a representation has either been decided by the authority or got decided by getting a direction from the court as the issue regarding delay and laches is to be decided with reference to original cause of action and not with reference to any such order passed. Delay and laches on the part of a government servant may even deprive him of the benefit which had been given to others. Article 14 of the Constitution of India, in a situation of that nature, will not be attracted as it is well known that law leans in favour of those who are alert and vigilant. Even equality has to be claimed at the right juncture and not on expiry of reasonable time. Even if there is no period prescribed for filing the writ petition under Article 226 of the Constitution of India, yet it should be filed within a reasonable time. Such an order promoting a junior should normally be challenged within a period of six months or at the most in a year of such promotion. Though it is not a strict rule, the courts can always interfere even subsequent thereto, but relief to a person, who allows things to happen and then approach the court and puts forward a stale claim and try to unsettle settled matters, can certainly be refused relief on account of delay and laches. Anyone who sleeps over his rights is bound to suffer. An employee who sleeps like Rip Van Winkle and got up from slumber at his own leisure, deserves to be denied the relief on account of delay and laches. Relevant paragraphs from the aforesaid judgment are extracted below:-

"13. We have no trace of doubt that the respondents could have challenged the ad hoc promotion conferred on the junior employee at the relevant time. They chose not to do so for six years and the junior employee held the promotional post for six years till regular promotion took place. The submission of the learned counsel for the respondents is that they had given representations at the relevant time but the same fell in deaf ears. It is interesting to note that when the regular selection took place, they accepted the position solely because the seniority was maintained and, thereafter, they knocked at the doors of the tribunal only in 2003. It is clear as noon day that the cause of action had arisen for assailing the order when the junior employee was promoted on ad hoc basis on 15.11.1983. In C. Jacob v. Director of Geology and Mining and another, (2008) 10 SCC 115, a two-Judge Bench was dealing with the concept of representations and the directions issued by the court or tribunal to consider the representations and the challenge to the said rejection thereafter. In that context, the court has expressed thus:-

"Every representation to the Government for relief, may not be replied on merits.

Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim. In regard to representations

unrelated to the Department, thereply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim."

14. In Union of India and others v. M. K. Sarkar, (2010) 2 SCC 59, this Court, after referring to C. Jacob (supra) has ruled that when a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time- barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a Court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.

15. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time. In Karnataka Power Corpn. Ltd. through its Chairman & Managing Director v. K. Thangappan and another, (2006) 4 SCC 322, the Court took note of the factual position and laid down that when nearly for two decades the respondent-workmen therein had remained silentmere making of representations could not justify a belated approach.

16. In State of Orissa v. Pyarimohan Samantaray, (1977) 3 SCC 396, it has been opined that making of repeated representations is not a satisfactory explanation of delay. The said principle was reiterated in State of Orissa v. Arun Kumar Patnaik, (1976) 3 SCC 579.

17. In Bharat Sanchar Nigam Limited v. Ghanshyam Dass(2) and others, (2011) 4 SCC 374, a three-Judge Bench of this Court reiterated the principle stated inJagdish Lal v. State of Haryana, (1977) 6 SCC 538 and proceeded to observe that as the respondents therein preferred to sleep over their rights and approached the tribunal in 1997, they would not get the benefit of the order dated 7.7.1992.

18. In State of T. N. v. Seshachalam, (2007) 10 SCC 137, this Court, testing the equality clause on the bedrock of delay and laches pertaining to grant of service benefit, has ruled thus:-

"... filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration. Delay and/or laches on the part of a government servant may deprive him of the benefit which had been given to others.Article 14of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant."

19. There can be no cavil over the fact that the claim of promotion is based on the concept of equality and equitability, but the said relief has to be claimed within a reasonable time. The said principle has been stated inGhulam Rasool Lone v.State

of Jammu and Kashmir and another, (2009) 15 SCC 321.

20. In New Delhi Municipal Council v. Pan Singh and others, (2007) 9 SCC 278, the Court has opined that though there is no period of limitation provided for filing a writ petition underArticle 226of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as stated earlier, took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.

21. Presently, sitting in a time machine, we may refer to a two Judge Bench decision inP. S. Sadasivasway v. State of Tamil Nadu, (1975) 1 SCC 152, wherein it has been laid down that a person aggrieved by an order of promoting a junior over his head should approach the court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers underArticle 226nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time, but it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers underArticle 226in the case of persons who do not approach it expeditiously for the relief and who stand by and allow things to happen and then approach the court to put forward stale claims and try to unsettle settled matters.

22. We are absolutely conscious that in the case at hand the seniority has not been disturbed in the promotional cadre and no promotions may be unsettled. There may not be unsettlement of the settled position but, a pregnant one, the respondents chose to sleep like Rip Van Winkle and got up from their slumber at their own leisure, for some reason which is fathomable to them only. But such fathoming of reasons by oneself is not countenanced in law. Anyone whosleeps over his right is bound to suffer. As we perceive neither the tribunal nor the High Court has appreciated these aspects in proper perspective and proceeded on the base that a junior was promoted and, therefore, the seniors cannot be denied the promotion. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the tribunal and accepted by the High Court. True it is, notional promotional benefits have been granted but the same is likely to affect the State exchequer regard being had to the fixation of pay and the pension. These aspects have not been taken into consideration. What is urged before us by the learned counsel for the respondents is that they should have been equally treated with Madhav Singh Tadagi. But equality has to be claimed at the right juncture and not after expiry of two decades. Not for nothing, it has been said that everything may stop but not the time, for all are in a way slaves of time. There may not be any provision providing for limitation but a grievance relating to promotion cannot be given a new lease of life at any point of time."

7. The aforesaid view was followed by Hon'ble the Supreme Court in **Union of India and others vs Chaman Rana**[2] and

Union of India and others vs. C. Girija and others[3].

8. In Chennai Metropolitan Water Supply and Sewerage Board and others v. T. T. Murali Babu4, Hon'ble the Supreme Court opined as under:-

"13. First, we shall deal with the facet of delay.In Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and others, AIR 1969 SC 329, the Court referred to the principle that has been stated by Sir Barnes Peacock in Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewall, and John Kemp, (1874) 5 PC 221, which is as follows:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

14. In State of Mahrashtra v. Digambar, (1995) 4 SCC 683, while dealing with exercise of power of the High Court underArticle 226of the Constitution, the Court observed that power of the High Court to be exercised underArticle 226of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It isfor that reason, a person's entitlement for relief from a High Court underArticle 226of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct.

15. In State of M. P. and others etc. etc. vs. Nandlal Jaiswal and others etc. etc., AIR 1987 SC 251, the Court observed that it is well settled that power of the High Court to issue an appropriate writ underArticle 226of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. It has been further stated therein that if there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed

aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained ornot. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant "a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons- who compete with `Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."

9. In **Bal Krishan vs. State of Punjab and others**[5], wherein the petitioner, after rendering about 34 years of service, sought refixation of his pay from the date he joined service by filing a petition more than three years after his retirement, the court dismissed the writ petition on account of delay and laches only.

10. The issue regarding decision of a claim on a direction by the Court on the representation filed by a writ petitioner was also considered in**Union of India and others vs. M.K. Sarkar**[6], wherein it was held that the issue of limitation or delay and laches is to be considered with reference to original cause of action and not with reference to an order passed in compliance to Court's direction. The Court's direction to consider representation or a decision given in compliance thereof, will not extend the limitation or erase the delay and laches.

11. In **Vijay Kumar Kaul and others vs. Union of India and others**[7], Hon'ble the Supreme Court declined relief to the petitioners who were fence sitters as they had approached the Court after the issues raised by other employees were decided. Relief was declined on account of delay and laches.

12. The issue was further examined in P**rabhakar vs. Joint Director Sericulture Department and another**[8]. It was a case under the Industrial Disputes Act. In the aforesaid case the matter in dispute was regarding delay in raising the industrial dispute. The opinion expressed by the Court was that right not exercised for a long time is non-existent even if there is no limitation period prescribed. The litigant was non-suited on the doctrine of delay and laches as well as doctrine of acquiescence. Paragraph 38 of the judgment is extracted below:-

"38. Likewise, if a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case party who didnot make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong."

13. The Halsbury's Laws of England explains delay, latches and acquiescence as under:

"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."

14. In **State of Jammu & Kashmir vs. R. K. Zalpuri and others**[9], Hon'ble the Supreme Court considered the issue regarding delay and laches in raising the dispute before the Court. It was opined that the issue sought to be raised by the petitioners therein was not required to be addressed on merits on account of delay and laches. The relevant paras thereof are extracted below:-

"27. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already visited his claim like the chill of death which does not spare anyone even the one who fosters the idea and nurtures the attitude that he can sleep to avoid death and eventually proclaim "Deo gratias - thanks to God".

28. Another aspect needs to be stated. A writ court while deciding a writ petition is required to remain alive to the nature of the claim and the unexplained delay on the part of the writ petitioner. Stale claims are not to be adjudicated unless non-interference would cause grave injustice. The present case, need less to emphasise, did not justify adjudication. It deserves to be thrown overboard at the very threshold, for the writ petitioner had accepted the order of dismissal for half a decade and cultivated the feeling that he could freeze time and forever remain in the realm of constant present."

15. The aforesaid view was followed by Hon'ble the Supreme Court in **Union of India and others v. Chaman Rana**[10].

16. Subsequently, a Constitution Benchy of Hon'ble the Supreme Court in **Senior Divisional Manager, Life Insurance Corporation v. Shree Lal Meena**[11], considering the principle of delay and laches, opined as under:-

"36. We may also find that the appellant remained silent for years together and that this Court, taking a particular view subsequently, in Sheel Kumar Jain v. New India Assurance Company Limited, (2011)12 SCC 197 would not entitle stale claims to be raised on this behalf, like that of the appellant. In fact the appellant slept over the matter for almost a little over two years even after the pronouncemtn of the judgment.

37. Thus, the endeavour of the appellant, to approach this Copurt seeking the relief, as prayed for, is clearly a misadventure, which is liable to be rejected, and the appeal is dismissed."

17. Recently, in **Bharat Coking Coal Ltd. And othyers v. Shyam Kishore Singh**[12], the issue regarding the delay and laches, was considered by Hon'ble the Supreme Court and a petition filed belatedly, seeking change in the date of birth in the service record, was dismissed.

18. Reference can also be made to the Division Bench judgments of the **Jammu and Kashmir High Court in State of J&K and others v. S. Bhupinder Singh**[13] and in **Farooq Ahmad v. State of J&K and others**[14].

19. Keeping in view the authoritative enunciation of law, as referred to above, the present Special Appeal challenging the judgment and order passed by the learned Single Judge dated July 07, 2021 whereby the writ petition seeking a direction to the respondents to consider and decide the appeal dated December 30, 1995 filed by her late husband, who was dismissed from service way back in the year 1990, was dismissed on the ground of delay and laches, deserves to be dismissed.

20. Ordered accordingly.

(2024) 1 ILRA 601
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2024

BEFORE

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

Writ-A No. 7342 of 2022

Ravi Shankar Dwivedi ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohd. Samiuzzaman Khan, Sonamati Kumari

Counsel for the Respondents:
A.S.G.I., Sri Sanjai Singh,Sri Jayesh Pathak

A. Service Law – Disciplinary Proceedings – Principles of Natural Justice – Requirement of Oral Evidence – Petitioner, a bank employee, charged with embezzlement of funds from two customers' accounts – Inquiry Officer held charge proved based solely on documentary evidence without examining any witnesses – Disciplinary Authority imposed compulsory retirement – Held, in disciplinary proceedings involving major penalties, the department must prove charges through oral evidence by examining relevant witnesses, particularly the complainants, to establish unauthorized transactions – Failure to examine witnesses, especially account holders alleging forged signatures, constitutes a fundamental

procedural lapse vitiating the inquiry – Inquiry Officer's findings based on unproven documents and absence of oral evidence deemed perverse. (Paras 15, 16, 17)

B. Service Law – Disciplinary Proceedings – Role of Inquiry Officer – Quasi-Judicial Function – Inquiry Officer must act as an independent and impartial adjudicator, not as a representative of the department – Charges cannot be deemed proved automatically due to non-participation of the delinquent or absence of a reply – Department bears the initial burden to prove charges through oral and documentary evidence – Failure to adduce oral evidence in a case warranting major penalty violates principles of natural justice. (Paras 16, 17, 21)

C. Service Law – Appellate Authority – Duty to Address Grounds of Appeal – Petitioner challenged Disciplinary Authority's claim of guilt admission and lack of oral evidence in appeal – Appellate Authority failed to address these grounds – Held, non-consideration of material contentions, including the absence of witnesses and disputed confession, renders the appellate order unsustainable. (Para 20)

D. Writ Jurisdiction – Alternative Remedy – Pure Question of Law – Respondent-Bank argued petitioner, as award staff, should seek remedy under Industrial Disputes Act, 1947 – Held, where a pure question of law arises, such as procedural fairness in disciplinary proceedings, writ jurisdiction can be exercised despite alternative remedies – Plea of alternative remedy rejected as petition was already admitted and involved legal issues. (Paras 11, 12, 13)

Writ Petition Allowed in Part – Impugned Orders Quashed – Matter Remanded for Fresh Inquiry.

<u>List of Cases cited:</u>

1. A.P. Foods Vs S. Samuel & ors., (2006) 5 SCC 469

2. Dr. Bal Krishna Agarwal Vs St. of U.P. & ors., (1995) 1 SCC 614

3. Godrej Sara Lee Ltd. Vs Excise and Taxation Officer-cum-Assessing Authority & ors., (2023) 3 SCC 157

4. St. of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

5. St. of U.P. & anr.Vs Kishori Lal & anr., 2010 (2) AWC 1628

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

7. St. of U.P. & anr. Vs T.P. Lal Srivastava, 1997 (1) LLJ 831

8. Subhash Chandra Sharma Vs Managing Director & anr., 2000 (1) UPLBEC 541

9. Subhash Chandra Gupta Vs St. of U.P., 2012 (4) ADJ 4 (NOC)

10. Salahuddin Ansari Vs St. of U.P. & ors., 2008 (3) ESC 1667

11. Imperial Tobacco Co. Ltd. Vs Its Workmen, AIR 1962 SC 1348

12. Uma Shankar Vs Registrar, 1992 (65) FLR 674 (All)

13. Mahesh Narain Gupta Vs St. of U.P. & ors., (2011) 2 ILR 570

14. Vinod Kumar Vs St. of U.P. & ors., unreported (Allahabad High Court)

15. Jai Prakash Vs Gen. Manager, Zonal Office & ors., unreported (Allahabad High Court)

16. Ramesh Chandra Vs Punjab National Bank & ors., unreported (Allahabad High Court)

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

The petitioner, Ravi Shanker Dwivedi, was a Single Window Operator-A, a member of the clerical staff employed with the Punjab National Bank, Gorakhpur. He was posted at the Urdu Bazar Branch of the Punjab National Bank, Gorakhpur. He was

suspended pending inquiry into the allegations of embezzlement of funds relating to two customers, to wit, Munni Devi, who was the holder of Account No. 0184000100257189 and Om Prakash Verma, holder of Account No. 0184000100200844. A charge-sheet was issued to the petitioner, carrying a solitary charge, that reads to the following effect :

CHARGE : 1- At BO : Urdu Bazar two customers Smt. Munni Devi A/c No. 0184000 100257189 and Shri Om Prakash Verma A/c No. 0184000100200844 complained of unauthorised debts in their SF accounts it was revealed that you have committed unauthorised transactions/ withdrawals in the SF accounts of these two customers on different dates and embezzlement amount of Rs. 3.65 lacs as under thereby jeopardizing the interest of the bank.

Account No. 0184000100257189 of Smt. Munni Devi :

Sr. No.	Date	Amount	Transaction Id	User Id
1.	15.01.2019	20000	M863401	301223 RSD
2.	19.01.2019	20000	M627356	301223 RSD
3.	21.01.2019	20000	M785502	301223 RSD
4.	28.01.2019	20000	M848282	301223 RSD
5.	02.02.2019	20000	M683629	301223 RSD
6.	06.02.2019	10000	M652561	301223 RSD
7.	12.02.2019	20000	M715059	301223 RSD
8.	16.02.2019	20000	M447804	301223 RSD
	Total	150000		

Account No. 0184000100200844 of Shri Om Prakash Verma:

Sr. No.	Date	Amount	Transaction Id	User Id
1.	02.02.2019	20000	M160010	301223R SD
2.	02.02.2019	20000	M680609	301223R SD
3.	04.02.2019	20000	M823578	301223R SD
4.	04.02.2019	20000	M1014365	301223R SD
5.	06.02.2019	20000	M617645	301223R SD
6.	11.02.2019	20000	M980932	301223R SD
7.	12.02.2019	20000	M321542	301223R SD
8.	12.02.2019	20000	M869709	301223R SD
9.	16.02.2019	20000	M116541	301223R SD
10.	16.02.2019	20000	M533862	301223R SD
11.	16.02.2019	15000	M689347	301223R SD
	Total	215000		

The matter has been reported as Fraud to RBI.

Due to your above acts, Bank's interest & reputation has been jeopardised.

The aforesaid acts of yours are prejudicial to the interest of bank and constiture Gross Misconduct as per clause (j) of Paragraph 5 of Bipartite Settlement dated 10/04/2002 as amended from time to time.

2. A reply to the charge-sheet was submitted by the petitioner on 14.02.2021,

denying the charge and pleading his detailed defence. The Inquiry Officer submitted his report dated 10.05.2021, holding the charge proved. The petitioner was served with a show-cause notice dated 01.06.2021 by the Deputy General Manager, Punjab National Bank, Circle Office, Gorakhpur, acting as the Disciplinary Authority. The show-cause notice is detailed and after referring to the solitary charge and the gist of findings, the Inquiry Officer proposed to impose upon the petitioner the penalty of compulsory retirement with superannuation benefits i.e. pension and/or Provident Fund and Gratuity, without disqualification from future employment.

3. In answer to the show-cause notice, the petitioner showed cause by his reply dated 09.06.2021. The Disciplinary Authority, by an order passed on the same day i.e. 09.06.2021, proceeded to punish the petitioner with compulsory retirement, granting superannuation benefits with no disqualification from future employment.

4. Aggrieved by the order passed by the Disciplinary Authority, the petitioner preferred an appeal to the Appellate Authority, the General Manager/Zonal Manager, Punjab National Bank, Zonal Office, Lucknow vide his appeal dated 06.07.2021. The Appellate Authority, by his order dated 30.12.2021, dismissed the appeal, affirming the Disciplinary Authority.

5. Disillusioned by the infliction of penalty, the petitioner has preferred this writ petition under Article 226 of the Constitution.

6. Heard Mr. Mohd. Samiuzzaman Khan, learned Counsel for the petitioner and Mr. Jayesh Pathak, Advocate holding brief of Mr. Sanjai Singh, learned Counsel appearing on behalf of the respondent-Bank.

7. The thrust of Mr. Khan's submissions is that the impugned orders have been passed on the foot of an inquiry report, where the Establishment did not prove the charge against the petitioner in the manner imperative in a case involving the infliction of major penalty. Elaborating his submission, it is pointed by Mr. Khan that during the inquiry, though there was a Presenting Officer and a Defence Representative to represent the petitioner, the Establishment did not produce a single witness in support of the solitary charge. All that was produced was documentary evidence, with no witness to prove those documents on behalf of the Establishment. Learned Counsel for the petitioner emphasizes that the charge here was about embezzlement of a sum of ₹1,50,000 from the account of Munni Devi and a sum of ₹2,15,000 from the account of Om Prakash Verma. The charge was based on a complaint made by these customers that there were illegal withdrawals from their bank account. The respondent-Bank have held the charge proved by saying that the withdrawals were made through withdrawal forms, where the signatures on the withdrawal forms did not match with the specimen. It was, therefore, imperative for the Bank, in a case like the present one, to examine the two complainants as witnesses before the charge could be proved against the petitioner.

8. It is next submitted that there is some kind of a confession by the petitioner, going by the fact that the sum of money allegedly embezzled was got credited to the two aggrieved account holders' account by

the petitioner's mother, paying it out of her own bank account. The submission is that while payment of the embezzled money to the complainant(s) made in certain circumstances may be understood as admission, it is equally true that considering the sum of money involved, a delinquent or a relative acting on his behalf might think that it would serve as a reprieve from the consequences of a wrong never done, which, otherwise, might bring severe punishment for no good reason. It is particularly argued by the learned Counsel for the petitioner that the remark in the Disciplinary Authority's order to the effect that the petitioner, in the personal hearing before him, had accepted his guilt/charge, is absolutely incorrect and was specifically challenged by the petitioner through a ground raised in the memorandum of appeal to the Appellate Authority. It is pointed out that the Appellate Authority, in the order impugned, has not at all considered the said ground or other relevant grounds, including the one that no witness was examined on behalf of the Establishment before the Inquiry Officer to prove the charges. It is urged that conclusions drawn by the Authorities are perverse, based on irrelevant evidence, apart from the fact that in proceedings before the Inquiry Officer, the charge has not been proved by examining witnesses, imperative in a case where a major penalty is likely to be imposed upon the delinquent.

9. Mr. Jayesh Pathak, Advocate holding brief of Mr. Sanjai Singh, learned Counsel for the Bank, on the other hand, has supported the impugned orders. He has emphasized that the Disciplinary Authority has awarded the punishment of compulsory retirement, after considering the entire evidence on record and it is not for this Court to sit in appeal over the Disciplinary Authority's wisdom, or that of the Appellate Authority. It is particularly emphasized that what can be challenged before this Court is the decision-making process and not the correctness of the decision. Learned Counsel has placed reliance upon the decision of the Supreme Court in **A.P. Foods v. S. Samuel and others**[1] to submit that the petitioner, being a member of the award staff, this Court ought not to entertain his writ petition and relegate him instead, to his alternative remedy under the Industrial Disputes Act, 1947[2]. He has drawn the attention of this Court to an unreported decision of our Court in **Ramesh Chandra v. Punjab National Bank and others**[3], where the petitioner, who had challenged his order of dismissal from service after departmental proceedings, was relegated to the forum constituted under the Act of 1947, following the decision of the Supreme Court in A.P. Foods (supra).

10. Further reliance has been placed by the learned Counsel for the Bank upon the Bench decision of this Court in **Jai Prakash v. Gen. Manager, Zonal Office and others**[4] to submit that the scope of judicial review is very limited, and, as said earlier, confined to ensuring due provision of opportunity and procedural fairness; nothing more. It is also urged on the foot of the Authority of the Bench decision last mentioned that discipline in an organisation, particularly, a Bank, is dependent upon all officers acting and operating within the ambit of their authority.

11. This Court has considered the submissions made on behalf of learned Counsel for the parties. So far as the preliminary objection raised on behalf of the respondent-Bank is concerned that the

petitioner, being a member of the award staff, should invoke his remedies under the Act of 1947, we do not find tenable for more than one reason. The foremost is that this petition was entertained by this Court on 16.05.2022, when no objection of this kind was raised. Now that the parties have exchanged affidavits and the matter ready for hearing on merits, a plea of alternative remedy, in our opinion, ought not to be entertained. The other is that primarily, the petitioner has raised a pure question of law whether the inquiry to find him guilty was procedurally fair in that, that no evidence was examined to prove the solitary charge against him, which ought to have been done, going by the salutary procedure governing an inquiry, where the result is likely to be the imposition of a major penalty. If the question primarily to be examined is purely legal, relegation to an alternative remedy under the Statute may not be tenable. After all, the principle of alternative remedy is a rule of convenience; not ouster. Where a pure question of law is involved, the Supreme Court has leaned in favour of entertaining a writ petition and deciding it on merits in **Dr. Bal Krishna Agarwal v. State of U.P. and others**[5]. In Dr. Bal Krishna Agarwal (supra) it was observed :

10. Having regard to the aforesaid facts and circumstances, we are of the view that the High Court was not right in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy under Section 68 of the Act especially when the writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than five years. Since the question that is raised involves a pure question of law and even if the matter is referred to the Chancellor under Section 68 of the Act it is bound to be agitated in the court by the party aggrieved by the order of the Chancellor, we are of the view that this was not a case where the High Court should have non-suited the appellant on the ground of availability of an alternative remedy. We, therefore, propose to go into the merits of the question regarding inter se seniority of the appellant and Respondents 4 and 5. We may, in this context, mention that Respondent 4 has already retired in January 1994.

(emphasis by Court)

12. A very recent exposition of the principle is to be found in **Godrej Sara Lee Ltd. v. Excise and Taxation Officer-cum-Assessing Authority and others**[6] where it has been held :

8. That apart, we may also usefully refer to the decisions of this Court reported in *(1977) 2 SCC 724 (State of Uttar Pradesh v. Indian Hume Pipe Co. Ltd.)* and (2000) 10 SCC 482 (Union of India v. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. *What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only*

questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available.

(emphasis by Court)

13. In view of the nature of controversy here, apart from the fact that parties have exchanged pleadings, this Court is not inclined to entertain the respondents' objection regarding the availability of an alternative remedy to the petitioner. We reject the objection.

14. This Court has looked into the inquiry report and finds that though the Presenting Officer has produced a number of documents, marked as 'management exhibits' in support of the charges, not a single witness has been examined on behalf of the Bank to prove the charge vis-à-vis either of the two complainant-account holders. The findings recorded by the Inquiry Officer read :

Assessment of Evidence and Findings:

a. In both the cases, it is eviden that unauthorized transactions were made and upon receiving the complaint the embezzled amount got recovered and finally letter of satisfaction of obtained since the embezzled amount.

b. All the signatures which were told to be obtained by the customer itself are not on the specified place.

C. Though PO was not able to proof that any of the signature available on the record were forged but on three withdrawals difference of signatures is clearly visible.

d. In both the cases embezzled amounts were was settled through the account of charge sheeted employee's mother.

In view of the above I hold charge "I" as PROVED.

15. There is no cavil between parties on the issue that the Management never endeavoured to prove their case by examining even a solitary witness in support of the charge. The charge is about unauthorized withdrawal of money from the account of the two customers. All that was led by way of tomes in evidence are documents endeavouring to show that on the particular withdrawal forms, the signatures of the customers, the two account holders, Munni Devi and Om Prakash Verma, did not tally. A charge of this kind has, in any case, to be proved by production of relevant witnesses, quite apart from the salutary principle that in every case, where there is a likelihood of imposition of a major penalty, witness(es) must be examined by the Establishment to prove the charge(s). Here, it is all the more necessary, given the nature of the charge. It would be imperative for the Bank to examine the two account holders, who said that there was an unauthorized withdrawal from their account. If produced in evidence and shown the withdrawal forms, where unauthorized signatures were alleged, they would either affirm the fact of their signatures being not there, or deny it. If they deny it, it would be open to the petitioner to cross-examine them and then lead his own evidence. It is, perhaps, on account of absence of the two witnesses on behalf of the Establishment that the Inquiry Officer has recorded a finding, holding the charge proved, based on the complaint about the unauthorized transaction, followed by credit of the complainant's accounts with unauthorized sums of money by the petitioner's mother. The Inquiry Officer, however, returned a finding that the Establishment could not prove that the

signatures on the withdrawal forms were forged. Still, he has said that it is visible that there was a difference in signatures on three of the withdrawal forms. This kind of a finding is open to be termed as perverse, looking to the way the Inquiry Officer has guessworked through idle papers, in the absence of the two customers in the witness box, whose signatures, the Management say, were forged on the withdrawal forms. This Court is constrained to hold that there is a fundamental procedural lapse in not examining the two complainants as witnesses at the inquiry vitiating the proceedings, oral evidence in matters involving the imposition of a major penalty being a salutary imperative.

16. The question whether the mere fact of the petitioner depositing through his mother in the account of the account holders (complainants) would amount to a confession, may be an issue best left open to be determined by the Bank, after an inquiry is undertaken in accordance with law, where oral evidence of the two witnesses and any other witness, whom the Bank wish to examine, is led. The principle that it is necessary to examine witnesses in an inquiry, where the likelihood is the imposition of a major penalty, in the event the charge is proved, is a principle too well settled to brook doubt. In this connection, reference may be made to the holding in **State of U.P. and others v. Saroj Kumar Sinha**[7] where it was observed by their Lordships of the Supreme Court :

27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

17. Also of much relevance is the Bench decision of this Court in **State of U.P. and another v. Kishori Lal and another**[8], where it has been held :

13. Similar view was taken in Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570 :

'Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled

against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11.A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer

cannot straightaway dismiss him, but he must hold and ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary.

18. I have subscribed to the same principle in **Vinod Kumar v. State of U.P. and others**[9].

19. This Court particularly noticed in this case that a plea was raised in the grounds of appeal before the Appellate

Authority vide paragraph No. 9 of the memorandum of appeal, which reads :

9. Sir, no witness has been produced by the prosecution. Even the customers as mentioned under para 3, were not called on before the enquiry. Sir, mere production of the document is not enough, contents of documentary evidence has to be proved. Under the law of evidence it is necessary that contents of documents are required to be proved either by primary or by secondary evidence, and at the most, admission of documents may amount to admission of contents, but not its truth. Sir, by not producing witness this very important guideline has not been adhered to. Hon'ble Disciplinary Authority also did not consider this important aspect of the case.

20. This plea was not at all dealt with by the Appellate Authority, while deciding the appeal. May be, the Appellate Authority was not at all trained to understand the significance of the principle that witnesses have to be examined in disciplinary proceedings involving the likelihood of a major penalty being awarded. This Court must also remark that the observation in the order of the Disciplinary Authority impugned to the effect that in the personal hearing, the petitioner accepted his guilt/charge, as contained in the charge-sheet dated 06.02.2021, appears to be absolutely without basis. This remark of the Disciplinary Authority was also challenged in appeal by raising a specific ground in paragraph No. 18, saying that it is against the facts on record. It is averred by the petitioner that to the best of his knowledge and belief, he never accepted any kind of wrongdoing. One could raise the presumption of regularity in official actions and discard the petitioner's case on this ground alone, but this is a case where the Disciplinary Authority has purported to act on almost a confession by the petitioner. Therefore, fairness of procedure would require that the petitioner's statement in this regard, if he appeared before the Disciplinary Authority on 09.06.2021, ought to have been recorded in writing and got duly signed by him, after explaining him the consequences thereof. It would certainly not be open to the Disciplinary Authority to act on any kind of an admission or confession said to be made by the petitioner in a case where he has all along denied the charges right from the stage of his reply to the charge-sheet, proceedings of the inquiry and his reply to the show-cause notice, all of which disclose his stand in writing. The appellate order hardly deals with these very material contentions raised by the petitioner, and on that ground alone, the orders impugned cannot be sustained. All these material contentions, that have not been dealt with by the Appellate Authority, have been indicated hereinabove.

21. It goes without saying that the respondents would have liberty to proceed from the stage of the charge-sheet afresh and pass fresh orders, holding inquiry, if they so elect, bearing in mind the guidance in this judgment. It is also clarified that upon the matter being remanded, in adherence to another salutary principle, it would not be open to the respondents to impose, if they so find and hold, a punishment higher than the one now inflicted and proposed to be quashed by this Court.

22. In the result, this writ petition **succeeds** and stands **allowed in part.** The impugned orders dated 09.06.2021 passed by the Deputy General Manager, Circle

Office, Punjab National Bank, Gorakhpur and the order dated 30.12.2021 passed by the Zonal Manager, Human Resource Development, Zonal Office, Punjab National Bank, Lucknow are hereby **quashed**. The petitioner shall be reinstated in service forthwith and paid his current salary regularly, month by month. It will be open to the respondents to proceed afresh against the petitioner from the stage of the charge-sheet, bearing in mind the guidance in this judgment. If the respondents elect to proceed afresh, the petitioner shall not be entitled to arrears of salary for the period that he has remained out of employment, and the question of arrears shall then abide by the result of fresh proceedings. If, however, no proceedings are taken, the petitioner shall be entitled to 50% of the arrears of his salary and all other emoluments. In either case, if no fresh proceedings are pursued, or these are pursued and the petitioner reinstated, without a terminal punishment, he would be entitled to all other benefits of continuity and seniority. The respondents, in the event of taking fresh proceedings, if they find the petitioner guilty again, shall not impose a punishment higher than that imposed by the orders impugned and quashed by this Court.

23. There shall be no order as to costs.

(2024) 1 ILRA 612
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-A No. 7791 of 2023

Mahesh Chandra Agarwal ...Petitioner
Versus
Rent Tribunal, A.D.J. & Ors. ...Respondents

Counsel for the Petitioner:
Nandini Verma, Aparjita Bansal

Counsel for the Respondents:
C.S.C., Shresh Agarwal

A. Tenancy Law – UP Regulation of Urban Premises Tenancy Act, 2021– Sections 21(2) (m) & 35 – Eviction suit – Ground of arrear of rent as well as of personal need was taken – Tenant-petitioner alleged no service of notice upon him – Rent authority passed eviction order only after considering the aspect of personal need – Validity challenged – Service of prior notice – Necessity – Held, S. 21 would indicate that 12 grounds have been specified for moving an application for eviction against the tenant. Only grounds (b), (d) and (g) provide for service of notice prior to moving an application for eviction – There is no requirement of service of prior notice where eviction was sought on the ground of personal need as provided in clause (m) of section 21(2) of the Act of 2021, and hence it is not necessary to go into the issue of sufficiency of notice. (Para 16 and 19)

B. Tenancy law – UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – UP Regulation of Urban Premises Tenancy Act, 2021 – Act of 1972 is replaced by Act of 2021 – Substantial difference in the procedure – Under the Act of 2021 an obligation is cast upon the landlord and the tenant to enter into agreement in writing and inform the rent authority within two months of the said agreement either jointly or separately provided that the tenancy is for a period of 12 months or more. (Para 11)

Writ petition dismissed. (E-1)

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

1. The petitioner being aggrieved by the order dated 29/08/2023 passed by the Additional District and Sessions Judge

under Section 35 of the Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 (hereinafter referred to as the Act of 2021) thereby rejecting the appeal filed by the petitioner and upholding the order of eviction passed by the prescribed authority dated 14/12/2022, has preferred the present writ petition.

2. Ms Aparajita Bansal, learned counsel appearing on behalf of the petitioner has submitted that opposite party No. 3 is the owner of house situated at 253/96, Nadan Mahal Road, Lucknow which consists of 6 shops, one basement and one go-down. Out of the 6 shops, opposite party No. 3 had let out shop no.1 to the petitioner in 1989 and an agreement was also entered into on 3.4.1989 creating a tenancy in his favour for 11 months at the monthly rent of ₹ 500/-.

3. An application under section 21(1) of the Act of 2021 was filed by the opposite party No. 3 who is the owner of the property in question which has been tenanted to the petitioner on a monthly rent of Rs. 4000/-. The said property is being utilised by the petitioner for running a shop. It was further stated that after coming into force of the Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021, a new tenancy agreement was submitted by opposite party no.3 to the petitioner who refused to sign the same, pursuant to which a notice was given on 23.11.2021 to vacate the said premises. The legal notice was also not accepted by the petitioner, and hence an application for eviction was filed stating that the premises were required for his establishment of a business for his son. It was further stated that the petitioner has not paid the enhanced rent since 01.03.2021.

4. The rent authority had issued notices to the petitioner who had put in appearance and opposed the application for eviction.

5. The application for eviction was allowed by the Rent authority by means of the impugned order dated 14.12.2022 after recording the finding that the petitioner did not execute the rent agreement as per the provisions contained in the Act of 2021 nor did he pay the enhanced rent since 01.03.2021 and consequently there was violation of Section 9(3) of the Act of 2021. It was further held that the petitioner has repeatedly refused to accept the new agreement proposed by the landlord, and also that the landlord wanted the premises for establishing the business / office and on account of the aforesaid facts allowed the application, and ordered the petitioner to vacate the said premises in 30 days.

6. Appeal was preferred by the petitioner before the Rent Tribunal against the order passed by the rent authority dated 14.12.2022. In the said appeal it was submitted that the landlord had not given any notice as prescribed under the Act of 2021 nor was any notice received by the petitioner and consequently he is not entitled to enhancement of rent as prayed for. It was further stated that agreed rent was only Rs.500/- as per the agreement dated 3.4.1989 and the petitioner has already deposited the said rent.

7. Objections were filed by the landlord to the said appeal wherein it was stated that the petitioner has not deposited Rs.24000/- which is fifty percent of the outstanding rent as per the provisions of Section 35 and consequently the said appeal was not maintainable nor even entertainable in the said form. It was further stated that the rent authority had duly taken into consideration all the facts

with regard to service of notice upon the petitioner and on his being satisfied that despite service of notice the enhanced rent has not been paid and also that the petitioner has deliberately avoided entering into new agreement as per the provisions contained under Section 4 of the Act of 2021 which in itself was a ground for eviction and consequently submits that there was no illegality or infirmity in the order of eviction passed by the rent authority.

8. Counsel for the petitioner assailing the impugned orders has vehemently submitted that no notice was served upon the petitioner prior to institution of the eviction proceedings before the rent authority and that the findings recorded by the courts below is perverse and requires interference. It was further stated that the owner has alternative properties in which he can settle his son and accordingly even on the ground of comparative hardship no case is made out in favour of the landlord.

9. Counsel for the respondent has supported the impugned orders and submitted that prior notice was duly served upon the petitioner and there is no infirmity in the findings recorded by the courts below in this regard. He further stated that the respondent was able to demonstrate that the premises are required for his personal need as per section 21 (2) (m) of the Act of 2021 and consequently order for eviction was passed. He prayed for dismissal of the writ petition.

10. I have heard learned counsel for the parties and gone through the records.

11. At the outset, it is noticed that present proceedings have been initiated under Uttar Pradesh Regulation of Urban Premises Tenancy Act, 2021 which has replaced Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. There is substantial difference in the procedure laid down for eviction of the tenant in both the enactments. Under the Act of 2021 an obligation is cast upon the landlord and the tenant to enter into agreement in writing and inform the rent authority within two months of the said agreement either jointly or separately provided that the tenancy is for a period of 12 months or more. In case of old/existing tenancy on the date of commencement of the new Tenancy Act of 2021, the parties are expected to enter into agreement in writing and inform the rent authority within three months of the commencement of the said Act and in case of written agreement obligation is cast upon him to inform the rent authority jointly or separately and present the same to the Rent authority.

12. That first proviso of Section 4(3) makes it obligatory to the landlord to give particulars in prescribed format in First Schedule qua tenancy to the rent authority within one month of the expiry of three months referred to above. In the event no agreement is entered in writing, and in such an eventuality the tenant will also be required to give his particulars and in the event of failure on part of the tenant in discharge in his part of obligation, he will be liable to eviction .

13. Under the old Act of 1972 suits were maintainable to certain specified contingencies for seeking eviction, while under the new tenancy Act any application for eviction would be maintainable on the grounds mentioned in the said Act before the rent authority. Accordingly, simple and summary procedure has been devised under the Act of 2021 for eviction of tenant.

14. Considering the rival submissions, it is noticed that respondent No.3 (The Landlord) had moved an application under Section 21(2)(b) of the Tenancy Act, 2021 alleging that the petitioner has not paid arrears of rent for more than two consecutive months and also under Sub-Section 2(m) of Section 21 wherein he has stated that the said premises was required by him for establishing business for his son. Tenancy in the present case had commenced on 3.4.1989 with regard to the shop situated at 253/96, Nadan Mahal Road, Lucknow which was owned by respondent No.3. The rent agreed in 1989 was Rs.500/- per month. Case of the landlord was that after coming into force of the Tenancy Act of 2021 he has been repeatedly asking and requesting the petitioner to enter into rent agreement, but he did not enter into any such agreement and subsequently he had sent notice on 23.11.2022 which was refused to be accepted by the petitioner consequent to which application for eviction was filed before the rent authority. It was stated that the petitioner has alternate accommodation from which he can start his business and that he requires the said shop for opening family business and also for his personal use and accordingly the rent authority found it to be a fit case for allowing the application. Much emphasis has been laid by the petitioner with regard to service of notice. It has been stated that repeated attempts were made for service of notice upon the petitioner and the service has been found to be sufficient by the authorities below.

15. Considering the submissions made by the petitioner with regard to not receiving any notice of prior to filing of the suit for eviction, this Court is of the considered view that when an application for eviction is based solely on Sub Section 2(b) of Section 21 of the Act of 2021 which provides that in case the tenant has not paid arrears of rent and other charges payable in full as specified in sub section (1) of Section 13 for two consecutive months including interest for the delayed payment as specified by the tenancy agreement within a period of one month from the date of service of notice for payment of such arrears of rent and other charges payable to the landlord, service of notice by the Landlord is essential and mandatory as is provided in section 21(2)(b) of the Act of 2021. Relevant extract of section 21 are reproduced hereunder:-

21(2)-The rent authority may, on an application made to it by the landlord in such manner as may be prescribed, make an order for eviction and recovery of possession of the premises on one or more of the following ground, namely-

(a)…….

(b) That the tenant has not paid the areas of rent and other charges payable in full as specified in subsection (1) of section 13 for 2 consecutive months, including interest for delayed payment as be specified in the tenancy agreement within a period of one month from the date of service of notice of demand for payment of such arrears of rent and other charges payable to the landlord:

(d) and the tenant has continued to misuse the premises even after receipt of notice from the landlord to desist from such misuse.

(g) that the tenant has given written notice to vacate the premises let out on rent and in consequence of that notice the landlord has contracted to sell the said premises or a stake in any other step, as a result of which his interest would seriously

suffer if is not put in possession of the premises.

(m) that the premises are required by landlord either in its existing form or after demolition and new construction thereof for the purposes of its occupation by landlord.

16. Provisions of section 21 would indicate that 12 grounds have been specified for moving an application for eviction against the tenant. Only grounds (b),(d) and (g) provide for service of notice prior to moving an application for eviction. According to Subclause (b) where the application for eviction sought to be made on ground of non-payment of rent a prior notice has to be given to the tenant, and in the event of non-compliance, an application for eviction can be filed. As per sub clause (d) in case of the misuse of the premises by the tenant even after receipt of notice for the landlord, an application for eviction can be filed. Here also it is necessary that the prior notice is required to be given to the tenant to restrain him from misusing the property and lastly according to subclause (g) of section 21 (2) the landlord can give written notice to the tenant to vacate the premises informing him that he has contracted to sell the said premises or that his interest will suffer in case he is not put in possession, and in case despite the notice the premises are not vacated, then an application for eviction can be filed.

17. It is accordingly noticed that it is not necessary to give a prior notice for vacation of the tenanted premises in all the contingencies as provided for in section 21(2). Wherever notice has to be given prior to submission of application for eviction, it been expressly provided for in section 21(2) and therefore in case the application for eviction is filed under clause (b),(d) and (g) of section 21(2) only then the notice would be necessary given to the tenant and not otherwise.

18. In the present case application for eviction was filed under Section 21(2) (m) and also under section 21(2)(b) of Act of 2021. Respondent No.3 landlord had stated that the said premises was required for his personal use which is a condition prescribed in sub clause 2 (m) of Section 21 and consequently there was no dispute in this regard and even rent authority has only ordered eviction without passing any order for payment of arrears of rent, clearly indicating that the application for eviction has been allowed only considering the aspect of personal need of the landlord as per section 21(2)(m).

19. Both the authorities below have returned a concurrent finding of fact with regard to service of notice though the petitioner has vehemently contested this fact in the present petition. In light of the above discussions where we have already held that there is no requirement of service of prior notice where eviction was sought on the ground of personal need as provided in clause (m) of section 21(2) of the act of 2021, and hence it is not necessary to go into the issue of sufficiency of notice. The application for eviction filed by the landlord has been allowed only on the ground of personal need as contained in Section 2(m) of Section 21. It is for this reason that the rent authority did not pass any order directing the petitioner to pay the outstanding rent. According to sub section 2 (m) of Section 21 the landlord has only to demonstrate that the premises are required for his occupation. This provision is clearly distinguishable from the provisions in erstwhile Act No.13 of 1972 where the aspect of comparative hardship and

bonafide requirement was to be established by the landlord.

20. Exclusions of bonafide requirement of landlord as a ground for eviction has, in fact, materially altered the law in this regard.

21. In absence of the word "bonafide requirement" under the Tenancy Act, 2021 the landlord has to demonstrate that the premises are required by him in its existing form or after demolition for the purpose of its occupation by him. This aspect of the matter has not been disputed by the petitioner nor is there averment or material either before the rent authority or rent tribunal or before this Court to show that the landlord does not require the tenanted premises for his own occupation. In absence of any such averment or material there would not be any occasion to interfere in the order passed by the rent authority or the rent tribunal.

22. Accordingly, there is no merit in the present writ petition which is accordingly **dismissed**.

(2024) 1 ILRA 617
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 8700 of 2023

No. Jc-58164m Sub Maj Clk(Sd) Manoj Kumar Pandey ...Petitioner
Versus
The Armed Forces Tribunal Lko. & Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Murtaza Hasan, Anshuman Srivastava, Manoj Kumar Awasthi

Counsel for the Respondents:
A.S.G.I.

Service Law - Army Rules, 1954 - Rule 13 (3) item 1 (i) (a) - Petitioner enrolled in Army on 04.05.1990, placed in low medical category P2 (permanent), promoted to rank of Subedar Major w.e.f. 01.04.2020 - Petitioner did not submit two-year unwillingness certificate before retirement as required under letter/policy dated 20.09.2010, and thus deemed willing for extension under para 2(a) of Appendix 'A' of said letter - After his promotion to Subedar Major, screening for extension could not be held due to nationwide lockdown in April-May 2020 - Following phased lifting of lockdown from 01.06.2020, procedure for such screening amended by policy dated 05.05.2020 - Petitioner promoted prior to amended policy which came into force on 01.06.2020 - His willingness for two years' extension later submitted on 29.07.2020, after coming into force of amended policy - Considering deeming clause enunciated in Old Policy coupled with fact that petitioner promoted on 01.04.2020 i.e. before coming into force of amended policy, thus petitioner's case for extension of service for two years comes under Old Policy, action of respondents in considering willingness of petitioner under amended policy is contrary to 'deeming clause' of Old Policy. (Para 15, 19, 21, 22)

Writ petition allowed. (E-13)

List of Cases cited:

1. Kamraj Nadar Vs Kanju Thevar : (1959) S.C.R. 583(602), A.I.R. 1958 SC 687, (Para 28)

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

(A) Introduction

(1) The challenge in the present writ petition under Article 226 of the

Constitution of India is to the impugned order dated 29th of March, 2023 passed by the Armed Forces Tribunal, Regional Bench, Lucknow (hereinafter referred to as 'the Tribunal') in Original Application No.649 of 2022, whereby, a challenge laid by the petitioner to his discharge from service on May 31, 2022 was dismissed..

(B) Factual Matrix

(2) The petitioner was enrolled in the Indian Army (JAK RIF Regiment) on May 4, 1990. Subsequently, he was granted promotion to the rank of Naik w.e.f. 01st December, 1995; to the rank of Havildar w.e.f. 01st December, 1999; and to the rank of Naib Subedar w.e.f. 01st June, 2013.

(3) While continuing to work as Naib Subedar in the Indian Army, he was diagnosed *"Coronary Artery Disease-Interior Wall Myocardial Infraction (ICD-121.0)"* by 92 Base Hospital and accordingly, he was downgraded to low medical category P3 (T-24) with effect from 08th October, 2013 to 25th March, 2014. Subsequently, petitioner's case was reviewed, upon which his medical category was upgraded to P2 (T-24) w.e.f. 25th March, 2014 to 09th September, 2014 and thereafter P2 (Permanent) with effect from 09th September, 2014.

(4) Apparently, even after placing the petitioner in low medical category P2 (Permanent), he was promoted to rank of Subedar Major w.e.f. 01st August, 2016. Again while he was posted with 119 MC/MF Detachment, he was promoted to the rank of Subedar Major Clerk (Staff Duty) w.e.f. 01st April, 2020. After assuming the rank of Subedar Major Clerk (Staff Duty), the petitioner was required to be screened for extension of service as per the provisions of Integrated Headquarters of Ministry of Defence letter No. B/33098/AG/PS-2(c) dated 20th September, 2010. The procedure and criteria for promotion dated 20th September, 2010 reads as under:-

"PROCEDURE & CRITERIA FOR SCREENING OF PBOR IN THE ARMY

Aim. To screen PBOR for the grant of extension by two years.

Criteria. The following guiding principles will be adhered to while considering the grant of two years extension in age/service.

(a) Willingness of the Individual. An individual will be deemed to be willing for 2 years extension in age/service unless he submits his unwillingness certificate two year before his retirement date duly counter signed by OC unit.

(b) Medical Classification The medical criteria for 2 years extn in age/service will be same as for promotion in respect of JCOs and OR as laid down vide IHQ of MoD (Army) letter No. B/33513/AG/PS 2(c) dt 10 Oct 97. They should be in medical category ;AYE'. However personnel in lower medical category (both temporary and permanent) as a result of the circumstances indicated below would be eligible :-

(i) Eligibility upto Medical Category 'CEE'

(aa) **Battle casualties** as defined in special Army Order 8/S/85 including those casualties in fighting against armed hostiles shall also be treated as battle casualties.

(ab) Personnel wounded/injured during deployment in **'Op Meghdoot','Op Rhino', 'Op Rakshak', 'Op Pawan', 'Op Bajrang', Op Bluestar', 'Op Cactus Lilly'** and other similar **CI Operations** involving fighting against Militants/ Terrorists and consequently placed in medical category CEE (Permanent/ Temporary) will be treated at par with 'Battle Casualties'.

(ac) JCOs/NCOs Wounded/ Injured during **battle inoculation**, field, mine training using live ammunition and while handling/disposing live ammunition, explosives, bombs and Improvised Explosive Devices and placed in Medical Category CEE (Permanent/ Temporary) will also be treated as battle casualtiies.

(ad) JCOs and NCOs who sustain injuries or are wounded as a result of accidental explosion of mines caused while laying operationally oriented mine fields or lifting or negotiating mine fields laid by the enemy or own forces in operational areas, near the international borders or the Line of control and consequently placed in Medical Category CEE (Permanent/Temporary) will also be treated as battle casualties.

(ae) JCOs/NCOs, who are wounded/injured during **UN Mission**, where such a deputation is to count as active service in field, will also be treated as battle casualties.

(iii) In exceptional cases, such as distinction achieved by an individual in War or Peace, the GOC-in-C Command, on the recommendation of the OIC Records, may waive the stipulations given in Sub Para (i) & (ii) above.

Note : This criteria will be applicable to all Regt/Corps less DSC, in whose regards orders issued separately vide letter No. B/33513/AG/PS-2 (c) dt 18 Jun 2009 will be applicable.

Method of Screening. Screening of the affected PBOR for the grant of extension should be carried out 24 months prior to their reaching the current laid down service limits. It should be conducted by the same boards which are constituted and assembled for the purpose of deciding promotions, should also undertake the following additional tasks, whenever required :-

(a) Screen affected PBOR for the grant of extension.

(b) Consider PBOR for continued retention during the extended tenure in case there is drop in any criteria as mentioned at Appx 'B' to this letter.

(c) Consider Ris Maj/Sub Maj who do not complete 34 yrs pensionable service or 4 yrs tenure by the time they reach 52 yrs of age, for screening for extn in service up to the age of 54 yrs to 34 yrs of pensionable service or 4 yrs of tenure whichever is earlier.

Note : In exception to the above, the PBOR who could not be screened for extn of service under the existing policy as per the laid down screening schedule given at Para 4 below due to the LMC, court cases or any other circumstances beyond his control, will be screened by the Screening Board before retirement.

4. **Scheduling of Screening** Shall be regulated on attaining the following service limits :-

S/No.	Rank	Service of years
(a)	Sub/Ris	26th year
(b	Nb Ris/Nb Sub	24th year
(c)	Dfr/Hav	22nd year
(d)	Nks	20th year
(e)	L/NK/Sepoy/TSLNk/TS Nk	15th year/18th year

5. **Board Proceeding** On completion, one copy of the board

proceeding shall be forwarded to the concerned OIC Records. Necessary casualties will, however, be published by units concerned.

6. **Applicability**. The revised policy will be made applicable with effect from 01 Apr 2011.

(5) In view of the aforesaid letter dated 20th September, 2010, the petitioner among other affected personnel were requested to submit their willingness/unwillingness certificate for extension for service vide Records JAK RIF letter 1428/S/C/RA-2 dated 08th June, 2020, however, even thereafter required certificate was not submitted by the petitioner and as such, reminders were issued for the same vide letter dated 26th June, 2020 and 07th July, 2020. Apparently, even after the issuance of the aforesaid reminder, the required certificate for extension of service was not submitted.

(6) In the meantime, due to country wide lockdown on account of pandemic 'Corona', all the offices were closed, hence Screening Board for grant of two years extension of service in respect of centrally controlled category was not held during the month of April, 2020 and May, 2020.

(7) Thereafter, Integrated Headquarters of Ministry of Defence had issued certain amendments in the procedure and criteria for screening of personnel for grant of extension of service by two years vide letter No. B/33098/AG PS 2(c) dated 05th May, 2020, by which it has been stated that the personnel placed in permanent low medical category would be screened with a view to assess their suitability for grant of extension of service, if they are due for re-categorization medical board prior to commencement of their extension and such personnel can be declared provisionally fit for extension subject to their medical category being upgraded to acceptable level before expiry of normal terms of engagement. It is also stated that if the personnel are not assessed fit by screening board or not upgraded to acceptable category prior to commencement of extension, these personnel shall be disposed of in normal manner and not be granted benefit of extension of time.

(8) Thereafter, the petitioner was posted to Records JAK RIF w.e.f. 09th July, 2020 and on physical reporting at Records JAK RIF, the petitioner submitted his willingness certificate for extension of two years of service on 29th July, 2020. After receipt of said willingness certificate, re-categorization Medical Board of the petitioner was conducted at Military Hospital, Jabalpur on 08th February, 2021, wherein he continued to remain in the same medical category i.e. P2 (permanent) for another two years w.e.f. 05th February, 2021 to 05th February, 2023.

(9) Based on the fact that the petitioner was not upgraded to medical category 'SHAPE-1', his claim for extension was not accepted in terms of the revised policy letter dated 05.05.2020 and consequently, since his extension was not granted, he was discharged from service on completion of terms of engagement w.e.f. 31.05.2022 (AN) under Rule 13 (3) item 1 (i) (a) of Army Rules, 1954 having rendered 32 years and 28 days of service.

(10) Feeling aggrieved by the order of discharge dated 31.05.2022, the petitioner preferred Original Application No. 649 of 2022 before the Tribunal. The Tribunal, after appreciating the fact that the petitioner

had submitted his willingness for extension on 29.07.2020 and the revised policy dated 05.05.2020 came into existence w.e.f. 01.06.2020, had returned a finding that the case of the petitioner for grant of extension could not be considered in accordance with old policy as the applicant submitted his willingness for extension only on 29.07.2020, by which time the new policy was in force. The learned Tribunal also gave a passing reference, in as much as it observed that had the old policy been in force, the applicant would have been benefitted for service extension of eleven months as by that time he would have attained the age limit of 54 years. In this backdrop, the learned Tribunal has dismissed the original application vide judgment/order dated 29.03.2023. It is this judgment/order dated 29.03.2023, which has been challenged in the instant writ petition.

(11) Heard Shri Manoj Kumar Awasthi, learned Counsel representing the petitioner and Shri S.B. Pandey, learned Senior Advocate/Deputy Solicitor General of India assisted by Shri Varun Pandey, representing the Union of India/respondents.

C. Contentions of the parties

(12) Learned Counsel representing the petitioner drawing our attention to reasoning given by the learned Tribunal while dismissing the original application, has submitted that the learned Tribunal has not appropriately considered the issues involved in this matter inasmuch as the petitioner was promoted to the rank of Subedar Major w.e.f. 01.04.2020 and at that relevant time, the petitioner was governed by the procedure and guidelines enumerated in the letter of Integrated Headquarter of Ministry of Defence Army 20.09.2010, from which willing for two years extension in age/service is deemed unless the officer may submit his unwillingness certificate two years before his retirement date duly counter signed by authority concerned. Learned Counsel has submitted that admittedly, the petitioner was promoted to the rank of Subedar Major on 01.04.2020 i.e. during the lockdown period w.e.f. 25.03.2020 to 31.05.2020 and at that relevant time, the petitioner was not screened due to complete lockdown under old policy i.e. dated 20.09.2010. In the meanwhile, the amended policy dated 05.05.2020 came into existence by which the individual who have been under the permanent low medical category prior to commencement of extension would be discharged on completion of normal terms of engagement without extension which was not available in the old policy. Submission of the learned Counsel, therefore, is that once the promotion of the petitioner to the rank of Subedar Major was made w.e.f. 01.04.2020 and the petitioner's case is covered under policy dated 20.09.2010, therefore, the amended policy dated 05.05.2020, which was applicable w.e.f. 01.06.2020, would not be made applicable in the case of petitioner. However, while considering the claim of the petitioner for extension of service, the respondents have erroneously applied the amended policy 05.05.2020 and declined the claim of the petitioner for extension of service, which according to him, is per se illegal and arbitrary. In this backdrop, learned Counsel submits that the learned Tribunal has erroneously returned a finding that the petitioner's case for grant of extension could not be considered in accordance with old policy, therefore, the impugned judgment/order as well as

impugned rejection of extension of service are not sustainable and the same are liable to be set-aside.

(13) On the other hand, learned Senior Counsel representing the respondents has submitted that the learned Tribunal has taken into account all relevant aspects of the matter and has returned a finding that the petitioner's case for grant of extension could not be considered in accordance with old policy and further the petitioner could not be granted service extension due to extant policy which specifically provides that service extension cannot be granted to personnel placed in low medical category, which medical category the petitioner was holding and it could not be upgraded in re-categorization medical board. In this backdrop, learned Senior Counsel submits that the Tribunal has rightly dismissed the original application preferred by the petitioner. The instant petition lacks merit and is liable to be dismissed.

D. Findings & Analysis

(14) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before this Court in the instant writ petition, it is required to be noted herein that a bare perusal of the impugned judgment/ order passed by the learned Tribunal, what we find is that the learned Tribunal, after analyzing the facts of the case, has drawn an inference that had the old policy would have in force, the petitioner could have been benefitted for service extension of 11 months as by that time he would have attained the age of limit of 54 years. Meaning thereby if the old policy would have applied to the case of the petitioner, apparently, the petitioner's service would have extended by the respondents. Therefore, to test the correctness of the impugned judgment/order passed by the learned Tribunal, we deem it apt to consider first the issue 'whether the petitioner's case for grant of extension of service is to be considered under the old policy dated 20.09.2010 or the new amended policy dated 05.05.2020 w.e.f 01.06.2020

(15) Apparently, the petitioner was enrolled in Army on 04.05.1990 and being placed in low medical category P2 (permanent), he was promoted to the rank of Subedar Major w.e.f. 01.04.2020. It is an admitted fact that in normal course of service, a Subedar Major can serve up to four years in the rank or 54 years of age, whichever is earlier. At the relevant time i.e. on 01.04.2020, when the petitioner was promoted to the rank of Subedar Major, the procedure and criteria for screening of Personnel Below Officer Rank (hereinafter referred to as 'PBOR') for grant of extension of service by two years was the letter dated 20.09.2010. Para-4 of the letter dated 20.09.2010 stipulates that all **PBOR** will be screened for extension by two years by Screening Board to be held on Unit/ Regiment/Corps/Records Office basis, as applicable to access their suitability for extension. The procedure and criteria for screening is laid down in Appendix 'A' to the letter dated 20.09.2010. Para 2 (a) of Appendix 'A' of the letter dated 20.09.2010 deals with willingness of the individual, which stipulates that an individual will be deemed to be willing for 2 years extension in age/service unless he submits his unwillingness certificate two years before his retirement date duly counter signed by the OC unit. Thus, unwillingness certificate was required to be submitted rather than a

willingness certificate under the old regime.

(16) At this juncture, it is significant to notice that the conditions enumerated in para 2 (a) of the Appendix 'A' of the letter dated 20.09.2010 (hereinafter referred to as **'old policy dated 20.09.2010'**) are coached with deeming provisions and also with non-obstante clause having overriding effect upon the other provisions of the Act, therefore, full effect of the provisions has to be given by the Courts.

(17) In **Kamraj Nadar Vs. Kanju Thevar** : (1959) S.C.R. 583(602) = A.I.R. 1958 SC 687, the Apex Court has held that a deeming provision creates a legal fiction. The effect of such a legal fiction is that a position which otherwise would not obtain is deemed to obtain under certain circumstances. For ready reference the pertinent observation made by Apex Court in para 28 of the decision is reproduced as under:-

"28. ..... The provision is therefore made in Section 55-A (5) that any person who has given a notice of retirement under Section 55-A (2) is deemed not to be a contesting candidate for the purposes of Section 52. This is a deeming provision and creates a legal fiction. The effect of such a legal fiction however is that a position which otherwise would not obtain is deemed to obtain under those circumstances....."

(18) Thus, it is well settled that a deeming provision is an admission of the non-existence of the fact deemed. The Legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. It means that the Courts must assume that such a state of affairs exists as real, and should imagine as real the consequences and incidents which inevitably flow therefrom, and give effect to the same.

(19) In the instant case, undisputedly, after getting promotion to the rank of Subedar Major on 01.04.2020, the petitioner has not submitted unwillingness certificate of two years before his retirement date as is mentioned in the letter/policy dated 20.09.2010. Meaning thereby as per para-2 (a) of the Appendix 'A' of the letter/policy dated 20.09.2010, the petitioner will be deemed to be willing for two years extension in age/service. It is also an admitted fact that after getting promotion to the rank of Subedar Major, the screening of the petitioner for extension by two years by the Screening Board has not been done due to country wide lockdown during the month of April, 2020 and May, 2020. However, apparently, when the lockdown was removed w.e.f. 01.06.2020 in a phased manner, amendment in the procedure and criteria for screening of PBOR for grant of extension of service by two years was made vide letter dated 05.05.2020 (hereinafter referred to as **'amended policy dated 05.05.2020**'). For ready reference, the relevant para 2 (b) and para-4 of the amended policy dated 05.05.2020 is reproduced as under :-

"2 (b) Med Classification The Med Criteria for grant of two yr extn in age/service limit will be as follows :

(i) Must continue to remain in Med Cat SHAPE-1

(ii) **Tem LMCs**

(aa) Those pers who are in temp Low Med Cat at the time of screening bd/prior to commencement of extn will

continue to be in service. **If downgraded to permt. Low Med Cat during recat prior to commencement of extn pd indl would be disch on completion of normal terms of engagement (without extn). Those downgraded to permit low med cat during extn pd will be disposed of in accordance with procedure for drop in med criteria.]**

…..

(iii) **Permt. LMC** The pers in **Permn LMC** would be screened with a view to assess their suitability for grant of extn in service. If pers are due to recat med bd prior to commencement of extn the screening bd can declare such pers as provisionally fit for extn subject to med cat being upgraded to acceptable level before expiry of normal terms of engagement. If not assessed fit by screening bd or not upgraded to acceptable med cat prior to commencement of extn. these pers will be dispose of in normal manner and not be granted benefit of extn. in service."

4. Applicability. The changes to criteria for grant of extn in service issued vide this letter would be applicable for screening bds conducted on or after 01 Jun 2020. Indis screened for extn in service prior to this dt would continue to be governed by the provisions contained in our letter No.B/33098/Screening/AG/PS-2 (c) dt. 20 Sep 2010."

(20) Apparently, when the petitioner was promoted to the rank of the Subedar Major on 01.04.2020, the petitioner had not submitted any certificate, however, when willingness certificate was sought from the petitioner after removing the countrywide lock down, the petitioner had submitted his willingness certificate for extension of service on 29.07.2020 and thereafter, screening for extension of service of the petitioner was carried out on 25.08.2020, whereby it was found that petitioner was still in P2 (permanent) medical category, therefore, his extension was not accepted in terms of the amended policy letter dated 05.05.2020. Consequently, since his extension was not granted, he was discharged from service w.e.f. 31.05.2022 (AN). Thereafter, the petitioner had filed original application before the learned Tribunal, seeking to grant him for extension of tenure i.e. upto 30.04.2023 i.e. till he completes 54 years age.

(21) A bare perusal of old policy dated 20.09.2010 reveals that this policy on willingness/unwillingness for extension of service categorically states that unless an individual explicitly gives 'unwillingness for extension', he will be deemed as willing. The petitioner was promoted to the rank of Subedar Major on 01.04.2020 even he being placed in low Medical Category P2 (Permanent) i.e. before coming into force the amended policy dated 05.05.2020 as the amended policy dated 05.05.2020 came into force on 01.06.2020. It appears that the petitioner submitted his willingness for extension of service for two years on 29.07.2020 on being sought by the respondents after coming into force the amended policy dated 05.05.2020.

(22) Considering the facts and circumstances of the case, particularly the deeming clause enunciated in para 2(a) of the Appendix 'A' of the Old Policy dated 20.9.2010 coupled with the fact that the petitioner was promoted to the rank of Subedar Major on 01.04.2020 i.e. before coming into force the amended policy, we are of the considered that the petitioner's case for extension of service for two years comes under Old Policy dated 20.09.2010 and the action of the respondents in considering the willingness of the petitioner

under the amended policy dated 05.05.2020 is contrary to 'deeming clause' of para 2(a) of the Appendix 'A' of the Old Policy dated 20.9.2010.

(23) From perusal of the impugned judgment/order dated 29.03.2023, what we find is that the learned Tribunal, while adjudicating the issue, has not considered the para 2(a) of the Appendix 'A' of the Old Policy dated 20.9.2010 in the aforesaid aspect of the matter and has erroneously came to the conclusion that the petitioner's case for extension came under amended policy dated 05.05.2020. Thus, the impugned judgment/order passed by the learned Tribunal is not sustainable and the same is liable to be set-aside.

E. Conclusion

(24) In view of the aforesaid, the instant writ petition is **allowed**. The impugned judgment and order dated 29.03.2023 passed by the learned Tribunal in Original Application No. 649 of 2022 is hereby set-aside. The impugned order of discharge dated 31.05.2022 is also quashed.

(25) Having said so, since in terms of para 2 (a) of Appendix 'A' of Old Policy dated 20.09.2010, the petitioner is entitled to be retained for two years being in the rank Subedar Major. Since, he joined rank of Subedar Major on 01.04.2020, he would be deemed to be discharged only on 30.04.2023 i.e. till he completed 54 years of age, however, 30.04.2023 has already been passed.

(26) As a consequence thereof, the petitioner became entitled to pension in addition to other benefits which was granted to him. However, the petitioner will not be entitled to arrears of salary for the period up to the date of discharge inter alia on the ground of 'no work no pay' but he shall be entitled to arrears of pension for a period of two years prior to filing of original application before the Tribunal. The arrears of pension be paid to the period within a period of six months from the date of receipt of copy of this order.

(27) For the facts and circumstances of the case, there shall be no order as to costs.

(2024) 1 ILRA 625
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2023

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Writ-A No. 13676 of 2023
with
Writ-A No. 18299 of 2023

Mahendra Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Abhishek Kumar Saroj, Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C., Sri Rajneesh Tiwari, Sri Siddharth Khare, Sri Vimal Chandra Mishra, Sri Jigar Khare, Sri Asok Khare(Sr. Advocate)

A. Service Law – Promotion – U.P. Secondary Education Service Selection Board Rules, 1998 – Year of Recruitment – Petitioner, an Assistant Teacher, challenged denial of promotion to Lecturer (Sanskrit) in favor of respondent no. 6 – Vacancy arose on 31.3.2022 – Petitioner acquired M.A. (Sanskrit) degree on 16.11.2021, after the first day of the year of recruitment (1.7.2021) – Held, under Section 2(l) of U.P. Act No. 5 of 1982 and Rule 14 of the 1998 Rules, eligibility for promotion must be assessed on the first day of the year of

recruitment (1.7.2021), not the date of vacancy occurrence (31.3.2022) – Petitioner lacked requisite qualification on 1.7.2021, rendering him ineligible for promotion – Impugned orders dated 7.7.2023 and 11.10.2023 upheld. (Paras 14, 27, 29, 36)

B. Service Law – Promotion – Interpretation of Statutory Provisions – Regulation 6 of Chapter II, U.P. Intermediate Education Act, 1921, and Rule 14 of the 1998 Rules require teachers to possess prescribed qualifications and five years of continuous service on the first day of the year of recruitment for promotion eligibility – Year of recruitment defined as 12 months from 1st July under Section 2(l) of U.P. Act No. 5 of 1982 – Larger Bench decision in *Smt. Sadhna* clarified that eligibility is assessed on 1st July of the year preceding the vacancy – Petitioner's reliance on date of vacancy occurrence (31.3.2022) misconceived. (Paras 27, 34, 36)

C. Service Law – Promotion – Precedents – Judgments relied upon by petitioner (*Lalit Kumar Mishra*, *Virendra Pal Singh*, *Km. Shweta Garg*, *Siddharth Shankar Mishra*) distinguished as inapplicable to the issue of eligibility date for promotion – Precedents in *Committee of Management, Shri Krishna Inter College*, *Kashmeer Singh Yadav*, *Smt. Sadhna*, *Sunil Kumar Verma*, and *Tribhuvan Nath* upheld the requirement of possessing qualifications on the first day of the year of recruitment – No grounds to deviate from established law. (Paras 31, 32, 34, 37–39)

Writ Petitions Dismissed.

List of Cases cited:

1. Committee of Management, Shri Krishna Inter College Vs St. of U.P., 2007 (3) ESC 1736

2. Kashmeer Singh Yadav Vs Director of Education, 2010 (4) ADJ 652

3. Smt. Sadhna Vs St. of U.P., 2017 (6) ADJ 418

4. Sunil Kumar Verma Vs St. of U.P., Service Single No. 18977 of 2017, decided on 19.9.2017

5. Tribhuvan Nath Vs St. of U.P. & ors., Service Single No. 20041 of 2016, decided on 8.1.2020

6. Lalit Kumar Mishra Vs St. of U.P. & ors., 2009 (2) ADJ 624

7. Virendra Pal Singh Vs Joint Director of Education & ors., 2011 (2) ADJ 542

8. Km. Shweta Garg Vs St. of U.P., 2010 (8) ADJ 325

9. Ram Prakash Sharma Vs Joint Director of Education, Agra Region, Agra, 2010 (2) ADJ 243

10. Siddharth Shankar Mishra Vs St. of U.P. & ors., 2023 (6) ADJ 308 (FB)

11. Sunil Kumar Mishra Vs Regional Selection Committee, Gorakhpur & ors., 2004 (1) AWC 620

12. Subhash Prasad Vs Regional Selection Committee, Gorakhpur & ors., 2004 ALJ 3711

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Prabhakar Awasthi, learned counsel along with Sri Abhishek Kumar Saroj, learned counsel for the writ petitioner in leading and connected writ petition, Sri Shailendra Singh, learned Standing Counsel, who appears for the respondent no. 1 to 4 in the leading writ petition and connected writ petition and Sri Ashok Khare, learned Senior Counsel assisted by Sri Jigar Khare for respondent no.6 in the leading and connected writ petitions.

2. Since affidavits have been exchanged between the parties and they do not propose to file any further affidavits, thus both the writ petitions are being decided by a common order.

3. The case of the writ petitioner, Mahendra Kumar Yadav in both the writ petitions is that there happens to be an

institution by the name of Madan Mohan Malviya Inter College, Karchana, District Prayagraj which is recognised under the provisions of U.P. Intermediate Education Act, 1921, the provisions U.P. Act No. 5 of 1982 and U.P. Act No.24 of 1971 are applicable.

4. The writ petitioner claims to be appointed as an Assistant Teacher pursuant to the recruitment exercise undertaken by U.P. Secondary Service Selection Board on 9.2.2005. It is further asserted that at the time of the induction of the writ petitioner pursuant to the selection proceedings undertaken by the Service Selection Commission on 9.2.2005 the writ petitioner possessed the academic qualifications of B.A. in Ancient History, Political Science, Sociology. In the year 1993, the writ petitioner acquired Masters Degree in Political Science and also obtained B.Ed. in the year 1999. It is also the case of the writ petitioner that he qualified the M.A. in the subject Sanskrit in 1st Division, the results whereof was declared on 27.9.2021 and the mark sheet was issued in favour of the writ petitioner on 16.11.2021.

5. Consequent to the retirement of one Sri Swatantra Kumar Pandey, on 31.3.2022 on the post of Lecturer, a vacancy stood arisen which was to be filled by way of promotion under 50% quota. The Committee of Management of the institution in question resolved to promote the writ petitioner as Lecturer on 27.2.2022. The entire papers were forwarded to the Competent Authority as envisaged under U.P. Act No.5 of 1982.

6. The Regional Promotion Committee as per Section 12 of the U.P. Act No. 5 of 1982 headed by Joint Director of Education, Prayagraj Region, Prayagraj proceeded to accord promotion to the writ petitioner on the post of Lecturer on 8.2.2023.

7. Being aggrieved against the said order, the sixth respondent, Sri Gaurav Tripathi, who was working as an Assistant Teacher (Sanskrit) since 30.3.2012 in Adarsh Gram Sabha Inter College, Charwan, Kaushambi and he was transferred in the fifth respondent institution preferred **Writ-A No.3629 of 2023, Gaurav Tripathi, vs. State of U.P. & others.** The said writ petition came to be disposed of on 13.3.2023 while passing the following orders.

"Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Siddharth Khare and Ms. Neha Rai Chaudhary, learned counsel for the petitioner and learned Standing counsel for the State respondents.

The petitioner who is currently posted as Assistant Teacher in the institution in question, is aggrieved against the order dated 08th February, 2023 issued by the office of Joint Director of Education, Prayagraj Region, Prayagraj whereby his request for grant of promotion stands brushed aside and resultantly candidature came to be registered.

Plea set up by the petitioner is that on the first day of the year of the recruitment i.e. 1st July, 2021 in respect of the vacancy of Lecturer Sanskrit in question which fell vacant on 31st March, 2022, respondent no. 6 did not possess requisite qualification of post graduation decree in the subject of Sanskrit as he was issued with the marksheet on 27th September, 2021 only i.e. subsequent to the first day of the year of the recruitment.

Learned Senior Advocate submits that legal position is that a candidate must

have requisite qualification on the first day of the year of recruitment. In this regard he has also placed reliance upon the judgment of a concurrent bench of this Court in the case of Kasmeer Singh v. Director of Education, Uttar Pradesh alongwith connected matter being Civil Misc. Writ Petition No. 35034 of 2000, 2010 SCC Online All 740. He further submits that objection as to the qualification of respondent no. 6 came to be raised in his representation addressed to the Manager of the Committee of Management on 12.4.2022 and later on 18.08.2022, ought to have been considered but Regional Level Committee instead of addressing issue involved in the case simply held that respondent no. 6 did possess requisite qualification and therefore, promotion was rightly given and thus it approved promotion of respondent no. 6.

Learned Standing Counsel has passed on instructions to the Court which has been obtained by him from the Joint Director of Education (dated 06th March, 2023) and the same are taken on record. The instruction placed show only this much that respondent no. 6 since was found to be senior most in the category of L.T. Grade Assistant Teacher, he deserved promotion in preference to the present petitioner.

Having heard learned counsel for the respective parties and their arguments raised across the bar and looking to the facts, I find that vacancy arose in the month March, 2022, so the year of recruitment would have certainly been 2021-2022, and the first day of the year of recruitment therefore, would have been 1st July, 2021. Looking to the provision as contained under Rule 14 of UP Secondary Education Service Selection Board Rule,1998, It is important to be looked into and determined as to assistant teachers who claimed promotion whether possessed of requisite qualification on the first day of the year recruitment or not and if several of them were found eligible then only senior most teacher would have been given promotion as the principle of seniority subject to eligibility, is to be reckoned with in such cases.

The petitioner has placed before this Court marksheet of respondent no. 6, which was issued on 16.11.2021, whereas it has come to be mentioned in paragraph 29 that result was declared by the University only on 27.09.2021. Both these dates are subsequent to 1st July, 2021. From the order impugned it clearly transpires that the question as was posed by the petitioner before the authorities has remained unaddressed by Regional Level Committee. It is another aspect that a candidate possesses requisite qualification but moot question is, whether candidate possesses requisite qualification on the first day of the year of recruitment.

A coordinate bench of this Court in the case of Kasmeer Singh Yadv (supra) has been very categorical in holding that candidate want possess requisite qualification on the first day of the year of recruitment. The year of recruitment has also been discussed to be the year in which vacancy fell and the first day i.e. 1st July would be one of preceding year.Paragraphs 18 and 19 are reproduced hereunder:

"18. The first issue that has to be decided is as to what would be the date on which the qualification has to be seen. This issue need not detain this Court for long in view of the decision in the case of Committee of Management, Shri Krishna Inter College (supra) which in turn considers the judgment in the case of Sunil Kumar Mishra v. Regional Selection Committee, Gorakhpur and Ors. MANU/UP/0640/2003MANU / UP/0640 / 2003 : 2004 (1) AWC 620 and the Division

Bench judgment in the case of Subhash Prasad v. Regional Selection Committee, Gorakhpur and Ors. 2004 ALJ 3711.

19. The position has been amply clarified in the case of Committee of Management, Shri Krishna Inter College (supra). The year of recruitment would mean from 1st of July of the year preceding which the vacancy is to occur. The last date of the year of recruitment would be obviously on the date when the vacancy actually occurs. This is because the date of occurrence of vacancy in the normal course is known as the date of retirement which is fixed. This mechanism has been made to ensure that the vacancies are intimated during the year of recruitment positively so that the teachers are recruited by the Board and they Join immediately after the occurrence of the vacancy without causing any loss to the academic session of the students. This ensures the availability of teachers continuously without any gap."

On a pointed query being made to the learned Standing Counsel as to whether it can be gathered from any of the recitals in the order impugned that this above issue has also been addressed to or discussed by the Regional Level Committee but he could not cite even a single paragraph to that count and, therefore, this Court finds that this above legal issue that was raised repeatedly by the petitioner has remained unnoticed and thus decision given by Regional Level Committee is per se bad and needs to be remitted.

Since I am remitting the matter to the Regional Level Committee for taking decision afresh in the light of observations made hereinabove, and all the interested parties will naturally be heard again by the Regional Level Committee, I do not consider it appropriate to issue notice to the respondent no. 6 at this stage.

In view of above, the order of Regional Level Committee dated 08th February, 2023 is set aside.

The matter is remitted to the Regional Level Committee to decide afresh in the light observations made inhereinabove after giving full opportunity of hearing to all the interested and contesting parties. Needless to add, the order to be passed shall be reasoned and speaking one and that too within a period of two months from the date of production of certified copy of this order.

With the aforesaid observation and directions, this petition stands disposed of."

8. Post remand now an order has been passed on 7.7.2023 by the Regional Promotion Committee under Section 12 of the U.P. Act No. 5 of 1982 headed by the Joint Director of Education, Prayagraj Region, Prayagraj whereby the claim of the writ petitioner for promotion as Lecturer has been negated.

9. Questioning the said order, the writ petitioner has filed the present writ petition. The said writ petition was entertained by this Court on 28.8.2023 while seeking response and issuing notice to the Committee of Management and there is an office report dated 3.10.2023 that the service upon the Committee of Management stood confirmed.

10. So far as the connected writ petition is concerned the same has been preferred by Sri Mahendra Kumar Yadav questioning the order dated 11.10.2023 passed by the Regional Promotion Committee as per Section 12 of the U.P.

Act No. 5 of 1982 headed by Joint Director of Education, Prayagraj Region, Prayagraj as well as the order dated 17.10.2023 passed by the District Inspector of Schools, Prayagraj according benefit to Sri Gaurav Tripathi while confirming his promotion as Lecturer (Sanskrit). The connected writ petition was tagged with the leading writ petition and it is before the Court.

11. A counter affidavit has been filed in the leading writ petition by the District Inspector of Schools, Prayagraj dated 15.9.2023 on behalf of the respondents no. 2, 3 & 4 and followed by a counter affidavit by the sixth respondent, Sri Gaurav Tripathi to which rejoinder affidavits have been filed.

12. Since a statement has been made by the rival parties they do not propose to file any further response, thus the writ petitions are taken on board and decided at this stage.

13. Sri Prabhakar Awasthi, learned counsel along with Sri Abhishek Kumar Saroj, learned counsel for the writ petitioner while questioning the orders impugned in the writ petitions have sought to submit that the impugned orders cannot be sustained for even a single moment particularly in view of the fact that once the vacancy on the post of Lecturer (Sanskrit) fell vacant on 31.3.2022 and it was earmarked for promotion quota then obviously the writ petitioner being senior and eligible and qualified in all respects was entitled to be considered for promotion.

14. Submission of learned counsel for the writ petitioner is that in the impugned order a totally incorrect approach has been adopted by the Regional Promotion Committee while wrongly interpreting the provisions contained under Regulation 6 of the Chapter II of the U.P. Intermediate Education Act, 1921 read with Rule 14 of the U.P. Secondary Education Service Selection Board Rules, 1998 as on the date of the occurrence of the vacancy that on 31.3.2022 the writ petitioner possessed the requisite qualification to his credit.

15. Emphasising the aforesaid submission, the learned counsel for the writ petitioner submits that though the writ petitioner was having necessary teaching experience and he was qualified but the only fetter was with respect to possession of the qualification of M.A. which admittedly the writ petitioner obtained prior to the occurrence of the vacancy on 31.3.2022 as the results of M.A. Sanskrit were declared on 27.9.2021 and a mark-sheet was issued on 16.11.2021.

16. According to the learned counsel for the writ petitioner the interpretation so sought to be suggested by the respondents as recited in the impugned orders that the writ petitioner was liable to possess the eligibility on the first day of year of recruitment is totally misplaced and out of context as eligibility is to be seen on the date of the occurrence of vacancy. Since the vacancy occurred on 31.3.2022 thus the eligibility is to be seen on 1.4.2022.

17. In order to buttress the said submission, learned counsel for the writ petitioner has sought to rely upon the decision in the case of **Lalit Kumar Mishra vs. State of U.P. & others 2009 (2) ADJ 624, Virendra Pal Singh vs. Joint Director of Education and others 2011 (2) ADJ 542, Km. Shewta Garg vs. State of U.P. 2010 (8) ADJ 325 as well as the case of Ram Prakash Sharma vs. Joint**

Director of Education Agra Region, Agra 2010 (2) ADJ 243 and Larger Bench decision in Siddharth Shankar Mishra vs. State of U.P. & five others 2023 (6) ADJ 308 (FB).

18. Sri Ashok Khare, learned Senior Counsel while countering the submission of the learned counsel for the writ petitioner submits that the order impugned in the writ petitions are perfectly valid and no fault whatsoever can be attributed in this regard inasmuch as the writ petitioner was not qualified and eligible on the first day of year of recruitment as the first date of recruitment would be 1.7.2021 in view of the fact that the vacancy stood arisen on 31.3.2022 and the writ petitioner as per his own saying was possessing M.A. Degree post first day of recruitment on 16.11.2021 as whereas the date of issuance of mark-sheet and the results were declared on 27.9.2021. According to him both the dates are subsequent to the first date of recruitment and thus in view of the provisions contained under Regulation 6 of the Chapter II of the U.P. Intermediate Education Act, 1921 read with Rule 14 of the U.P. Secondary Education Service Selection Board Rules, 1998 the writ petitioner was rightly not considered for promotion. He seeks to rely upon the decision in the case of **Committee of Management Krishna Inter College and others vs. State of U.P. 2007 (3) ESC 1736, Kashmeer Singh Yadav vs. Director of Education 2010 (4) ADJ 652, Larger Bench decision in the case of Smt. Sadhna vs. State of U.P. 2017 (6) ADJ 418, Service Single No.18977 of 2017, Sunil Kumar Verma vs. State of U.P. decided on 19.9.2017 and Service Single No.20041 of 2016, Tribhuvan Nath vs. State of U.P. & others decided on 8.1.2020.**

19. Sri Shailendra Singh, learned Standing Counsel has supported the submissions of Sri Khare. Learned counsel for the Committee of Management has also advanced his arguments.

20. Before addressing to the arguments raised by the rival parties, it would be apposite to have a quick survey over the statutory provisions which are governing the field.

21. Section 2 (l) of the Uttar Pradesh Secondary Education [Service Selection Boards,]Act 1982

"(l) Year of recruitment' means a period of twelve months commencing from first day of July of a calendar year;"

22. Regulation-6 of Chapter-II of the Regulations framed under the U.P. Intermediate Education Act, 1921 stated as under:-

"6(1) Where any vacancy in the lecturer's grade or in the L.T. Grade as determined under Regulation 5, is to be filled by promotion, all teachers working in the L.T. or the C.T. Grade, as the case may be, having a minimum of five years continuous substantive service to their credit on the date of occurrence of the vacancy shall be considered for promotion by the Committee of Management without their having to apply for the same provided they possess the prescribed minimum qualifications for teaching the subject in which the teacher in the lecturer's grade or in the L.T. Grade is required.

The aforesaid Regulation clearly indicates that teacher is entitled for the promotion, provided he has a minimum of five years of continuous substantive service on the date of the occurrence of the

vacancy. Section 32 of the Act, 1982 provides that the provisions of the Intermediate Education Act, 1921 and the Regulations made thereunder in so far as they are not inconsistent with the provisions of this Act of 1982 or the Rules or Regulations made thereunder was continue to be in force for the purpose of selection, appointment, promotion, dismissal, removal, termination or reduction in the rank of a teacher."

23. The procedure has been prescribed under Rule 14 of the U.P. Secondary Education Services Selection Board Rules, 1998 which is quoted hereunder:-

"14. Procedure for recruitment by promotion. (1) where any vacancy is to be filled by promotion all teachers working in trained graduates grade or certificate of teaching grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade or the trained graduates grade, as the case may be, without their having applied for the same.

Note. For the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in subrule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the proforma given in Appendix 'A'.

(4) With three weeks of the receipt of the list from the Management under sub-rule (3), the Inspector shall verify the facts from the record of his office and forward the list to the Joint Director.

(5) The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call for such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee referred to in sub-section (1) of Section 12 and after the Committees recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management.

(6) Within ten days of the receipt of the panel from the Joint Director under sub-rule (5), the Inspector shall send the name of the selected candidates to the Management of the institution which has notified the vacancy and the Management shall accordingly on authorization under its resolution issue the appointment order in the proforma given in Appendix 'F' to such candidate."

24. I have heard learned counsel for the parties and have carefully perused the record.

25. The facts of the case are not in dispute. It is not disputed by the parties that in the institution, Madan Mohan Malviya Inter College, Karchana, District Prayagraj a vacancy on the post of Lecturer (Sanskrit) fell vacant on 31.3.2022. Parties are also in agreement that the provisions of the U.P. Intermediate Education Act, 1921, U.P. Act No.5 of 1982 and the 1998 Rules, are applicable.

26. It is also not in dispute that the possession of Masters Degree was a mandatory qualification required for promotion on the post of Lecturer as per Appendix-A under Regulation (1) Chapter II of the U.P. Intermediate Education Act, 1921. There is also no dispute that the writ petitioner obtained the degree of M.A. in Sanskrit on 16.11.2021 as on that date mark-sheet was issued and the results were declared on 27.9.2021.

27. Now a question arises, as to what would be the crucial date on which eligibility of the writ petitioner is to be seen. Regulation 6 of Chapter II of the U.P. Intermediate Education Act, 1921 provides that where any vacancy in the Lecturer Grade or in the L.T. Grade as determined under Regulation 5, is to be filled by promotion, all teachers working in L.T. Grade or C.T. Grade as the case may be having a minimum of five years of continuance substantive service to their credit on the date of the occurrence of the vacancy shall be considered for promotion by the Committee of Management without there having to apply for the same provided that they possess the minimum qualification for teaching the subject in which the teacher in the Lecturer Grade or L.T. Grade is required.

28. Similarly, Rule 14 of the 1998 Rules, further provides that where a vacancy is to be filled by promotion of all teachers working in trained grades or certificate of teaching grade, if any, who possesses the qualifications prescribed for the post and have completed five years of continuous regular service as such on the first day of recruitment shall be considered for promotion to the Lecturer Grade or Trained Graduate Grade as the case may be without there having applied for the same.

29. Further the year of recruitment is not defined either under the U.P. Intermediate Education Act, 1921 or the 1998 Rules but it is defined in Section 2(l) of the U.P. Act No.5 of 1982, according to which year of recruitment means a period 12 months commencing from the first day of July of a calendar year.

30. Though, the learned counsel for the writ petitioner has submitted that the year of recruitment would be 1.4.2022 as the vacancy had fallen vacant on 31.3.2022 and before that date the writ petitioner had attained eligibility but according to the respondents the year of recruitment would be on the first day of the year of recruitment i.e. 1.7.2021 as the vacancy stood arisen on 31.3.2022.

31. According to the learned counsel for the respondents on the date of the occurrence of the vacancy the writ petitioner was not possessing the eligibility. The said issue is no more res integra as this Court in the case of **Shri Krishna Inter College (Supra)** had the occasion to deal with the said aspect and held as under:-

"Para 16 (1)……
(2)……
(3)……
(4)……..
(5) A post of lecturer in Economics fell vacant on 30.6.2002. The petitioner Claim promotion on the said post. There is no dispute about the qualification of the petitioner. The only ground on which the claim of the petitioner has been turned down is that the petitioner has not put in five years continuous regular services as on date of occurrence of vacancy. It is to be noted that under the Rules the date on which the candidature has to be considered is the first day of year of recruitment and

not the date of occurrence of vacancy. The impugned order, therefore, is erroneously proceeds on the aforesaid presumption that the date of occurrence of vacancy would be the relevant date So far as the question of continuous regular service is concerned, the admitted facts are tha the petitioner was appointed in accordance with rules on ad hoc basis against substantive vacancy. The said appointment was regular appointment and cannot be termed to be irregular in any way."

32. Following the said judgment, this Court in the case of **Kashmeer Singh Yadav (Supra) in paras 18, 19 and 21** observed as under:-

18. The first issue that has to be decided is as to what would be the date on which the qualification has to be seen. This issue need not detain this Court for long in view of the decision in the case of Committee of Management, Shri Krishna Inter College (supra) which in turn considers the judgment in the case of Sunil Kumar Mishra v. Regional Selection Committee Gorakhpur and others, 2004 (1) AWC 620 and the Division Bench judgment in the case of Subhash Prasad v. Regional Selection Committee, Gorakhpur and others, 2004 ALJ 3711.

19. The position has been amply clarified in the case of Committee, of Management, Shri Krishna Inter College (supra). The year of recruitment would mean from 1st of July of the year preceding which the vacancy is to occur, The last date of the year of recruitment would be obviously on the date when the vacancy actually occurs. This is because the date of occurrence of vacancy in the normal course is known as the date of retirement which is fixed. This mechanism has been made to ensure that the vacancies are intimated during the year of recruitment positively so that the teachers are recruited by the Board and they f Join immediately after the occurrence of the vacancy without causing any loss to the academic session of the students. This ensures the availability of teachers continuously without any gap.

(21) The date on which the qualification has to be seen is not the date of the occurrence of vacacny but the first day of the year of recruitment. This is also evident from the ratio of the decisions which have been referred to herein above. Thus, the date on which the qualification has to be held by the candidate in this case would be 1st of July 1996."

33. Recently in the case of **Tribhuvan Nath (Supra)** in para 4, 5, 6 and 11 observed as under:-

4. Learned counsel for the petitioner contends that the substantive vacancy of Lecturer in Education had arisen with the retirement of the erstwhile lecturer on 30.6.2014 and for all purposes the eligibility for promotion of those eligible in the feeder cadre is to be seen on 1.7.2014. He contends that as per Rule 10(b)(ii) of the U.P. Secondary Education Services Selection Board Rules, 1998 (hereinafter referred to as the 1998 Rules) 50% post of teachers of lecturer grade are to be filled in by promotion from amongst substantively appointed teachers of the trained graduates grade. It is also contended that in terms of Rule 14 of the 1998 Rules, where any vacancy is to be filled by promotion, all teachers working in trained graduates grade who possess the qualifications prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the lecturers grade.

Placing reliance on Rule 10 read with Rule 14 of the 1998, it has been argued by the learned counsel for the petitioner that once the petitioner has been substantively appointed on 18.7.2008 as Assistant Teacher, consequently he has completed 5 years and 2 months of service as per the requisition as on 1.7.2017 and was thus perfectly eligible for being considered for promotion on the post of Lecturer in Education which has not been done by the respondents.

5. It is also contended by the learned counsel for the petitioner that the respondent No.6, who has been recommended for promotion, has only been regularised vide order dated 3.5.2016, a copy of which is Annexure-24 to the writ petition, and it was also provided that he would be on probation for one year. It is contended that once the respondent No.6 has only been regularised vide order dated 3.5.2016, consequently there was no occasion for the respondents to consider his case for promotion as Lecturer in Education and hence the impugned resolution of the committee of management is patently vitiated on this ground also and merits to be quashed and set-aside.

6. On the other hand, Sri S.P. Singh, learned counsel for the respondent No.6, contends that a perusal of Rule 10 read with Rule 14 of the 1998 Rules would indicate that all teachers working in trained graduates grade who possess the prescribed qualifications and have completed 5 years regular service on the first day of the year of recruitment are to be considered for promotion. Placing reliance on the Larger Bench judgment of this Court in the case of Smt. Sadhna vs. State of U.P. and others reported in (2017)3 UPLBEC 2049, it is contended that this aspect of the matter has already been considered threadbare by the Larger Bench wherein it has been held that the 5 years of regular service is to be seen on the first day of year of recruitment which is to be seen well in advance i.e. a date prior to the date on which the actual determination of vacancy is to take place. Sri Singh has also contends that the Full Bench has taken into consideration the Government Order dated 13.12.1999 issued by the State Government wherein this aspect of the matter has been clarified and after considering this, it is apparent that the petitioner was required to possess the 5 years of service as on 1.7.2013, the substantive vacancy having arisen on 30.6.2014, as the regular service of the petitioner in terms of Rule 14 is to be seen on the first day of year of recruitment which would commence in the year in which the vacancy has arisen, in this case the year 2013-14. It is argued that as on 1.7.2013, the petitioner was being less than 5 years years and consequently, was ineligible for being considered for promotion It is thus contended that once the petitioner himself was not eligible for being considered for promotion, hence he cannot be allowed to raise a challenge to the promotion of respondent No.6.

11. From a perusal of the aforesaid Larger Bench judgment it clearly comes out that the Larger Bench after considering the Government Order dated 13.12.1999, as was reproduced in paragraph 102 of its judgment, has held that the requirement of an incumbent to possess the prescribed minimum qualification on the date of occurrence of vacancy mean fulfilling the qualification on the first day of the year of recruitment which provision has been maintained under the 1998 Rules. Elaborating this, it has been indicated that the teacher of the feeding cadre must possess the requisite qualification well in advance i.e. a date prior to the date of actual determination of the vacancy is to

*take place. While arriving on the said conclusion, the Larger Bench has also considered the expla*nation that has been given in the Government Order dated 13.12.1999."

34. Nonetheless, the Larger Bench decision of this Court in the case of **Smt. Sadhna (Supra)** had considered the aforesaid aspect and has held as under:-

94. In our opinion, "the last day of year of recuritment" as provided for under Rule 11 (2) of Rules, 1998 would mean "the last day of 12 calender month" starting from "1st July" and ending on "30th June" following which would be 30th June, like-wise "first day of year of recruitment" as provided for under Rule 14 would mean "the first day" i.e. of the 12 calender months starting from first July and ending on 30th June following i.e. 1st July.

95. The provisions cannot be read to mean that while determining the vacancies for direct recruitment under Rule 11 (2), year of recruitment would be 12 calender months starting from 1st July of a different calender year, while under Rule 14 of Rules, 1998 the phrase "year of recruitment" would mean a period of 12 calender months starting from 1st of July of a different calender year. The provisions of Rules, 10, 11 and 14 of Rules, 1998 have to be read as a continuous chain of different determinations/actions. The year of recruitment has to be one and the same for the proviso to Rule 10, Rule 11 (2), Rule 11(4) and Rule 14 (2) of Rules,1998 i.e. 12 calender months starting from 1st of July of the same calender year.

35. The judgement in the case of **Smt. Sadhna (Supra)** was followed in the case of **Sunil Kumar Verma (Supra).**

36. The net offshoot of the aforesaid judgements clearly mandates that the date on which the qualification has to be seen is not the date of the occurrence of the vacancy but the first day of year of recruitment. Applying the said principles of law in the present facts of the case the Court finds that the vacancy stood arisen on 31.3.2022 thus the first day of recruitment would be 1.7.2021, thus on the first day of recruitment the writ petitioner was not eligible and qualified.

37. So far as the reliance placed upon by Sri Awasthi, with respect to the judgement in the case of **Lalit Kumar Mishra (Supra),** is concerned the same is not applicable on the facts of the matter particularly wherein the issue therein was with respect to the vacancy which had arisen on 30.6.2003 as whereas in the present case in hand the vacancy stood arisen on 30.3.2022 wherein the year of recruitment commences from 1st day of July till 30th June of the said year.

38. So far as the judgement in the case of Virendra Pal Singh (Supra) and **Km. Shweta Gara (Supra**) are concerned they would not give any aid to the writ petitioner.

39. In so far as the Full Bench judgement in the case of **Siddharth Shankar Mishra (Supra)** is concerned the same does not deal with the issue which is being raised in the present writ petition.

40. Since there happens to be direct judgement on the said point as discussed above, thus this Court does not even otherwise find any justification to differ with the same.

41. As regards the argument of the learned counsel for the writ petitioner that

since the letter dated 13.12.1999 of the Secretary U.P. Madhyamik Shiksha Chayan Board addressed to the District Inspector of Schools provides for the year of recruitment means a period of 12 months commencing from the 1st Day of July of calendar year stands withdrawn on 17.6.2003 and the said letter was considered in the judgement of **Smt. Sadhna (Supra)** thus the position would change and tilt in favour of the writ petitioner appears to be attractive at the first blush but may not detain the Court particularly when it is apparent from the statute i.e. Section 2(l) of the U.P. Act No.5 of 1982 which defines the year of recruitment.

42. Since there is no challenge to the definition of the year of recruitment coupled with the fact that the promotion exercise is to be undertaken based upon the same, thus in the opinion of the Court the writ petitioner is not entitled to any relief.

43. Moreover, nothing has been brought into record to substantiate that the sixth respondent Sri Gaurav Tripathi, was not eligible or qualified, thus in the opinion of the Court, the writ petitioner is not entitled to any relief.

44. Accordingly, both the writ petitions are dismissed.

(2024) 1 ILRA 637
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

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

Writ-A No. 14898 of 2023

Gajendra Singh ...Petitioner
Versus
U.P.P.C.L. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manu Mishra

Counsel for the Respondents:
Sri Abhishek Srivastava, Sri Ujjwal Srivastava

A. Service Law – Disciplinary Proceedings – Principles of Natural Justice – U.P. Power Corporation Ltd. – Petitioner, a Junior Engineer, challenged dismissal order dated 03.03.2021 and appellate order dated 27.12.2021 following a disciplinary inquiry – Charge-sheet issued on 25.06.2019 for alleged financial irregularities – Inquiry Committee failed to conduct a formal oral inquiry or examine witnesses to prove charges – Held, in disciplinary proceedings involving major penalties, the establishment must prove charges through oral and documentary evidence, with witnesses produced and subject to cross-examination – Inquiry Committee's reliance solely on charge-sheet, petitioner's reply, and unproven documents violates principles of natural justice – Inquiry procedurally flawed, vitiating the impugned orders. (Paras 7, 8, 14, 15)

B. Service Law – Disciplinary Proceedings – Role of Inquiry Officer – Inquiry Officer acts as an independent quasi-judicial authority, not a representative of the department – Must ensure charges are proven by the establishment through evidence, even in the absence of the delinquent employee – Failure to convene a formal inquiry, produce witnesses, or prove documents renders the inquiry invalid – Impugned orders based on such inquiry unsustainable. (Paras 9, 10, 11, 13)

Writ Petition Allowed – Impugned Orders Quashed – Respondents Permitted to Conduct Fresh Inquiry.

List of Cases cited:

1. St. of U.P.& ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

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

3. St. of U.P. & anr.Vs Kishori Lal & anr., 2018 (9) ADJ 397 (DB)(LB)

4. Smt. Karuna Jaiswal Vs St. of U.P., 2018 (9) ADJ 107 (DB)(LB)

5. St. of U.P. Vs Aditya Prasad Srivastava & anr., 2017 (2) ADJ 554 (DB)(LB)

6. Chamoli District Co-operative Bank Ltd. Vs Raghunath Singh Rana & ors., AIR 2016 SC 2510

7. St. of U.P. & anr.Vs T.P. Lal Srivastava, 1997 (1) LLJ 831

8. Subhash Chandra Sharma Vs Managing Director & anr., 2000 (1) UPLBEC 541

9. Subhash Chandra Gupta Vs St. of U.P., 2012 (4) ADJ 4 (NOC)

10. Salahuddin Ansari Vs St. of U.P. & ors., 2008 (3) ESC 1667

11. Subash Chandra Sharma Vs U.P. Cooperative Spinning Mills & ors., 2001 (2) UPLBEC 1475

12. Laturi Singh Vs U.P. Public Service Tribunal & ors., Writ Petition No. 12939 of 2001, decided on 06.05.2005

13. Mahesh Narain Gupta Vs St. of U.P. & ors., (2011) 2 ILR 570

14. Imperial Tobacco Co. Ltd. Vs Its Workmen, AIR 1962 SC 1348

15. Uma Shankar Vs Registrar, 1992 (65) FLR 674 (All)

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

1. The petitioner is a Junior Engineer in the service of the U.P. Power Corporation Limited, Lucknow. The petitioner was served with a charge-sheet on 25.06.2019 issued by an inquiry committee constituted by the U.P. Power Corporation carrying three charges for the period of time that he was posted as a Junior Engineer with the Electricity Urban Distribution Division, Farrukhabad. The charges against the petitioner, carried in the charge-sheet, read:

"आरोप 1 :-

शिकायतकर्ता, विजय कुमार कटियार पुत्र श्री राजेन्द्र नाथ कटियार, निवासी मिशन कम्पाउण्ड नेकपुर कला, फतेहगढ़ जानपद फर्रुखाबाद की शिकायत पर प्रबन्ध निदेशक, दक्षिणांचल वि०वि०नि०लि० के आदेश पर गठित जाँच कमेटी द्वारा की गयी जाँच में यह पाया गया कि अधिशासी अभियन्ता विद्युत नगरीय वितरण खण्ड, फर्रुखाबाद द्वारा डा० राम मनोहर लोहिया हॉस्पिटल, आवास विकास, फर्रुखाबाद को 33 KV स्वतंत्र पोषक से निर्बाध विद्युत आपूर्ति प्रदान करने हेतु रू० 2,18,20,093.00 का प्राक्कलन पूर्ण जमा योजना के अन्तर्गत वर्ष 2008-09 में स्वीकृत किया गया था। परन्तु निगम के पास धनराशि माह अप्रैल 2014 में प्राप्त होने के कारण इस कार्य को कराने में स्वाभाविक बिलम्ब हुआ। सामग्री प्रबन्धन, द०वि०वि०नि०लि० द्वारा उक्त कार्य को टर्नकी आधार पर कराने के लिए मै० अमित इंजीनियरिंग कारपोरेशन, मैनपुरी से दिनांक 29.10.2014 को अनुबन्ध किया गया। उक्त अनुबन्ध के अन्तर्गत कार्यदायी संस्था को 3.560 किमी, 33 के0वी0 लाइन (33 KV उपकेन्द्र, भोलेपुर से डा० राम मनोहर लोहिया हॉस्पिटल तक) का निर्माण करना था। लेकिन प्राक्कलन स्वीकृत होने व लाइन निर्माण में

लगभग 07 वर्ष का अन्तर होने एवं नगर में विभिन्न स्थानों पर मकान बन जाने के कारण 33 के0वी0 लाइन निर्धारित रूट से न जाकर जिला प्रशासन के सहयोग से सकरे एवं छोटे मार्ग से बनायी गयी, जिससे लाइन की वास्तविक लम्बाई कम हो गई। अधिशासी अभियन्ता, वि०न०वि०ख०, फर्रुखाबाद द्वारा मुख्य विकास अधिकारी जनपद फर्रुखाबाद को अपने पत्र 2216/ वि०न०वि०ख० / फर्रुखाबाद दिनांक 13.09.2018 में यह इंगित किया गया कि मौके पर जी०पी०एस० सर्वे कराने पर, लाइन की लम्बाई 1.931 किमी (1.606 किमी उपरगामी + 0.325 भूमिगत) पाई गई। आपके द्वारा कार्यदायी संस्था मै० अमित इंजीनियरिंग कारपोरेशन से मिली भगत कर मानक को दरकिनार कर लाइन की पूर्व निर्धारित लम्बाई 3.560 कमी के अनुरूप विद्युत सामग्री कार्य शुरू होने पर मंगाई गयी एवं सम्पूर्ण विद्युत सामग्री का भुगतान किया या परन्तु जी०पी०एस० सर्वे कराने पर, लाइन की लम्बाई घटकर 1.931 किमी पाये जाने पर, अतिरिक्त मंगाई गई अवशेष सामग्री मूल्य रू0 23,50,247.00 को उसी समय अक्टूबर 2015 में इरेक्शन के बिलों से न काट कर अथवा भण्डार में वापस जमा न कर कार्यदायी संस्था को अतिरिक्त सामग्री मूल्य रू0 23,50,247 का भुगतान हेतु बिलों का सत्यापन कर विभाग को आर्थिक क्षति पहुँचाने एवं अपने उत्तरदायित्वों का निर्वहन न करने के लिए आप प्रथमदृष्टया दोषी है।

<u>आरोप 2 :-</u>

मै० अमित इंजीनियरिंग कारपोरेशन, मैनपुरी द्वारा रोड क्रासिंग पर एच०डी०पी०ई० (160mm dia) पाइप, 530 मी0 का कार्य नहीं किया गया, परन्तु आपके द्वारा कार्यदायी संस्था को अनैतिक लाभ पहुँचाने के उद्देश्य से उक्त कार्य से सम्बन्धित इरेक्शन बीजक सं0 29 / 15-16 दिनांक 28.10.2015 के क्रम सं0 28 (सी) पर अंकित कार्य हेतु रू. 5,95,508.00 एवं क्रम सं0 28 (डी) पर अंकित कार्य हेतु रू. 2,08,427.00, कुल रू. 8,03,935.00 का अधिक भुगतान हेतु बिलों का सत्यापन किया गया। अतः आपके द्वारा Executed Estimate बनवाये बिना कार्यदायी संस्था को अधिक भुगतान हेतु बिलों का सत्यापन कर अनैतिक लाभ पहुँचाने, विभाग को आर्थिक क्षति पहुँचाने एवं अपने उत्तरदायित्वों का निर्वहन न करने के लिए प्रथमदृष्टया दोषी है।

<u>आरोप 3:-</u> आपके द्वारा निम्नांकित आपूर्ति बीजकों के भुगतान हेतु बिलों का सत्यापन, अनुबन्ध की General Requirement of Specification की शर्त सं0 15.0A (TERMS OF PAYMENT) के अनुसार नहीं किया गया, जोकि अनुबंध की शर्तों का सीधा उलंधन है:-

3.1 आपूर्ति बीजक संख्या 54/ दिनांक 25.01.2015, 55/ दिनांक 25.01.2015 एवं 56 / दिनांक 25.01.2015 में अनुबन्ध की शर्तो के अनुरूप 60 प्रतिशत धनराशि का भुगतान किया जाना था लेकिन भुगतान हेतु बिलों का सत्यापन 90 प्रतिशत धनराशि का किया गया।

3.2 आपूर्ति बीजक सं0 42 / दिनांक 27.01.2015 में अनुबंध की शर्तों के अनुरूप 60 प्रतिशत धनराशि का भुगतान किया जाना था लेकिन भुगतान हेतु बिलों का सत्यापन 80 प्रतिशत धनराशि का किया गया।

3.3 कार्य बीजक संख्या 28/ दिनांक 28.10.2015, 29 / दिनांक 28.10.2015 एवं 30/ दिनांक 28.10.2015 में अनुबंध की शर्तो के अनुरूप 90 प्रतिशत धनराशि का भुगतान किया जाना था लेकिन भुगतान हेतु बिलों का सत्यापन 100 प्रतिशत धनराशि का किया गया।

अतः आपके द्वारा कार्यदायी संस्था से साँठ-गाँठ कर, अनुबंध की शर्तो का उल्लंघन कर, उसे उपरोक्त बीजकों का अधिक भुगतान हेतु सत्यापन कर विभाग को आर्थिक क्षति पहुँचाने एवं अपने उत्तरदायित्वों का निर्वहन न करने के लिए आप प्रथमदृष्टया दोषी है।"

2. The petitioner submitted his reply dated 25.06.2019 to the charge-sheet, submitting amongst others that the estimate for construction of the then proposed feeder for the Dr. Ram Manohar Lohia Hospital, Farrukhabad was sanctioned in 2008-09, but the expenses were deposited with the respondent Corporation in 2014. Work commenced during the period when Rakesh Kumar was posted as the Junior Engineer. He never informed the petitioner nor handed over details of the materials issued earlier. The charges were specifically denied with defences in answer to each.

3. The Inquiry Committee proceeded to hold inquiry in utter breach of the salutary principles where no witness was produced or examined on behalf of the establishment to prove the charges. The Inquiry Committee submitted their report dated 20.06.2020, a copy whereof was served upon the petitioner along with a show cause notice dated 16.09.2020, asking the petitioner to submit his reply in answer to the findings of the inquiry report within three weeks. The petitioner submitted his reply to the show cause on 01.12.2020.

4. It is the petitioner's case that without considering the petitioner's reply, the Disciplinary Authority/ Chairman, U.P. Power Corporation Limited, Lucknow vide order dated 03.03.2021 punished the petitioner with award of a censure entry and withholding two increments with cumulative effect. Dissatisfied with the order of punishment, the petitioner carried an appeal to the Board of Directors of the U.P. Power Corporation Limited, Lucknow vide memo of appeal dated 24.07.2021. The Appellate Authority, by their order impugned dated 27.12.2021, dismissed the petitioner's appeal and affirmed the order passed by the Disciplinary Authority.

5. The petitioner has now approached this Court aggrieved by the two orders impugned by means of the present writ petition.

6. Heard Mr. Manu Mishra, learned Counsel for the petitioner in support of the petition and Mr. Ujjwal Srivastava, Advocate holding brief of Mr. Abhishek Srivastava, learned Counsel for the respondents.

7. A perusal of the inquiry report shows that the Inquiry Committee proceeded in the fashion of an investigator or at best an Inquiry Committee or officer entrusted with holding a preliminary

inquiry. The Inquiry Committee's report does not show that any formal proceedings of inquiry were convened, as required to be done at the stage when an inquiry into charges that may lead to the imposition of a major penalty is mandated by salutary principles. The Inquiry Committee, comprising two officers of the Corporation, looked into the charge-sheet together with the annexed documents themselves and the petitioner's reply. They decided upon the worth of the charges by perusing the charge-sheet, the reply and the documents annexed by parties. It is not even remotely discernible from a perusal of the inquiry report that the Inquiry Committee convened themselves as a formal Inquiry Tribunal, requiring the establishment to prove the charges through a Presenting Officer, acting on their behalf to lead evidence both documentary and oral. It is a salutary requirement of the law that in all cases involving charges that can lead to the imposition of a major penalty, it is the establishment's burden in the first instance to lead evidence, particularly, oral, that is by production of witnesses, to prove the charges. The documents filed along with the charge-sheet are but idle papers, which can be galvanized into evidence once introduced by the Presenting Officer and proved by oral testimony of witnesses, who depose for the establishment. The witnesses can then be cross-examined by the delinquent. It is after the establishment have led evidence to prove the charges that the delinquent can be called upon by the Inquiry Committee to produce his evidence, both documentary and oral, in the same fashion. In Paragraph No.14 of the writ petition, it is averred that no witness was produced or examined by the establishment to prove the charges nor oral inquiry conducted. The averments in Paragraph No.14 of the writ petition together with a host of other paragraphs, all jumbled up, have been answered in the counter affidavit vide Paragraph No. 3. v., vii. and vii., where it is averred:

"V. Further, in the chargesheet the copy of the documents which had been relied upon by the Corporation in support of the charges were also provided to the petitioner and in the chargesheet it was also mentioned that the petitioner can file his written reply within 15 days along with all relevant evidences on which he wants to rely in his defence and it was also mentioned that in his written reply he should also provide names of the persons whom he wants to produce as witnesses for examination/cross examination along with names and address of all those witnesses and should also bring details of the points on which he wants to examine/cross examine.

vii. There after the Enquiry Committee after going through the entire materials evidence on record, reply given by the petitioner and examining his statement, a detail enquiry report was submitted on 20.6.2020 wherein all the charges leveled against the petitioner were found to be proved.

viii. Further after giving due opportunity of hearing to the petitioner and on the on the basis of material evidence on record, the enquiry committee has submitted his report and during the course of departmental enquiry, the petitioner has not disputed about the genuineness of any of the documents provided to the petitioner during the course of enquiry nor he had shown any interest in asking the department to produce any witness for examination/cross examination, therefore, once the employee has duly participated in the departmental enquiry and has admitted the evidence on record, therefore, it cannot be said that any

prejudice is caused to him in not examining any witness by the department and if we go by the plain reading of the Regulation 7 of the 2020 Regulation it only says, in Regulation 7(5) that, along with the chargesheet the copy of the documents and list of witnesses should be provided to the employee and Regulation 7(7) provides that, in case the employee refuses the charges, the enquiry committee should call the proposed witnesses to record their evidence whose names are mentioned in the chargesheet and in the present case, if names of no one are mentioned in the chargesheet then the enquiry committee cannot be said to have committed any mistake in not examining any witness. Further Regulation 7(8) provides that, an enquiry committee can ask any witness to appear before it and provide any document and Regulation 7 (9) says, the enquiry committee can ask any question to the witness to find out the true facts, therefore, from the bare perusal of the Regulations, 2020 it cannot be said that the enquiry committee has committed any the which has caused prejudice to petitioner, who has been given full opportunity of oral hearing along with option to examine any witness or dispute the admissibility of any documents, and once the employee has not disputed about the genuineness and admissibility of the documents, taking into consideration by the enquiry committee, it cannot be said that the enquiry was not proper."

(emphasis by Court)

8. A perusal of the respondents' stand in the counter affidavit does not dispute the fact that no witness was examined before the Inquiry Committee. Rather, it is said that since no names of witnesses were mentioned in the charge-sheet, the Inquiry Committee committed no mistake in not requiring the establishment to call witnesses to prove the charges. The principle about proof of the establishment's case in an inquiry, the manner in which the inquiry has to proceed and what evidence has to be produced by the establishment to prove the charges, has already been indicated hereinabove. The stand taken by the respondents in the counter affidavit falls foul of the aforesaid salutary requirements. For the principle that it is imperative for the establishment to examine witnesses in support of the charges, where there is the likelihood of imposition of a major penalty, there is ample and consistent authority.

9. The law in this regard has been laid down by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772**, where it has been held:

"27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

(emphasis by Court)

10. Guidance in this regard is to be found in the holding of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570**, where it has been observed:

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

11. A Division Bench of this Court in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB)**, dealing with the same issue, held:

"14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the

judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold and ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the

delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

12. The same principle has been reiterated by the Division Bench of our Court in **Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)**, where it is observed:

"15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

13. In **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB)**, again a Bench decision of this Court, it was held:

"14. Recently the entire law on the subject has been reviewed and reiterated in Chamoli District Co-operative Bank Ltd. v. Raghunath Singh Rana and others, AIR 2016 SC 2510 and Court has culled out certain principles as under:

"(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

(ii) If an officer is a witness to any of the incidents which is the subject-matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

15. The principal of law emanates from the above judgments is that initial burden is on the department to prove the charges. In case where inquiry is initiated with a view to inflict major penalty, department must prove charges by adducing evidence by holding oral inquiry.]

17. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

14. This Court, as already held, that the inquiry proceedings in this case do not conform to the fundamentals of a fair procedure. Rather, this Court is minded to think that the inquiry in this case is hardly an inquiry, because it was never convened on the formal pattern of an Inquiry Tribunal, where the members of the Committee have to sit as an impartial arbiter, before whom the establishment have to prove their case by leading evidence both documentary and oral. In this case, the respondents have admitted that they have not examined any witnesses. The findings have been recorded by the Inquiry Committee gleaning through the charge-sheet and the petitioner's reply, besides documents on record, that do not speak for themselves. No one has explained those documents or led them in the form of documentary evidence before the Inquiry Committee on behalf of the establishment. No witness also has been examined to introduce, explain and prove those documents. There is nothing on record to suggest that the petitioner has either admitted the charges, or any of the documents, indicating his complicity on one or more charges.

15. In the circumstances, the inquiry leading to the impugned orders, is procedurally flawed and prejudices the petitioner's rights going to the root of the matter. The impugned orders passed on the basis of such an inquiry cannot be sustained.

16. In the result, this writ petition succeeds and is **allowed**. The impugned order dated 03.03.2021 passed by the Chairman, U.P. Power Corporation Limited, Lucknow and the appellate order dated 27.12.2021 passed by the Board of Directors, U.P. Power Corporation Limited, Lucknow are hereby quashed. It will be open to the respondents to proceed with the inquiry afresh, if they so elect, from the stage of issue of the charge-sheet and pass fresh orders in accordance with law, after holding a proper inquiry de novo, following the guidance in this judgment.

17. There shall be no order as to costs.

(2024) 1 ILRA 647
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 17887 of 2022
with
Writ-A Nos. 11798 of 2021 & 4236 of 2022

Dr. Sheo Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare(Sr. Advocate), Sri Kunal Shah, Sri Suvanshit Kumar Jaiswal, Sri Vipul Raj Gautam

Counsel for the Respondents:
C.S.C., Sri Avanish Mishra, Sri Gaurav Pundir, Sri Hritudhwaj Pratap Sahi, Sri M.N. Singh, Sri Sanjay Kumar Om

Equivalence of Experience for Additional Professor and Professor – The petitioner, Dr. Sheo Kumar, challenged the cancellation of his selection as Principal (Allopathy) by the U.P. Public Service Commission (UPPSC) for lacking requisite experience as a Professor – Held, the experience of an Additional Professor is equivalent to that of a Professor for the post of Principal, as clarified by the St. Government and supported by Medical Council of India (MCI) and National Medical Commission (NMC) guidelines, which equate the academic qualifications and teaching duties of both posts. (Paras 7, 13, 14, 21, 24)

Validity of St. Government Clarifications – The St. Government's letters dated 10.01.2022 and 30.05.2022, clarifying that the experience of an Additional Professor counts as Professor experience, were issued in response to UPPSC queries and a court directive – Held, these clarifications do not amount to changing the recruitment rules but interpret the experience requirement in line with MCI/NMC norms, and thus are legally vali (Paras 7, 16, 24, 29)

UPPSC's Cancellation Order – The UPPSC cancelled Dr. Sheo Kumar's provisional selection vide order dated 10.08.2022, citing lack of requisite Professor experience – Held, the cancellation order was cryptic, failed to consider MCI/NMC guidelines and St. Government clarifications, and was unsustainable for lacking reasoned justification. (Paras 7, 8, 30)

Interpretation of Recruitment Rules – The advertisement required 10 years of teaching experience as Professor/Associate Professor/Reader, with at least 5 years as Professor – Held, equating Additional Professor experience with Professor experience does not alter the essential qualifications but aligns with the expert interpretation of MCI/NMC, as the roles involve identical teaching duties and academic qualifications. (Paras 5, 7, 13, 21, 24)

Distinction from Precedents on Qualification Changes – The respondents relied on cases like *U.P. Public Service*

Commission Vs Alpana and *Yogesh Kumar Vs Govt. of NCT, Delhi* to argue that changing qualifications post-advertisement is impermissible – Held, these cases are distinguishable as they involved missing or non-equivalent qualifications, whereas here, the clarification on experience is an interpretation within the existing rules, not a relaxation or chang(Paras 9, 25-28)

Role of Expert Bodies – The MCI and NMC, as expert bodies in medical education, have equated the posts of Professor and Additional Professor for academic and experience purposes – Held, courts cannot override such expert interpretations, and the petitioner's 8 years of combined experience as Additional Professor and Professor satisfies the eligibility criteri(Paras 13, 14, 19, 22)

G. Outcome of Writ Petitions – Writ-A No. 17887 of 2022 filed by Dr. Sheo Kumar was allowed, quashing the UPPSC's cancellation order, and the Commission was directed to recommend his appointment as Principal, subject to formalities – Writ-A No. 11798 of 2021 filed by Dr. Jitendra Singh Kushwaha, challenging Dr. Sheo Kumar's selection, was dismissed – Writ-A No. 4236 of 2022 was disposed of accordingly. (Para 31)

Writ Disposed Of.

List of Cases cited:

1. U.P. Public Service Commission U.P. Allahabad Vs Alpana, (1994) 2 SCC 723

2. Yogesh Kumar Vs Govt. of NCT, Delhi, (2003) 3 SCC 548

3. Bedanga Talukdar Vs Saifudaullah Khan, (2011) 12 SCC 85

4. Sanjay K. Dixit Vs St. of U.P., (2019) 17 SCC 373

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Kunal Shah, learned counsel for the petitioner, Sri Sanjay Kumar Om and Sri F.A. Ansari, learned counsel appearing for Public Service Commission in respective petitions and Sri V.K. Singh, learned Senior Advocate assisted by Sri Kandarp Narayan and Sri Gaurav Pundir, learned counsel appearing for Dr. Jitendra Singh Kushwaha (respondent No.5 in Writ-A No.17887 of 2022 and petitioner in Writ-A No.11798 of 2021).

2. Writ-A No.17887 of 2022 has been filed by Dr. Sheo Kumar, whose selection has been cancelled by the Uttar Pradesh Public Service Commission (hereinafter referred to as " the Commission") vide its order dated 10.08.2022, which is under challenge, whereas Writ-A No.11798 of 2021 has been filed by Dr. Jitendra Singh Kushwaha questioning the selection of Dr. Sheo Kumar as Principal (Allopathy) in the Department of Medical Education on the ground that he did not possess the requisite experience under the relevant Recruitment Rules.

3. Writ-A No.17887 of 2022 is being taken up as a leading petition. The controversy involved in afore-captioned petitions is very short; as to whether the experience as an Additional Professor in a Medical College would also count as experience of a Professor, which a candidate is required to possess to become Principal of a Medical College under the relevant Rules.

4. Dr. Sheo Kumar has experience as an Additional Professor from 01.07.2013 to 30.6.2017 and then as Professor with effect from 01.07.2017 to 13.07.2020 and then from 14.07.2020 to 13.05.2021, thus total period of experience taking the post of Additional Professor and Professor together, Dr. Sheo Kumar has an experience of eight years.

5. The post of Principal (Allopathy) in the Department of Medical Education was advertised by the Commission on 22.12.2021 vide advertisement No.3/2020-21. For the purposes of essential qualifications, it prescribed that a candidate should possess (i) MD/MS or an equivalent qualification recognised by Medical Council of India (hereinafter referred to as "MCI") and (ii) at least 10 years teaching experience as a Professor/Associate Professor/Reader in a recognised Medical College/Institution, out of which atleast five years should be as a Professor in a Department. These were the basic qualifications prescribed for.

6. Both the petitioner and respondent No.5 applied for the post in question and petitioner came to be selected provisionally vide notification dated 20.07.2021 issued by Deputy Secretary of the Commission. While the provisional selection was notified by the Commission, Dr. Jitendra Singh Kushwaha, the other applicant filed, a writ petition before this Court questioning the provisional selection of the petitioner and prayed for a mandamus that he may be taken to be selected and be recommended for appointment. Later, amending the writ petition, he also challenged the order of the Chief Secretary, Government of U.P. dated 10.01.2022 whereby a clarification was made by the State Government that qualification for the post of Professor and Additional Professor being the same, the teaching experience of both Additional Professor and Professor should be taken to be as of a Professor and, therefore, Dr. Sheo Kumar was absolutely eligible for the post in question.

7. Sri Ashok Khare, learned Senior Advocate assisted by Sri Kunal Shah, learned counsel appearing for the petitioner Dr. Sheo Kumar has submitted that in the State of U.P. while State Medical Colleges have 3-tier hierarchical system of teaching faculty with Assistant Professor, Associate Professor and Professor, the Institution like Sanjay Gandhi Postgraduate Institute has 4-tier system with the post of Assistant Professor, Associate Professor, Additional Professor and Professor. He submits that though there is little difference in the pay-scale between the post of Additional Professor and Professor but for the purposes of essential qualifications for a candidate to be appointed as Additional Professor and Professor is the same, inasmuch the teaching work/assignment both for Additional Professor and Professor is the same. In support of his contention, learned Senior Advocate has relied upon the guidelines issued by the National Medical Commission in which it had come to be recorded that many institutions have 4-tier faculty designation system while others have 3-tier faculty designation system. So the query was where does one equate as Additional Professor, the answer by the National Medical Commission was that Additional Professor is to be equated to a Professor. Sri Khare submits that the Medical Council of India (hereinafter referred to as "MCI") has also prescribed academic qualifications for the post of Professor and Additional Professor as same, according to which one should have eight years of postgraduate experience and must possess qualification of MD/MS/DNB in the concerned subject as per the regulations. Sri Khare has also taken the Court to the earlier notification issued by the Board of Governors of the MCI dated 13.12.2018, which prescribes that as far as MCI norms are concerned, Professor and Additional Professor are equivalent. Sri Khare submits that when confusion arose as to the experience of the petitioner as a

Professor for the post of Principal (Allopathy), the Commission wrote a letter dated 27.11.2021 to the State Government seeking its guideline to the issue, as to whether experience of a candidate as Additional Professor would be admissible as a Professor and the State Government vide its letter dated 10.01.2022 answered that in the considered view of the Government, those Professors working in Government Medical Colleges and Additional Professors working in SGPGI since were discharging similar duties and their nature of work was the same, therefore, they could be equated and thus Dr. Sheo Kumar possessed the requisite qualification. He further submits that in writ petition filed by Dr. Jitendra Singh Kushwaha, this Court vide order dated 08.10.2021 had directed the Director General, Medical Education and Training, Uttar Pradesh to take a decision with regard to the equivalence of qualification, insofar as it related to the experience on the post of Additional Professor/ Professor in consultation with National Medical Commission. In compliance of this Court's order dated 08.10.2021 corrected on 22.10.2021, a decision was taken by the State Government on 10.01.2022. However, upon repeated query being made by the Commission vide its letter dated 28.04.2022, the Government vide order dated 30.05.2022 reiterated its stand that since the work and discharge of duties on the posts of Additional Professor and Professor were the same, their respective experiences were logically required to be equated and thus the experience as an Additional Professor would count towards the experience of a Professor. Sri Khare submits that the order dated 30.05.2022 is not under challenge and has attained finality. He further argues that after the State Government took a conscious decision both in the light of the direction issued by this Court in the writ petition filed by Dr. Jitendra Singh Kushwaha and the query made by the Commission in its letters dated 27.11.2021 and 28.4.2022, it was not open for the Commission to have cancelled the selection made in respect of the petitioner Dr. Sheo Kumar. Sri Khare also argues that the order passed by the Commission is quite a cryptic order and does not deliberate upon the issue involved in the matter, nor does it discuss the notifications and resolution of the MCI and the State Government and, therefore, the order impugned cannot be sustained in the eyes of law and deserves to be quashed.

8. Learned counsel appearing for the Commission Sri Sanjay Kumar Om and Sri F. A. Ansari appearing in respective petitions argue that once the post has been advertised requiring the experience as Professor, there was no justification to accept the experience of an Additional Professor as a Professor. They further argue that recruitment and selection body is not empowered to change or relax the qualifications as prescribed for in the advertisement or in the absence of any relaxation or equivalence prescribed for in the advertisement, the recruitment and selection body cannot on its own accept the equivalent qualification or otherwise set up any definition to the qualification prescribed for the post. They further argue that the Professor means Professor and will not include Additional Professor. They argue that even in the notifications issued by the State Government dated 10.01.2022 and 30.5.2022, it has been very categorically stated that one should possess the experience of five years as Professor, so they argue that there is no dilution of the essential qualifications and any interpretation to incorporate within it the

experience of an Additional Professor, would amount to a legislative act which is beyond the scope of the authority of the recruitment and selection body. They further argue that the petitioner had been only provisionally selected and, therefore, his selection was subject to his furnishing requisite certificates of experience regarding which he had furnished his undertaking but failed to do so. In this connection they have drawn the attention of the Court to Annexure No.3 to the counter affidavit filed on behalf of the Commission to justify that a conscious decision has been taken by the Commission. They have defended the order passed by the Commission cancelling the provisional selection of the petitioner Dr. Sheo Kumar as Principal (Allopathy) in the Department of Medical Education, U.P. for the reasons assigned therein.

9. Sri Vijay Kumar Singh, learned Senior Advocate assisted by Sri Kandarp Narayan and Sri Gaurav Pundir, learned counsel appearing for contesting respondent No.5-Dr. Jitendra Singh Kushwaha, has argued that whatever be the resolutions of the MCI or the guidelines answering the query being made with regard to the experience, the Rules provide for only experience as a Professor and not as Additional Professor. He submits that even though the essential qualifications for recruitment on the post of Professor and Additional Professor in those colleges, where they have 3-tier or 4-tier faculty designation system, is the same but the legal position stands that the post of Additional Professor is of a lower cadre post in terms of pay-scale. He argued that experience has to be commensurate to the post and any equation of experience, if permitted to hold even an Additional Professor to be eligible to the post of Principal, would amount to substituting the qualification originally prescribed under the Rules. He submits that if it is permitted, as per the notifications made by the State Government without amending recruitment/service Rules, it would amount to changing the eligibility criterion which is certainly beyond the scope of authority of the recruitment and selection body. He argues that this amounts to changing the eligibility criterion altogether in contravention to what is prescribed under the Rules. He submits that legal position regarding change in qualification or eligibility criterion at the end of the recruitment and selection body is not permissible. He submits that there could be a case that many Additional Professor may not have applied on the ground that they did not possess the requisite experience as Professor. He has placed reliance upon the judgments of the Supreme Court rendered in **U.P. Public Public Service Commission U.P. Allahabad and Another v. Alpana, (1994) 2 SCC 723; Yogesh Kumar and Others v. Govt. of NCT, Delhi and Others, (2003) 3 SCC 548; Bedanga Talikdar v. Saifudaullah Khan and Others, (2011) 12 SCC 85 and Sanjay K. Dixit and others and The State of Uttar Pradesh and Others, (2019) 17 SCC 373.**

10. Having heard learned counsel appearing for respective parties and having perused the record, in my view, following questions arise for consideration in these petitions:

(i) Whether defining the experience of a Professor by including experience of Additional Professor would amount to encroaching upon the Rule making power and thereby changing the essential qualification prescribed for under the

relevant Rules and, therefore, the Commission was justified in cancelling the provisional selection or conversely, the clarification made as to the experience by the State Government vide letters dated 10.01.2022 and 30.05.2022 was to answer the query and remove the confusion, if created superficially and, therefore, would not amount to changing qualification, inasmuch as such a clarification is not a faulty one and so the clarification made under the letters do not suffer from any illegality and Commission was not justified in cancelling selection of petitioner.

11. In order to find the answer to the questions so formulated above, it is necessary to look into first the essential qualifications as prescribed under the Rules and then to test the notifications made by the State Government and experience for the post of Professor which is sought to be defined. There is no doubt that minimum qualifications for teachers in medical education institutions are prescribed as per the regulations framed by the MCI in the year 1998, which have been amended from time to time. It prescribes for the post of Professor/Additional Professor, the following qualifications as essential qualification :

Posts	Academic Qualification	Teaching & Research Experience
Professor/ Addl. Professor (8 years of Post PG Experience	A post graduate qualification MD/MS in the concerned subject and as per the TEQ Regulation	Associate Professor in the subject for 3 years in a permitted/ approved/ recognized medical college/ institution with 4 Research Publications in Indexed Journal on Cumulative basis with minimum of 2 Research Publication during the tenure of Associate Professor as Ist Author or as corresponding author.

12. From the perusal of the above, it is clear that as far as the post of Additional Professor and Professor are concerned, academic qualifications have been kept at par. For the post of Principal/Dean/Director of Medical Colleges, following qualifications have been prescribed for:

Post	Academic Qualifications	Teaching/Research Experience
Principal/ Dean/Director of Medical Institution	Should possess the recognised postgraduate medical qualification and other academic qualification from a recognized institution with a minimum of ten years' teaching experience as Professor/Associate Professor/Reader in a medical college/Instt. Out of which atleast five years should be as Professor in a department. Preference for these appointments may be given to the Heads of the Departments.	

13. The Board of Governors in supersession of MCI, while being queried upon, made a reply vide letter 13.12.2018 that the academic qualification and the teaching and research experience for the post of Professor and Additional Professor have been kept the same, so as per the MCI they are equivalent but it was left open for the concerned appointing authority to prescribe higher norms than what was prescribed under the Minimum Qualification for Teachers Regulations 1998. The reply made to the query is reproduced herein as under:

"This is with reference to your email dated 11.12.2018 and order dated

11.12.2018 passed by the Hon'ble High Court in the above captioned matter. In this regard I am directed to inform you that as regards the qualification and experience prescribed for appointment Professor/Addl. Professor in Broad Specialities [MD/MS] in Minimum Qualification for Teachers Regulations 1998 is as under:

Posts	Academic Qualification	Teaching & Research Experience
Professor/Addl. Professor (8 year of Post PG Experience)	A post graduate qualification MD/MS in the concerned subject and as per the TEQ Regulation	Associate Professor in the subject for 3 years in permitted/approved/recognized medical college/institution with 4 Research Publications in Indexed Journal on Cumulative basis with minimum of 2 Research Publication during the tenure of Associate Professor as 1st Author or as corresponding author.

The above position has been notified in Minimum Qualification for Teachers Regulations, 1998 on 05.06.2017 & again 01.11.2018 copy enclosed.

Therefore in so far as MCI norms are concerned Professor/Add. Professor are equivalent. However, it is for the concerned appointing authority to lay down/prescribe norms higher than that prescribed in Minimum Qualification for Teachers Regulations, 1998.

This issues with the approval of Secretary General, Board of Governors."

The National Medical Commission (NMC) also published the answer to the queries made from time to time for the academic year 2021-22. The NMC also made a specific reply to such query vide its clause 11, which reads as under :

"Many Institutions follow a 4-tier faculty designation system -Assistant Professor, Associate Professor, Additional Professor and Professor. For the purposes of our assessment, which has only 3 levels, where does one equate the Additional Professor?

Additional Professor is to be equated to a Professor."

(Emphasis added)

14. It is also interesting to notice here that Board of Governors also reiterated the academic qualification and teaching & research experience for the post of Professor and Additional Professor to be the same, which is reproduced herein as under:

"BOARD OF GOVERNORS IN SUPERSESSION OF MEDICAL COUNCIL OF INDIA NOTIFICATION

New Delhi, the 12th February, 2020

***No. MCI-12(2)/2019-Med.Misc./189334**.- In exercise of powers conferred by Section 33 of the Indian Medical Council Act, 1956 (102) of 1956), in Supersession of the Medical Council of India with the previous sanction of the Central Government hereby makes the following Regulations to further amend the "Minimum Qualifications for Teachers in Medical Institutions Regulations 1998, namely:-*

1. (i) These regulations may be called the "Minimum Qualifications for Teachers in Medical Institutions (Amendment) Regulations, 2019".

(ii) They shall come into force from the date of their publication in the Official Gazette.

2. In the "Minimum Qualifications for Teachers in Medical Institutions

Regulations, 1998 in Schedule 1 cluase 6 as amended vide notification dated 01.11.2018, shall be substituted with the following:-

"The Teachers in a medical college or institutions having a total of 8 years teaching experience out of which at least 4 years teaching experience as Assistant Professor with atleast one research publication in indexed journals (as indicated in table) gained after obtaining postgraduate degree shall be recognized as post graduate teacher in broad specialilities.

In case of super specialities only those teachers who possess 5 years teaching experience out of which at least 2 years teaching experience as Assistant Professor gained after obtaining the higher speciality degree shall be recognized as post graduate teacher.

I. **Broad Specialities (MD/MS/DNB)**

Posts	Academic Qualification	Teaching & Research Exp.
Professor/Addl. Professor (8 years of Post PG Experience)	A post graduate qualification MD/MS/ DNB in the concerned subject and as per these Regulations	(i) Associate Professor in the subject for 3 years in a permitted/approved/recogni-zed medical college/institution with three Research publications (atleast two as Associate Professor) (only original papers, meta-analysys, systematic reviews, and case series that are published in journals included in Medline, Pubmed Central, Citation index, Sciences Citation index, Expanded Embase, Scopus, Directory of Open access journals (DoAJ) will be considered). The author must be amongst first three or should be the Corresponding author. (ii) Should have completed the Basic course in Medical Education Technology from Institution(s) designated by MCI. (iii) Should have completed the Basic course in biomedical research from Institution(s) designated by MCI. Further provided that for the transitory period of 2 years w.e.f. the date of this notification, the appointment/ promotion to the post of Professor can be made by the institution in accordance with the "Minimum Qualifications for Teachers in Medical Institutions Regulations, 1998" as prevailing before issuance of this notification.

15. The essential qualifications that have been prescribed for, by the MCI in its Regulations have been adopted by the State Government and the same qualifications in terms of academic qualification have been prescribed for, under the advertisement in question for the post of Principal (Allopathy) in the Department of Medical Education. The relevant part of the advertisement that contains the post and educational qualifications etc. is reproduced as under:

"Medical Education Deptt. U.P. (Allopathy)

01 (One) Post of Principal (Allopathy) (General Recruitment), Deptt.No.(S-8/60), Nature of post-Gazetted/Temporary, Reservation- Unreserved/Pay Scale-Rs. Academic Level 14, Initial Pay Rs.1,44,200/-.

Essential Qualification:- *(i) M.D./M.S. or an equivalent qualification recognized by Medical Council of India, (ii) atleast 10 years Teaching experience as professor/Associate Professor/Reader in a recognized Medical College/Institution out of which atleast five years should be as a Professor in a department.* ***Preferential qualification:-*** *Reference for these appointments may be given to the heads of the department in a medical college or as head in Medical Institution.* ***Age Limit-*** *Minimum 50 years and maximum 62 years. No Private Practice is permissible but an allowance will be given in lieu thereof as per government orders. Selected candidates can be appointed/ transferred in public interest in any of the Govt. Medical Colleges of U.P.* ***Note*** *:- Essential qualification is required to be recognized by MCI otherwise candidature will not be considered."*

16. Relying upon the qualifications prescribed for the post of Professor and Additional Professor, the State Government came to reply the query made by the Commission and also in compliance of the order of this Court passed in Writ-A No.11798 of 2021 that for the purposes of experience, the experience gained as Additional Professor in SGPGI and as a Professor there or in any other medical college deserved to be equated and so also logically as the discharge of duty and the work and/or assignment in the field of teaching are the same.

17. Testing the argument of Sri Khare that this act of defining the experience for the purposes of eligibility would not amount to *'changing the qualifications prescribed for under the Rules'* or eligibility criterion otherwise, a legal plea advanced by learned counsel appearing for the respondents, I find that the experience as a Professor deserved scrutiny from the point of view of the qualifications prescribed by the MCI and clarificatory notifications/letters issued by it. While it is true that the Rules provide for requisite number of years of experience as Professor, in some department there is 4- tier system whereas in the large number of departments/institutions/universities there is 3- tier system faculty.

18. What can be a better Institution to All India Institute of Medical Sciences in the field of medical education setting up example, norms and quality of teaching and producing doctors in various disciplines and these norms as set by the AIIMS have been followed by adoption in various regional institutes of medical education like Postgraduate Institute of Medical Science at Lucknow, U.P. There is a circular letter issued by the SGPGI, Lucknow on 27.01.2012 that says that the new career progression scheme in respect of faculty members at par in AIIMS, New Delhi is hereby implemented in Institute in accordance with the orders issued by Government of India, Ministry of Health & Family Welfare dated 12.01.2010. It records that Government of Uttar Pradesh vide its letter dated 01.02.2011 has also accorded approval for the same. This letter prescribes for pay scale of both the Additional Professor and Professor under Pay Band-4 (Rs.37,400 - Rs.67,000/-) with a difference of Rs.1000/- in grade pay, as the grade pay of Additional Professor

would be Rs.9,500/- but Rs.10,500/- in case of Professor. In between Associate Professor and Professor, there is a post described as Additional Professor. In SGPGI, a Professor is required to have four years experience as an Additional Professor. This is a career advancement scheme with a difference of grade pay only and not the pay scale. The circular dated 27.01.2012 is reproduced herein as under:

"No.6911/PGI/DIR/DC/2012
Dated 27th January, 2012

OFFICE ORDER

In continuation to Office Order No.6129/DIR/PGI/ER/-Acad/3090/2010 dated 6 October 2010, New Career Progression Scheme in respect of faculty members at par with AIIMS, New Delhi is hereby implemented in the Institute in accordance with orders issued by the Government of India, Ministry of Health & Family Welfare vide their letter No.V.16020/57/2008-ME-1 dated 12.01.2010 and as per provisions of First Regulations, 2011 of the Institute. The Government of Uttar Pradesh vide their letter No.4090/71-2-11-42/2009 Dated 1st February, 2011 has also accorded approval for the same.

The following provisions have been made by the Government of India for revision of pay scales/Career Progression Scheme for faculty (teaching staff) of AIIMS, New Delhi vide their order No. V.16020/57/2008-ME-1 dated 12.01.2010:

I. ***Assistant Professor (Entry Grade):***

To be placed in Pay Band-3 (Rs. 15600-39100); minimum Pay to be fixed at Rs.30000/- with Academic Grade Pay of Rs.8000/-. After three years, Assistant Professors will move to Pay Band-4 (Rs.37400-67000/-) with Academic Grade Pay of Rs.8700/-.

The eligibility criteria for appointment as Assistant Professor (Medical & Non-medical) will be the same as prescribed by the Government of India, Ministry of Health & Family Welfare vide their letter No. V.16020/57/2008-ME-1 dated 12.01.2010.

II. ***Associate Professor:***

To be placed Pay Band-4 (Rs.37400-67000) subject to minimum Pay being Rs.42800/- and Academic Grade Pay of Rs.9000/-. Assistant Professor with three years of service will be eligible for appointment to the post of Associate Professor subject to clearance of the prescribed selection process.

III. ***Additional Professor:***

They will be placed Pay Band-4 (Rs.37400-67000) with minimum Pay being Rs. 46000/- and Academic Grade Pay of Rs. 9500/-. Associate Professor with three years of service will be eligible for appointment to the post of Additional Professor subject to clearance of the prescribed selection process.

IV. Professor:

They will be placed in Pay Band-4 (Rs.37400-67000) with the minimum Pay of Rs.51600/- and Academic Grade Pay of Rs.10500/-. Additional Professors with four years of service will be eligible for appointment to the post of Professor subject to clearance of the prescribed selection process.

Upto 40% of posts of Professors will be operated in new Higher Administrative Grade (HAG) scale of Rs. 67000-79000/-. Promotion to this grade will be subject to clearance of the prescribed selection process.

The Career Progression Scheme shall be implemented notionally w.e.f. 01.07.2008 subject to condition that pay fixation and other financial benefits are not allowed from a date prior to 31.12.2008 as

decided by the Government of India, Ministry of Health & Family Welfare vide their letter No.V.16020/11/2009-ME-1 dated 30.03.2010.

The rest terms and conditions shall be as per directives issued by the Government of India, Ministry of Health & Family Welfare vide their letters No.V.16020/57/2008-ME-1 dated 12.01.2010 and No.V16020/11/2009-ME-1 dated 30.03.2010.

The above orders are being issued with the approval of the Department of Medical Education, Government of Uttar Pradesh.

Sd. illegible
(PROF. R.K. SHARMA)
DIRECTOR"

19. Recently on 14.02.2022, National Medical Commission has floated Teachers Eligibility Qualifications in Medical Institutions Regulations, 2022. Regulation 6 of the Regulations prescribes for Faculty Appointment and Promotion, Teaching and Research Experience and the Academic Qualifications. This regulation provides for only Professor, Associate Professor, Assistant Professor, Senior Resident. Now, post of Professor being relevant here, the essential qualifications in terms of academic qualifications and the research experience are reproduced herein as under:

Posts	Academic Qualifications	Teaching and Research Experience
Professor 8 year post PG experience	MD/MS/DNB in the concerned subject.	i. Associate Professor in the subject for three years in a permitted/recognized medical college/institution. ii. Should have at least four Research publications (at least two as Associate Professor) [only original papers, meta-analysis, systematic reviews, and case series that are published in journals indexed in Medline, PubMed, Central Science Citation Index, Science Citation Index, Expanded Embase, Scopus, Directory of Open Access Journals (DoAJ) will be considered]. iii. Should have completed the basic course in Mecial Education Technology from Institutions designated by NMC. iv. Should have completed the Basic course in Biomedical Research from Institutions designated by NMC.

20. Thus, for a Professor, a candidate is required to possess eight years teaching experience at postgraduate level and three years teaching experience as an Associate Professor in a regcognised medical college/institution. As per the Medical Council of India that frames Rules and Regulations for academic qualifications for different categories of posts in the field of medical education, a Professor is required to possess experience of teaching at postgraduate level and also having at least three years as Associate Professor, so essentially the requirement is that eight years teaching experience, which would include teaching experience of Associate Professor for three years for professor.

21. Now, looking to the circular of the SGPGI, a person would be getting promotion as Additional Professor after

three years of service as an Associate Professor. Meaning thereby, those who are to be promoted as Additional Professor shall have to have three years experience of Associate Professor. Thus, feeding cadre of the Additional Professor is Associate Professor. The conclusion, therefore, would be that Additional Professor is above to the Associate Professor and since the Medical Council of India has defined experience of Professor as including of Additional Professor and the NMC has equated the posts, no other body can interpret experience as to qualification otherwise.

22. Both the MCI and NMC therefore, would be the only authorities to define the experience and it having defined in its wisdom the experience of a Professor to include the experience of an Additional Professor, the essential qualification/eligibility criterion for the two posts to be the same, this Court cannot sit in appeal to take a view contrary to what a body of experts in the field, has taken.

23. It is not the case of the respondents that the petitioner did not possess the eight years teaching experience at postgraduate level or that the petitioner had no experience as an Associate Professor. All that has been questioned is that his experience of Professor to be specific five years would not include his experience as an Additional Professor.

24. The Commission had also selected the petitioner for the post of Principal (Allopathy) in the Department of Medical Education, for the documents of experience furnished by him. It being not a case of "walk-in-interview", the applications were invited to shortlist the candidates on the basis of documents furnished by them, so the Commission could have rejected the candidature of the petitioner on the ground that the petitioner did not possess the requisite qualifications but it admitted his application and the candidature, though selected him provisionally only subject to his furnishing the experience certificate both of Professor and Additional Professor. While the petitioner could have done something, the litigation intervened and this Court also in its order directed the State Government to take a proper decision. The State Government, therefore, took a conscious decision to hold that the post of Additional Professor and Professor are equated for the purposes of experience. The State being the employer has issued clarifications and these clarifications cannot said to changing the Rules of recruitment on the post as to essential qualification in the midst of selection process. I do not, therefore, find any good ground to hold the decision taken by the State Government to be bad, as it stands in conformity with the guidelines of the MCI.

25. In view of what I have already discussed above, the arguments advanced by learned Senior Counsel appearing for the contesting respondent and the learned counsel appearing for the Commission that the petitioner did not possess the requisite qualification of teaching experience as a Professor cannot be accepted. The authorities that have been relied upon by the learned Senior Counsel appearing for the contesting private respondent in the case of **U.P. Public Service Commission v. Alpana (supra)**, is distinguishable on facts. In that case, for the post of Munsif Magistrate as then existed, the requirements were that a candidate must possess on the last date fixed for receipt of applications a *"degree of Bachelor of Laws of a University established by law in Uttar Pradesh or any other University of India*

recognised for this purpose by the Governor which entitles him to practice in courts of law or be an Advocate, Vakil or Pleader on the roll of or be entitled to practice in the High Court of Judicature at Allahabad or Courts Subordinate thereto". The advertisement required a candidate to submit Law Degree, Examination Certificates and Mraksheets by the last date as prescribed under the advertisement and such documents were to be in the form of attested copies. The petitioner in that case had appeared in the law degree examination and cleared the examination but the Public Service Commission did not call her for interview on the ground that she did not possess law degree on the last date of filling up the form. Being aggrieved, she approached the High Court and the High Court though directed the Commission to call her for interview but her interview result was directed to be withheld. When the High Court finally disposed of the writ petition directing the Commission to declare the result of the petitioner and, if successful, to forward her name to the State Government for appointment with a further direction that in the event there was no post available a supernumerary post should be created for her appointment, the Public Service Commission questioned the judgment before the Supreme Court by way of Special Leave Petition, and the judgment was reversed by Supreme Court. Supreme Court in the background of these above facts held that there shall be no estoppel against law, even if a candidate, who is allowed to appear in written part of the competitive examination. If he did not possess required qualification on the last date of submitting of application form, he would not be entitled to any selection an appointment. Here is not the case that the petitioner did not possess the required qualification but the case is as to the interpretation of the qualification that the petitioner did possess, whether to fall within the qualification prescribed for or not. Since highest body, the Medical Council of India and National Medical Commission interpreted that the Professor includes an Additional Professor, I see no justification to hold that the petitioner did not possess requisite qualification of experience as Professor on the last date of submission of the application form with the Commission.

26. The judgment in the case of **Yogesh Kumar and others (supra)** relied upon by the learned counsel appearing for the contesting private respondent relates to Teachers Training Certificate and the question was as to whether B.Ed., which is a higher qualification, can be taken to be equivalent to Teachers Training Certificate. The Court in that background held that the qualification in terms of degree or certificate, which is required for the purposes of post in question, would matter and not higher qualification. The Supreme Court held that *"so far as B.Ed. qualification is concerned, in the connected appeals [CA No. 1726-28 of 2001] arising from Kerala which are heard with this appeal, we have already taken the view that B.Ed. qualification cannot be treated as a qualification higher than TTC because the nature of training imparted for grant of certificate and degree is totally different and between them there is no parity whatsoever. It is projected before us that presently Yogesh Kumar And Others vs Government Of Ntc Delhi And Others on 5 March, 2003 Indian Kanoon - http://indiankanoon.org/doc/1021541/ 2 more candidates available for recruitment to primary school are from B.Ed. category and very few from TTC category. Whether for the aforesaid reasons, B.Ed.*

qualification can also be prescribed for primary teachers is a question to be considered by the authorities concerned but we cannot consider B.Ed. candidates for the present vacancies advertised as eligible. In our view, the division bench of the Delhi High Court was fully justified in coming to the conclusion that B.Ed. candidates were rightly excluded by the authorities from selection and appointment as primary teachers".

27. One must remember that there is distinction between a recognized course and experience of teaching, which is required for a post. A person, if required to possess a particular degree or a certificate and the advertisement does not require any equivalent qualification thereto, even if one possesses a higher degree or certificate, it would not amount to a certificate required under the advertisement for a candidate to possess. So far as experience part is concerned as a teacher, this can always be subjected to interpretation and the authoritative body in the field would require to interpret it and those who do not have expertise in the field, are not supposed to take a different view. Here is a case, where the experience of a Professor has been defined to include teaching experience as an Additional Professor also. There is no mechanism to know what would be difference in taking postgraduate classes as Additional Professor and as a Professor and so, it is not for this Court to review such interpretation made by a body of experts in the field of medical education. Such bodies of experts like Medical Commission and Medical Council have laid down guidelines for the purposes of appointment, promotions and others service benefits. So, even this judgment in the case of **Yogesh Kumar and others (supra)** would not be of any help to respondents.

28. In so far as the judgment in the case of **Bedanga Talukdar (supra)** is concerned, which has been relied upon by learned Senior Counsel appearing for contesting private respondent particularly putting emphasis on what has been held in paragraph No. 29 and 30 thereof, I find it to be dealing with the selection process to be undertaken strictly as per stipulated selection procedure and unless and until there is power of relaxation prescribed under the advertisement in terms of qualifications, the selecting body would be transgressing its authority in relaxing the same. In my considered view, in the present case, there is no relaxation as such involved which can be said to have been given to the petitioner by the Commission, initially when it required a candidate to furnish an experience certificate. The experience certificate of Professor would include the experience as Additional Professor as a matter of interpretation and not relaxation. Had it been the case that teaching experience as a Professor was directed to include the teaching experience of an Associate Professor beyond three years to make complete ten years teaching experience in postgraduate classes, it could have been said that the Commission was not justified in relaxing the criterion. I do not see any such relaxation has been offered to the petitioner in the matter.

29. The last judgment relied upon by the learned Senior Counsel appearing for the contesting private respondent is of **Sanjay Kumar Dixit's case (supra)**, in which Bedanga Talukdar's case (supra), just referred to above, was also relied upon. The principle, as was laid down in **Bedanga Talikdar's case (supra)** is not debatable and I would see it to be in tune with the settled law on the point but I find that in **Sanjay Kumar Dixit's case (supra)** the

question relates to whether completion of 80 hours of CCC issued by DOEACC could have further been relaxed or not. In that case, a large number of candidates could not produce CCC certificate issued by the DOEACC at the time of interview. The Chairman/Managing Director of the Power Corporation gave an extension of time for submitting the said certificate to those, who have earlier been found meritorious, and permitted them to participate in interview without submitting CCC certificate issued by DOEACC. This became a question of litigation, as the notification came late to make it impossible for others to appear in interview, who also did not have CCC certificate on that date. Rule 45 of the U.P. Rajya Vidyut Parishad Parichalika Karmchari Varg Sewa Niyamawali, 1995 was relied upon by the learned Single Judge of the High Court to hold that Chairman/Managing Director of the Corporation had the power and competence to relax the rule. The division bench partly allowed the writ petition and directed that all those candidates, who had submitted the CCC certificate issued by DOEACC prior to March 31, 2012 were entitled to be included in the select list but those who produced the said certificate after March 31, 2012 would not be eligible for appointment. The division bench held that such relaxation of the rule was impermissible, as there was no mention about the relaxation in the advertisement, yet the relaxation granted by the Chairman/Managing Director of the Corporation was upheld. The result of the judgment of the division bench was that those, who did provide the said certificate in earlier relaxation got removed with new merit after adjustment. Hence, the matter was taken to Supreme Court by way of Special Leave Petition and the Supreme Court held in the background of these developments that any exercise of such power not traceable under the rules to provide for relaxation. While the Supreme Court accepted the principle laid down in **Bedanga Talukdar's case (supra)** upheld the relaxation granted by the Chairman/Managing Director to submit the certificate before March 28, 2012. Regarding further relaxation granted by the High Court, Supreme Court negated the relief granted by the High Court. In my considered view, in the present case, there is no relaxation as such granted by the Commission or even the State Government has passed the order after the intervention of this Court in the writ petition filed by contesting private respondent. Any requirement by the Commission to bring certificate, which is already there, after a candidate is given provisional selection, it cannot be said that the Commission exceeded its authority. Upon a pointed query being made, learned counsel appearing for the Commission very clearly stated that in such cases, the provisional selection is only accorded after the other requisite documents and the documents already filed are produced in original. This, according to learned counsel for the Commission, is a rule by practise. Thus, I do not see any illegality in the selection and appointment of the petitioner as Professor pursuant to the advertisement in question. In so far as challenge to the order dated 10.01.2022 passed by the Chief Secretary, Government of India, U.P., which gives the answer to the query of the Commission dated 27.11.2021 to the effect as to whether the experience of Professor would include the experience of Additional Professor as well, is concerned, I do not find any manifest error in the said order. Had it been a case of the petitioner that the Additional Professor did not take the postgraduate classes or the petitioner was not assigned

postgraduate classes while he discharged duties as Additional Professor working on the said post, I do not find any good ground to take view contrary to what has been answered by the Government in reply to the query made by the Commission. It is all a question that experience as a Professor, which is to be reckoned with for the post in question for which selection has been undertaken by the Commission, in my considered view the experience as an Additional Professor or as a Professor would count to experience of teaching postgraduate classes and the petitioner having requisite teaching experience as Professor and Additional Professor would, therefore, be entitled to the post. The question formulated thus stands answered in favour of Dr. Sheo Kumar.

30. Besides the above, I find that the Commission cancelled the order of appointment/selection of the petitioner by means of a very cryptic order passed on 10.08.2022 though it records that the petitioner did not possess the requisite qualifications but it failed to deliberate upon the various guidelines prescribed by the MCI, opinion expressed by Board of Governors dated 13.12.2018 and the decision taken by the State Government vide letters dated 10.01.2022 and 30.05.2022 clarifying the experience. It is interesting to notice that these two letters/notifications wherein reply to the queries were made by the competent authority but the Commission miserably failed to notice them. The order, therefore, cannot be sustained also for the reason that it did not contain any good ground to cancel the provisional selection.

31. In view of the above, Writ-A No.17887 of 2022 succeeds and is allowed. The order impugned dated 10.08.2022 is hereby quashed. Accordingly, Writ-A No.4236 of 2022 stands disposed of. The Commission is directed to make recommendations in favour of the petitioner Dr. Sheo Kumar for appointment on the post of Principal provided the other requisite formalities as may be required in law are completed by the petitioner. In the circumstances, writ petition filed by Dr. Jitendra Singh Kushwaha being Writ-A No.11798 of 2021 is hereby dismissed.

(2024) 1 ILRA 662
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 19750 of 2022
connected with
Writ-A Nos. 21223 of 2022, 21543 of 2022, 21585 of 2022 & 2932 of 2023

Dr. Anil Kumar Katiyar & Anr. ...Appellants
Versus
State of U.P. & Orjs. ...Respondents

Counsel for the Appellants:
Sri S. Shekhar, Sri Mayank Singh, Sri V.K. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Pranab Kumar Ganguli

Civil Law - U.P. St. Agricultural Universities Act, 1958 - Section 2(k) - Definition of Teacher and Prospective Application – The amended definition of "Teacher" under Section 2(k) of the U.P. St. Agricultural Universities Act, 1958, introduced by U.P. Act No. 9 of 2019, operates prospectively, not affecting those already recognized as teachers under the unamended definition, which included persons involved in imparting instructions, conducting research, or extension programmes. (Paras 47, 48, 51)

Status of Krishi Vigyan Kendra (KVK) Staff – Employees of KVK, appointed as Scientists, Subject Matter Specialists, or Training Associates, are entitled to the same privileges, amenities, and facilities as corresponding teaching faculty of the university, as per Clause 7(viii) of the Memorandum of Understanding (MOU) between the Indian Council of Agricultural Research (ICAR) and the university, including superannuation at 62 years. (Paras 15, 21, 52, 60)

Application of UGC Career Advancement Scheme (CAS) – KVK staff, appointed prior to 29.03.2011 as Subject Matter Specialists or Senior Scientists, are eligible for the UGC CAS and associated pay scales, as confirmed by ICAR's letter dated 08.08.2022, aligning their service conditions with university teaching faculty. (Paras 22, 53)

St. Government's Overreach – The St. Government's orders dated 14.06.2022, 29.07.2022, and 10.11.2022, directing retirement of KVK staff at 60 years, were beyond its competence, as it is neither a party to the MOU nor funds KVK operations, rendering such orders arbitrary and an intrusion into the university's autonomy. (Paras 55, 56, 58)

University's Non-Application of Mind – The university's compliance with the St. Government's orders to retire KVK staff at 60 years, despite its earlier stand supporting a 62-year superannuation age, reflects a lack of independent application of mind, rendering the impugned orders legally unsustainabl(Paras 46, 57)
ICAR's Role and MOU Interpretation – The ICAR, as the funding authority, stipulates that KVK staff are under the administrative control of the host university, with service conditions governed by university rules, and no resolution or consultation with the university supports the St.'s interpretation of the MOU to retire KVK staff at 60 years. (Paras 49, 54)
G. Outcome of Writ Petitions – The impugned orders retiring petitioners at 60 years were quashed, restoring their status in KVK until the age of 62 years, with entitlement to all service benefits, including arrears of salary, as applicable to corresponding university faculty positions. (Paras 61-63)

Writ Allowed.

List of Cases cited:

1. Dr. Mithilesh Kumar Pandey Vs St. of U.P., Writ-A No. 7847 of 2022, decided on 17.05.2023

2. Section 6, U.P. General Clauses Act, 1904 (Paras 48)

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

1. Heard Sri V.K. Singh, learned Senior Advocate assisted by Sri Mayank Singh, learned counsel for the petitioner in Writ – A No. 19750 of 2022, Sri Ajeet Singh, learned Advocate holding brief of Sri Indra Raj Singh, learned counsel for the petitioner in Writ – A No. 2932 of 2023, Sri Atul Tej Kulshrestha, learned Advocate appearing for the respective petitioners in Writ – A No. 21543 of 2022 and Writ - A No. 21585 of 2022, Sri Manoj Kumar singh, learned counsel for the petitioner in Writ – A No. 21223 of 2022, Sri P.K. Ganguly, learned Advocate appearing for the University namely Sardar Vallabh Bhai Patel University of Agriculture and Technology, Meerut, Sri Rakesh Kumar, learned Advocate appearing for Chandra Shekhar Azad University in the respective petitions, Sri Ashok Mehta, learned Additional Advocate General assisted by Sri Manoj Kumar Singh, learned Chief Standing Counsel and Sri P.K. Srivastava, learned Additional Chief Standing Counsel for the State respondents.

2. All these petitions since raise common question of law, therefore, have been heard together and are being decided by this common judgment and writ petition of Dr. Anil Kumar Katiyar and another being Writ – A No.- 19750 of 2022 is taken

to be the leading petition and the documents of this petition have been referred to for reference purposes.

3. Petitioner No.- 1, namely, Dr. Anil Kumar Katiyar (Writ – A No. - 19750 of 2022) was appointed on 14th January, 1995 as Assistant Professor (Soil Science) and was given posting at Krishi Vigyan Kendra, Badaun whereas petitioner No.- 2, namely, Madhvendra Singh was appointed as Assistant Professor Agricultural Engineering and was posted at Krishi Vigyan Kendra, Ghaziabad. For the purposes of reference the appointment order of Dr. Anil Kumar Katiyar is reproduced hereunder:

"G.B. Pant University of Agriculture & Technology
Pant Nagar-263145 Distt. Nainital,U.P.

Personnel Management Section

No.PMS(A)III/SCR/8200
Date: Jan. 14, 1995

Sri/ Dr. Anil Kumar Katiyar,
C/O Sri M.C. Sachan
11, New Market, Pantnagar

With reference to your application dated 25.7.94 and on the basis of the approval by the Board of Management of this University, the Vice-Chancellor has been pleased to appoint you on the post of Training Associate/ S.M.S./ Asstt. Professor (Soil Science) temporarily in the University in the pay scale of Rs.2200-4000. You will be allowed a basic pay of Rs.2200/- Rupees Two thousand two hundred only), per mensum in the above scale plus dearness allowance as per rules of the University with effect from the date of joining.

2. The terms and conditions of your services shall be as mentioned in the form of contract already executed by you.

3. Residential accommodation, as available will be provided to you on rent.

4. The University will not pay any travelling allowance for taking up the above appointment.

5. You will have to abide by regulation on code of Conduct for teachers of this University, (a copy of the same is enclosed).

6. You will have also to abide by the Act, Statutes and Regulations of the University as framed or modified from time to time.

7. Please inform the Chief Personnel Officer immediately if the appointment is acceptable to you. If so you should report for duty to the Officer Incharge, K.V.K. Badaun of this University latest by 13.2.1995.

(M.S. Gangwar)
Chief Personnel Officer
for Vice-Chancellor"

4. Both the petitioners completed their Ph.D. degree from the University and were promoted on 12th April, 2017 as Professor, KVK. The promotion order of petitioner Dr. Anil Kumar Katiyar as a Professor dated 12th April, 2017 is reproduced hereunder:

"Personnel Section
Sardar Vallabhbhai Patel University of Agriculture & Technology,
Meerut – 250110
No: SVP/PS2017/5488
Date: 12.04.2017

Order

Consequent upon the promotion from Programme Coordinator/Associate Director Extension to Professor (KVK) under Career Advancement Scheme as promulgated by the U.P. Govt. vide G.O. No. 290/ 12-8-2002-400(43)/ 96ए date 07.02.2000, 2631/ 67- कृशिअ-10-

1500(16)/09 date 21.09.2010 and G.O. No. 2052/67-कृशिअ-14-1500(16)/09 dated 30.09.2014 applicable to the teachers of Agricultural Universities in U.P. (Krishi Vigyan Kendra) and there upon the decision of the Board of Management Dated 20.03.2017, Vice-Chancellor has been pleased to promote Dr. Anil Kumar Katiyar, Associate Director Extension, KVK, Muzaffarnagar pay band Rs. 37400-67000 AGP Rs. 9000/- to the post of Professor (Soil Science), KVK in the pay band Rs. 37400-67000 AGP Rs. 10000/- subject to the conditions as mentioned below:

1. That the aforesaid Selection Grade shall be governed by the conditions as laid down in the G.O. No. 2631/67-कृशिअ-10-1500(16)/09 date 21.09.2010 and G.O. No. 2052/67-कृशिअ-14-1500(16)/09 dated 30.09.2014 in respect of the Teacher's Promotion Policy which interalia lays down as follows:

(i) This promotion will be effective from the date it is due to him i.e. 01.07.2010 as per resolution of the Board of Management dated 20.03.2017.

(ii) This promotion is purely personal to the incumbent and the person concerned will continue to discharge his teaching/research/extension responsibilities as hitherto. There will be no reduction in workload nor any additional monetary benefit or any privilege due to this promotion.

(iii) That this promotion would, at no time, cause any creation of any additional post and as such, whenever the incumbent leaves the University services, the post held by him prior to the grant of aforesaid selection scale shall only be filled.

2. The other terms and conditions will remain the same as provided in the Act and Statutes, as well as the agreement bond already filled by him.

Registrar
for Vice-Chancellor"

5. These above documents have been annexed with specific averments made in paragraph 7 and 18 of the writ petition and in reply to the same, the university vide paragraphs 7 & 9 of the counter affidavit has only stated that these are matters of record and need no comments. In the counter affidavit filed on behalf of the State and sworn by Sri Ajay Kumar Dwivedi, Special Secretary, Agriculture Education and Research, U.P., Lucknow, there is no denial to these documents as it has been stated vide paragraphs 8 and 10 of the said counter affidavit these are matters of record and hence need no comments.

6. Similarly, petitioner, namely, Dr. Shripal (Writ – A No.- 21223 of 2022) was appointed as SMS/ Assistant Professor on 9th June, 2008, Planned Breeding and given posting at KVK, Noorpur. He was also subsequently benefited under the CAS.

7. Petitioner, namely, Dr. Satish Kumar (Writ – A No.- 21543 of 2022) was appointed on 20th December, 1995 as Training Associate (Extension) at Krishi Vigyan Kendra, Jalalpur. He was also promoted as Associate Professor/ Training Associate under the order of Vice-Chancellor dated 11th January, 2008.

8. Petitioner, namely, Dr. Sheesh Pal Singh (Writ – A No.- 21585 of 2022) was appointed as Training Associate/ Assistant Professor under the order dated 8th December, 2003 and was given posting at KVK, Nagina. He was also given benefit under the CAS vide order dated 7th February, 2011 and further given benefit on 12th April, 2017 in the pay band of Rs.15500-39100 to with A.G.P. of Rs.8,000/-.

9. Petitioner, namely, Om Prakash Verma (Writ – A No.- 2932 of 2023) was

appointed on 10th November, 1991 as Subject Matter Specialist, Dairy (ND) Scheme and was given posting at Kanpur. He was further conferred with the benefit under CAS on 29th July, 2015. These facts are also not disputed either by the university or by the State Government in their respective counter affidavits and have been replied to just as a matter or record.

10. Since the State of U.P. has already enacted the Uttar Pradesh State Agricultural Universities Act, 1958 and all the agricultural universities are governed under the said State Act, the State Government issued a Government order dated 14th November, 2014 applying first Statute of the Chandra Shekhar Azad Agricultural University to Sardar Vallabh Bhai Patel University of Agriculture and Technology, Meerut and other such agricultural universities run in the State of Uttar Pradesh.

11. The selection and appointment of the petitioners on their respective posts has been made upon creation of such posts by the Indian Council of Agricultural Research (hereinafter referred to as 'ICAR') as ICAR provides budget to run the Krishi Vigyan Kendra attached to the respective agricultural universities. The said Council has also reached to a Memorandum of Understanding (hereinafter referred to as 'MOU') with the respective universities on 5th April, 2020 jointly signed by the Officer on behalf of the ICAR as a first party and officer on special duty of the respondent University as a second party. The MOU states the object with which it has been signed and sub-clause (I), (II) and (III) of clause 2 being relevant are reproduced hereunder:

"2.(I). To plan, undertake, aid, promote and co-ordinate education, research and its application in agriculture, agroforestry, animal husbandry, fisheries, home science and allied sciences.

(II). To act as a clearing house of research and general information relating to agriculture, animal husbandry, home science, allied sciences and fisheries through its publications and information system, and by instituting and promoting transfer of technology programmes.

(III). To provide, undertake and promote consultancy services in the fields of education, research, training and dissemination of information in agriculture, agroforestry, animal husbandry fisheries, home science and allied sciences."

12. The mandate of the University under the MOU is as per sub-clause (III) of clause 4 *'Coordinating extension activities in the field and undertaking the field and extension programmes for Uttar Pradesh'*. Clause 5 of the MOU prescribes for two kinds of post, namely, Scientists/ Subject Matter Specialist (SMS) and Technical Staff and provides recurring and non-recurring cost on the pattern of the assistance applicable to the Krishi Vigyan Kendra (hereinafter referred to as 'KVK'). Sub-clauses (i) and (iii) of clause 5 are relevant and are reproduced hereunder:

"5(i). Salary assistance in respect of component scientists and technical staff in different disciplines (Agricultural Extension, Agronomy, Plant Breeding, Livestock Production, Horticulture, Home Science, Agricultural Engineering, Fisheries, Agroforestry, Soil Science and Plant Protection) based on the local needs and requirements for taking up various activities of the KVK as per mandate;

(iii) The cost of approved recurring and non-recurring items based on the pattern of assistance applicable to KVKs as

decided by the competent authority from time to time."

13. Sub-clauses (i) and (iii) of clause 6 are equally relevant here and are reproduced hereunder:

"6(i). At least Twenty hectares of good quality cultivable land at suitable location, fish ponds or other required field/ laboratory/ classrooms facilities for imparting instructions through work-experience/ learning by doing;

(iii) Required Staff, Building, equipments and animals presently available with the Grantee (Institution) and specifically identified by Council for transfer to KVK as agreed for joint use from time to time."

14. Thus, according to the above MOU, KVK provides for a centre at a suitable location for all kind of research activities based on cultivation and laboratory and the class room facility also for imparting instructions and take clauses and further the University staff may also be transferred to the centres if required as agreed by the University.

15. Clause 7 of the MOU that provides for grants to be made to the grantee by the Council which includes salary of the staff of the KVK and to provide designation and duties to the staff in accordance with law and provisions made under the scheme and that KVK staff will not be assigned any other duty except at the centre but the KVK staff will be treated at par with the staff of University for the purposes of privileges, amenities and facilities permissible to the corresponding staff of the grantee University, meaning thereby all service benefit of the corresponding positions in the University will be offered to the working staff of the KVK. Relevant sub-clauses (i), (v), (vi), (vii) and (viii) of clause 7 of MOU are reproduced hereunder:

"7(i). Open a separate Bank account in the name of KVK where entire grants-in-aid received from the Council would be deposited and amount will be withdrawn for the expenditure to be made only for the activities/programmes of the KVK including salary of the staff of KVK.

(v). Keep the designation and duties of the staff in accordance with the provisions made in the scheme.

(vi). Mortgage the land/ farm of the KVK to the ICAR before the fund for infrastructure development is released from the council and the mortgage paper be submitted to the council for record.

(vii). Not to divert/ transfer/ terminate any scientist, technical and office staff of KVK for any other work other than that of KVK.

(viii). Treat KVK staff at par for the purpose of privileges, amenities and facilities permissible to other staff of the Grantee."

(Emphasis added)

16. Sub-clauses (ii), (v) and (viii) of clause 8 of MOU are equally important and are reproduced hereunder:

"(ii). All staff of KVK shall borne on the establishment of grantee only. The administrative control over the staff employed under the scheme, therefore, shall vest in the host institution. The placement of staff working in the project after the termination of the project shall the sole responsibility of Grantee (second party) without having any liability on the Council.]

(v). In the case of the development of a new technique or some innovation, the Council's permission shall be sought before publishing it.

(viii) The expenditure incurred from the grant will be audited by the Accountant General, Central Revenues / Commerce, Works and Miscellaneous or Accountant General of the State concerned or the Examiner of the Local Fund Accounts or Statutory Auditors of the Grantee Institutions or a Chartered Accountant or the ICAR's own internal auditors. *Such auditors will furnish to the Secretary ICAR by the end of December of each year a certificate to the effect that the accounts of previous year ending on March have been audited and the grant has been spent on the objects for which it was meant. Any unspent balance should be refunded to the Council on the termination of the scheme. Further grants in respect of the scheme will be stopped unless the audit and utilization certificates in the prescribed proforma 'are received within a period of three years after the end of the financial year during which the grant has been made. Besides stoppage of grant of the KVK scheme due to non- receipt of the Audit and Utilization Certificate, the Council at its discretion may stop release of grant for other schemes being conducted at the time under the control of the defaulting grantee till the Audit and Utilization Certificates due are received."*

(Emphasis added)

17. From the perusal of the above it is clear that the entire KVK staff shall be borne on the establishment of the grantee University under its administrative and disciplinary control and entire work and conduct under the scheme will be monitored by the host University. The Council will not at all be responsible for any action taken by the University in respect of such employees regarding their work and conduct.

18. The half yearly report regarding work and progress of the centre will be sent to the Council and the grant will be released accordingly as per the performance at every half year. Sub-clause (xi) of clause 8 of the MOU equally provides it very clearly that *'the financial assistance rendered by the Council will always be acknowledged in any published account of the work for which the grant is given'.*

19. Vide sub-clause (xxv) of clause 8 the Council reserves the right to terminate the budget without any notice in the event of non-compliance of the conditions of MOU. It is admitted position to the parties that Council till date has continued to provide necessary budget to the University to run KVK and salaries and allowances have been paid out of that budget.

20. Sri Ganguli has accepted during the course of his submission that this budget has been kept under a different head and State Government has nothing to do with that budget provided by the Council inasmuch as those appointed and employed on the posts of Scientist or Subject Matter Specialist at the centre (KVK) only as per the MOU and State Government has never provided any matching grant or has directed for framing any rules or regulations to otherwise provide for the service conditions of such employees. Sri Ganguli would also not dispute that Chandra Shekhar Azad Agricultural University has also not made any amendment in its first Statute which has been made applicable to the universities separately to govern the service condition

of the employees like Scientist, Subject Matter Specialist and other technical staff or other regular staff working with KVK.

21. In view of the above admitted fact position the question that has been raised by the petitioners is, that petitioners would be equally entitled to such privileges, amenities and facilities as are permissible and admissible to the corresponding staff positions in the University as per sub-clause (viii) of clause 7 of MOU.

22. It is submitted by learned counsel for the petitioners that considering that the petitioners are Scientists involved in research work and imparting instructions in the field of agriculture science at the centre which has its own laboratory and classroom as per MOU, they stand at par with the teaching/ academic faculty of the University and this is the reason why the career advancement scheme (CAS) of the University Grants Commission (hereinabove referred to as 'UGC') has been made admissible to the petitioners in writ petitions/ petition No.- 19750 of 2022, 21543 of 2022 and 21585 of 2022 and this University has not done on its own but even the ICAR had admitted in its letter dated 8th August, 2022 addressed to the Vice-Chancellor of the Universities that all those who were appointed prior to 29th March, 2011 and have now become Senior Scientist and Head of KVK would be governed by the UGC pay package as that has been adopted and those who were appointed as Subject Matter Specialist and were appointed in grade pay of Rs.6,000/- to them also UGC Career Advancement Scheme (CAS) has been made applicable. The relevant letter written by the Director on behalf of ICAR dated 8th August, 2022 is reproduced hereunder:

"पत्रांकः ATAR/2022-23/Admn./KVK/964-66 दिनांकः 08.08.2022

सेवा में,

कुलपति

समस्त कृषि एवं प्रौद्योगिक विश्वविद्यालय

(उ०प्र०)

विषयः कृषि विज्ञान केन्द्रों में कार्यरत अधिकारियों को सेवानिवृत किये जाने के सम्बन्ध में।

महोदय,

उपरोक्त विषयक परिषद ने अपने पत्रांक संख्या A.Extn.4/17/2019-AE-III दिनांक 24.02.2020 से स्पष्ट कर दिया था कि 29 मार्च, 2011 से पूर्व विश्वविद्यालय में नियुक्त विषय वस्तु विशेषज्ञ जो कि रू० 6000.00 ग्रेड पे में नियुक्त किये गये थे, उन्हें UGC/CASअनुमन्य है एवं संबंधित सुविधायें भी देय है। इसी प्रकार वरिष्ठ वैज्ञानिक एवं अध्यक्ष, केबीके के पदोन्नति/भत्तों के लिये भी अनुमन्य है। इस संबंध में माननीय सचिव एवं महानिदेशक महोदय, भाकृअनुप, नई दिल्ली द्वारा मुख्य सचिव, उत्तर प्रदेश को भी अपने पत्र दिनांक 02.08.2019 के माध्यम से अवगत कराया गया था साथ ही माननीय केन्द्रीय कृषि मंत्री, भारत सरकार नई दिल्ली द्वारा माननीय मुख्यमंत्री महोदय, उत्तर प्रदेश को भी अपने पत्र दिनांक 05.08.2019 के माध्यम से अवगत कराया गया था।

संबंधित विषय पर यह भी अवगत कराया जाता है कि उत्तर प्रदेश के SAUs ने KVKs में कार्यरत अधिकारियों के लिये UGC pay package

adopt किया है जिसमें Senior Seientist/Head KVKतथा 29 मार्च, 2011 के पूर्व नियुक्त किये गये विषय वस्तु विशेषज्ञ शामिल हैं। अतः उक्त अधिकारियों के लियेpay package में निर्धारित की गई आयु तथा अन्य लाभ देने संबंधित प्रस्ताव पर कृषि विश्वविद्यालय द्वारा विचार किया जा सकता है।

उक्त आपके गंभीरतापूर्वक विचारानार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित है।

भवदीय,
ह०अ०
(यू०एस०गौतम)
निदेशक"

"Letter: ATAR/2022-23/Admn./ KVK/964-66
Date: 08.08.2022

To,
Vice-Chancellor,
All Agriculture and Technical University
(U.P.)

Subject: Regarding age of superannuation of officers in Krishi Vigyan Kendra.

Sir,

Regarding above it had been clarified by Council vide its letter No.-A.Extn.4/17/2019-AE-III date 24.02.2020 that all those Subject Matter Specialist, who have been appointed in the University prior to 29th March, 2011 in the Grade Pay of Rs.6,000/- to them UGC/ CAS is admissible and also related benefits.

Accordingly, Senior Scientists and Head of Krishi Vigyan Kendra are entitled to promotion/ allowances. In this regard, Hon'ble Secretary and Director General of Indian Council of Agriculture Research (ICAR), New Delhi had apprised Chief Secretary to the Government of U.P. vide letter dated 2nd August, 2019 as well as the Agriculture Minister, Government of India, New Delhi had also apprised Hon'ble the Chief Minister, U.P. vide his letter dated 5th August, 2019.

In connection with the above, this is also informed to you State Agriculture Universities (SAUs) of U.P. have adopted UGC pay package for the officers working in KVK which includes Senior Scientist/ Head KVK and also Subject Matter Specialist who were appointed prior to 29th March, 2011. Accordingly, proposal relating to the age prescribed for as per the pay package and other related benefits can be considered by the Krishi University.

Your serious consideration and appropriate action is solicited.

Yours' sincerely
Sd. illegible
U.S. Gautam)
Director"

(English translation done by the Court)

23. University has not denied in the entire pleadings raised in the counter affidavit that these petitioners have been granted matching salary to their corresponding positions in the regular faculty position of the university and that they have receiving all such allowances on such positions that they have been holding. One of the documents that requires to be mentioned here is the letter of the Director of extension of KVK regarding list of working staff of KVK under the university as it shows that petitioners were paid salary as on 1st April, 2001 in the pay scale of Rs.8,000-13,500/-, which upon a pointed query being made, Sri Ganguli admitted to be the pay scale of the Assistant Professor/ Lecturer of the university.

24. In support of the argument advanced by learned Senior Advocate appearing for the petitioners, he has drawn the attention of the Court towards the definition which the Uttar Pradesh State Agricultural Universities Act, 1958 prescribed originally vide clause 2 (k), according to which, the word and expression 'teacher' in relation to the agricultural universities would include a person appointed and recognized by the university for the purposes of imparting instructions or conducting and guiding research or extension programmes. The definition as contained originally under Section 2(k) of the Act, 1958 is reproduced hereunder:

"2(k). "Teacher" means a person appointed or recognized by the University for the purpose of imparting instruction or conducting and guiding research or extension programme and includes a person who may be declared by the statutes to be a teacher."

25. From a bare reading of the aforesaid provision it is clear that whoever is appointed and recognized by the University and is conducting and guiding research or is doing extension programme would be a teacher. Now the words and expressions 'extension programme' is to be read in relation to the words and expressions 'imparting instructions and conducting and guiding research' and, therefore, whoever is appointed either as a Scientist in a higher category or Assistant Teacher or Subject Matter Specialist in basic category of a teacher as Assistant Professor would be taken to be conducting research work, giving instructions in the extension programme of the university which would include KVK as that is an extension programme vide MOU signed between the University and the Council. This definition of 'teacher' has come to be amended in the year 2019 vide amendment act being U.P. Act No.- 9 of 2019 amending Section 2(k) thus:

"2(k). "Teacher" must a person not below the rank of Assistant Professor duly appointed as per norms and guidelines of UGC and ICAR in this regard by the University."

26. Now with effect from 2019, a teacher would mean a person not below the rank of Assistant Professor duly appointed as per the norms and guidelines of UGC and ICAR.

27. Learned Senior Advocate has argued that this amended definition would have a prospective effect inasmuch as the Scientist and Research faculty appointed to KVK are appointed as per the ICAR guidelines only for the purposes of KVK as these are the centres which are run basically on the aid of the ICAR in furtherance of its object of scientific research in the field of agriculture. It is argued that in the judgment of Division Bench of this Court in the case of **Dr. Mithilesh Kumar Pandey and others v. State of U.P. Thru. Principal Secretary Legislative Section Government of U.P. and others** (Writ – A No.- 7847 of 2022) decided on 17th May, 2023, it has been very clearly held that the definition would operate prospectively only so all those who were appointed to discharge duties as per the old definition of teacher, would continue to be treated as teacher. Their status, according to him, cannot be changed.

28. It is argued that petitioners since have been availing all the privileges,

facilities and amenities at par with their corresponding position holders of the University, they would also be entitled to continue till the age of attaining 62 years as the University has enhanced the age of superannuation for teaching faculty from 60 years to 62 years and this amendment has taken place prior to the amendment made in the year 2019.

29. Learned Senior Advocate has also drawn the attention of the Court to three orders of the University referred to in paragraph 42 of the writ petition in respect of Dr. Ramesh Chand Rathi dated 11th August, 2020 and Dr. Vijay Vikram Singh dated 7th February, 2022 and the same University, who were also working at KVK, were permitted to attain the age of 62 years. Paragraph 42 of the writ petition is reproduced hereunder:

"42. That, till 07.02.2022 the competent authority i.e., respondent no.2 and 3 have been adhering to the rule of continuing the identically situated teachers, namely Associate Professor in KVK, Muzaffarnagar and KVK, Dataganj Budaun – 2, by allowing them to continue to serve till attaining the age of 62 years. A photocopy of the order or retirement for Dr. Ramesh Chand Rathi dated 11.08.2020 and the order of retirement for Dr. Ajay Vikram Singh dated 07.02.2022 are collectively being filed herewith and marked as Annexure No. - 18 to this writ petition."

30. Learned Senior Advocate submits that in reply to the aforesaid paragraph 42 the only reply given vide paragraph 16 of the counter affidavit is that contents being matters of record, need no reply. Paragraph 16 of the counter affidavit of the University is reproduced hereunder:

"16. That the contents of paragraph no. 42 of the writ petition are matters of record and hence need no reply."

31. Learned counsel appearing for the University has contended that petitioners since were not appointed against teaching cadre strength of the University, they cannot be taken to be teachers within the definition. He submits that even if the old definition included persons imparting instructions in research work and those involved in extension programme like research in agricultural science, would mean teacher but since petitioners were not appointed to the sanctioned faculty of the University and were appointed under a project entered with the ICAR under an MOU, they at the most can be treated to be Project Scientists and Project Officers.

32. He submits that even if they have been paid salary as per the MOU by the Council but their continuance in the establishment of the centre would be as per the MOU and not as per the age prescribed under the State Act or First Statute of University as they are not employees of the University. It is also contended by Sri Ganguli, learned counsel appearing for the University that there is a letter of Special Secretary, Government of Uttar Pradesh dated 18th February, 2020 which prescribes that the persons working at the KVK are not eligible to the career advancement scheme. He further submits that the university has never adopted these staff of the KVK to its own faculty. Sri Ganguly submits that the university though had initially been discrepant with the State Government on the issue but has ultimately stood convinced that these staff of KVK, may be in the rank of Scientists or Assistant Professors or Subject Matter Specialists,

would not fall within the definition of teacher and hence would be made to retire at the age of 60 years as a staff of KVK.

33. Sri Ganguly has also drawn the attention of the Court to a latest letter issued by the Director, ICAR, Kanpur, according to which, the employees including petitioners, who were appointed at the strength of the KVK under the MOU entered with the ICAR, would not be entitled to the age of superannuation as Professor or teaching faculty of the university and if it is done it will be in gross violation of terms and conditions of the MOU.

34. Upon a pointed query being made as to whether this letter has been issued by adopting any resolution by the Council to interpret the MOU, Sri Ganguly submits that as per the recitals made in the letter dated 23rd November, 2023, it has been vetted by a law officer but there is no reference of the Council's resolution, if any. In the last Sri Ganguli submits that the university being a State University governed by the Act, 1958 as adopted vide Government order issued on 14th June, 2022 by the State Government and the subsequent orders and made the petitioners to retire accordingly.

35. Sri Rakesh Kumar, learned Advocate appearing for the other university, namely, Chandra Shekhar Azad University in one connected matter, adopts the arguments advanced by Sri Ganguli with a further addition that judgment in the case of Dr. Mithilesh Kumar Pandey (supra) would not apply as there in that case there was a resolution of the Board of Management of the university concerned taking such staff of the KVK at par with the faculty of university but here there is no such resolution placed before the Court.

36. Upon a pointed query being made as to whether any such pleadings have been made in the counter affidavit, he submits that this issue did not crop up earlier, therefore, no pleadings have been raised in this regard.

37. Sri Ashok Mehta, learned Additional Advocate General submits that the Government order dated 14th June, 2022 very clearly stipulates that those appointed on non-recurring grants cannot be absorbed against the regular cadre strength of the University and that is why there was a complaint that the university's budget under the recurring grant and otherwise the budget as a non-recurring grant granted by the State Government from time to time, was being misused.

38. Sri Mehta would, however, very fairly admit that the State Government has nothing to do with the MOU reached between the university and ICAR. He very fairly admits that neither there is any stake in respect of administration of the KVK or any financial stake of the State Government in the matter. He would further not dispute that the controversy regarding the orders dated 14th June, 2022 and the consequential order dated 29th July, 2022 and 10th November, 2022 have been held to be not having any bearing so far as the conditions of service of such officers working in KVK is concerned and they would be entitled to the benefit as admissible to the teaching faculty of the university in the Division Bench judgment delivered in the caes of Dr. Mithilesh Kumar Pandey (supra) as it has already covered the subject matter in issue and in respect of the orders that are impugned herein this petition. Sri Mehta, however, submits that this judgment is under challenge before the Supreme Court but

would further agree that only SLP has been filed and there is no further order in the matter. So as of now, according to him, he would not dispute that the judgment holds to be a good law unless and until reversed by the higher court.

39. Having heard learned counsel for the respective parties, noted their arguments as above and having perused the records particularly the order impugned in the petitions, I find that services of the petitioners have been dispensed with in compliance of the Government order dated 14th June, 2022, 29th July, 2022 and 10th November, 2022 on the ground that petitioners have attained superannuation at 60 years of age. Thus, petitioners have been relieved from the services of KVK.

40. Now, looking to the Government order dated 14th June, 2022 I find that such employees/ teachers working in the agriculture university, who did not fall within the amended definition of Section 2(k) of the Act, 1958 where taken to be not falling in the category of teachers and, therefore, not entitled to session benefit and other retirement age benefit at par with the teaching faculty of the university.

41. Paragraph 7 of the Government order dated 14th June, 2022 says that likewise Senior Research Associates, Junior Research Associates, Senior Technical Assistant, Technical Assistant and those who are working in KVK and with ICAR would not be offered any session benefit and age of retirement like university teachers except cases where there are Court's order operating. Paragraph 7 of the Government order dated 14th June, 2022 is reproduced hereunder:

"7- अतएव वर्णित तथ्यों के दृष्टिगत मुझे कहने का निदेश हुआ है कि कृषि विश्वविद्यालयों में कार्यरत ऐसे कार्मिकों/शिक्षकों जिन्हें उत्तर प्रदेश कृषि एवं प्रोद्योगिक विश्वविद्यालय अधिनियम 1958 की धारा-2(k) सपठित चैप्टर-xii की धारा-28(d) तथा चैप्टर-xii की धारा-4(d) के अन्तर्गत शिक्षक नियुक्त किया गया है, को ही शिक्षक माना जाएगा तथा उन्हें ही शैक्षिक लाभ यथा-अधिवर्षता आयु एवं सत्रांत लाभ की सुविधाएं देय होंगी। अनियमित रूप से या किसी अन्य विधि से नियुक्त कार्मिकों यथा- सीनियर रिसर्च एसोसिएट, रिसर्च एसोसिएट, जूनियर रिसर्च एसोसिएट, सीनियर टेक्निकल असिस्टेंट, टेक्निकल असिस्टेंट, कृषि विज्ञान केंद्र तथा आई०सी०ए०आर० की अन्य योजनाओं में मूलतः नियुक्त कार्मिकों को शिक्षकों की भाँति शैक्षिक लाभ यथा-अधिवर्षता आयु एवं सत्रांत लाभ आदि की सुविधाएँ (मा० न्यायालय के उन प्रकरणों को छोड़कर जहां कोई आदेश निर्गत हुआ हो तथा वर्तमान में प्रभावी हो) देय नहीं होंगी। यदि पूर्व में ऐसे कार्मिकों, जो नियमों/प्रावधानों के अन्तर्गत शिक्षक नहीं नियुक्त हुए हैं और उन्हें शैक्षिणिक लाभ यथा अधिवर्षता आयु एवं सत्रांत लाभ की सुविधाएँ दी गयी है, तो उन्हें तत्काल वापस करते हुए, कृत कार्यवाही से शासन को अविलम्ब अवगत कराया जाए। यह निर्देश इन प्रकरणों पर लागू नहीं होंगे, जहां मा० न्यायालय द्वारा अन्यत्र आदेश किये हो व प्रभावी हों।"

"7. Accordingly, looking to the facts stated above, I am directed to say that those employees/ teachers who are working in the agricultural university, have been appointed under Section 2(k) of the U.P. Agricultural and Technical University Act, 1958 read with Rule 28 (d) of Chapter XX and Rule 4(d) of Chapter XX, would only

be treated as teachers and they would only be entitled to academic benefit like retirement age and session benefit. Illegally appointed or otherwise appointed employees like Senior Research Associates, Research Associates, Junior Research Associates, Senior Technical Assistant, Technical Assistant to the KVK or other projects and ICAR would not be entitled but age of retirement and session benefits (except those cases where there are directions by the Court and are still in force). Those employees, who have not been appointed as per the rules and provisions, have been given educational/ academic benefits, benefit of age of retirement and session benefit that should to be withdrawn forthwith and, accordingly, Government be informed. These directions would not be applicable where Court's order are otherwise in force."

(English translation done by the Court)

42. The university in reply on 22nd June, 2022 very categorically made it clear to the State Government that these persons in the KVK were appointed on the post that were corresponding to the post created under the Act, 1958 read with Chapter III- 4(d) of the first Statute of university by a duly constituted Selection Committee and they were also conferred upon with the status of Trainee Associates/ Subject Matter Specialists as well as Assistant Professor. The Director of the centre working under the University also mentioned that those appointed as Scientists and have completed 60 years of service, are still working as they have been conferred upon with the benefit of 62 years of age of retirement. The Director accordingly asked for guidelines. The entire letter written by the Director of the KVK centre working under the university dated 22nd June, 2022 is reproduced hereunder:

"निदेशक, प्रशासन एवं अनुश्रवण कार्यालय
सरदार वल्लभभाई पटेल कृषि एवं प्रौद्योगिक विश्वविद्यालय,
मेरठ-250110

"पत्रांकः सवप/2022/नि०प्रा०अनु०/10673
दिनांकः 22.06.2022

सेवा में,
विशेष सचिव,
कृषि, शिक्षा एवं अनुसंधान अनुभाग
उत्तर प्रदेश शासन, लखनऊ।

विषयः कृषि एवं प्रौद्योगिक विश्वविद्यालय, उ०प्र० में कार्यरत कार्मिकों/शिक्षकों को अधिवर्षता आयु एवं सत्रांत लाभ के संबंध में।

महोदय,

कृपया उ०प्र० शासन के पत्र संख्या 237/2022/ कृशिअ-67- 400(27)/87 दिनांक 14 जून, 2022 का संदर्भ ग्रहण करने का कष्ट करें। उक्त के संदर्भ में सूचित करना है कि विश्वविद्यालय के अन्तर्गत संचालित सभी कृषि विज्ञान केन्द्रों के लिये भारतीय कृषि अनुसंधान परिषद, नई दिल्ली द्वारा पदों का सृजन किया गया है तथा उ०प्र० शासन द्वारा पदों को भरे जाने की स्वीकृति प्रदान की गयी है। कृषि विज्ञान केन्द्रों हेतु विषय वस्तु विशेषज्ञ तथा कार्यक्रम समन्वयक के पदों पर नियुक्तियाँ विश्वविद्यालय द्वारा कृषि विश्वविद्यालय अधिनियम-1958 के चैप्टर-XIII 4(d) के अन्तर्गत निर्धारित चयन समिति के माध्यम से की गयी है।

इस संबंध में अवगत कराना है कि विश्वविद्यालय द्वारा भारतीय कृषि अनुसंधान परिषद, नई दिल्ली द्वारा वित्त पोषित कृषि विज्ञान केन्द्रों के लिये स्वीकृत ट्रेनिंग एसोसिएट/विषय वस्तु

विशेषज्ञ तथा ट्रेनिंग आर्गेनाईजर/प्रोग्राम कोर्डिनेटर के पदों पर नियुक्ति कार्मिक को शिक्षक मानते हुये विश्वविद्यालय के अधिनियम-1958 के अन्तर्गत चैप्टर XIII 4(d) के अन्तर्गत नियुक्त करते हुये विश्वविद्यालय स्तर से मूलपदनाम ट्रेनिंग एसोसिएट/विषय वस्तु विशेषज्ञ के साथ-साथ सहायक प्राध्यापक के पदनाम भी दिये गये तत्पश्चात कैरियर एडवासमेंट स्कीम (CAS) के अन्तर्गत वेतनमान एवं पदनाम अनुमन्य किये गये है। जिसके अन्तर्गत सहप्राध्यापक एवं प्राध्यापक पदनाम भी अनुमन्य किये गये है।

साथ ही यह भी अवगत कराना है कि विश्वविद्यालय के अन्तर्गत संचालित कुल 20 कृषि विज्ञान केन्द्रों में से दो कृषि विज्ञान केन्द्र, क्रमशः कृषि विज्ञान केन्द्र, हस्तिनापुर, कृषि विज्ञान केन्द्र, बघरा पूर्व में एन.जी.ओ. के अन्तर्गत संचालित थे जो गोविन्द बल्लभ पन्त कृषि एवं प्रौद्योगिक विश्वविद्यालय, पन्तनगर के अधीन स्थानान्तरित हो गये थे। तत्पश्चात् उ०प्र० राज्य विभाजन के फलस्वरूप उक्त दोनों कृषि विज्ञान केन्द्र कर्मचारियों सहित सरदार वल्लभभाई पटेल कृषि एवं प्रौद्योगिक विश्वविद्यालय, मेरठ में हस्तानान्तरित हुये थे। इसी प्रकार पूर्व में अमर सिंह पी.जी. कालेज लखावटी के नियंत्रण में संचालित कृषि विज्ञान केन्द्र, लखावटी, बुलन्दशहर को भारतीय कृषि अनुसंधान परिषद द्वारा अपरिहार्य कारणों से कृषि विश्वविद्यालय, मेरठ को उ०प्र० शासन के पत्र संख्या लो.शि.-57/67-कृशिअ-08/500(1)/08 दिनांक 29 अगस्त, 2008 द्वारा हस्तानान्तरित किया गया था। जिसके क्रम में कृषि विज्ञान केन्द्र, लखावटी, बुलन्दशहर पर पूर्व से कार्यरत वैज्ञानिकों/कर्मचारियों को विश्वविद्यालय के पत्रांक संख्या सवभाप/2008/मु.का.अ./4186 दिनांक 24.12.2008 द्वारा सरदार वल्लभभाई पटेल कृषि एवं प्रौद्योगिक विश्वविद्यालय, मेरठ के अधीन पुर्ननियोजन किया गया था। (संलग्न-01, 02 व 03)।

उ०प्र० शासन के पत्र संख्या 237/2022/कृशिअ-67-400(27)/87 दिनांक 14 जून, 2022 के बिन्दु संख्या 07 में निर्देशित किया गया है कि कृषि विज्ञान केन्द्र तथा आई०सी०ए०आर० की अन्य योजनाओं में मूलतः नियुक्त कार्मिकों को शिक्षकों की भाँति शैक्षिक लाभ यथा-अधिवर्षता आयु एवं सत्रांत लाभ आदि की सुविधाएं (माननीय न्यायालय के उन प्रकरणों को छोडकर जहां कोई आदेश निर्गत हुआ हो तथा वर्तमान में प्रभावी हो) देय नहीं होगी। यदि पूर्व में ऐसे कार्मिकों जो नियमों/प्रावधनों के अन्तर्गत शिक्षक नहीं नियुक्त हुये हैं, और उन्हें शैक्षणिक लाभ यथा अधिवर्षता आयु एवं सत्रांत लाभ की सुविधायें दी गयी है, तो उन्हें तत्काल वापस करते हुये, कृत कार्यवाही से शासन को अविलम्ब अवगत कराया जाये।

उक्त के आलोक में सादर अवगत कराना है कि विश्वविद्यालय के कृषि विज्ञान केन्द्रों पर वर्तमान में कार्यरत कुल 07 वैज्ञानिकों (संलग्नक-04) में से 05 वैज्ञानिक (तालिका में क्रमशः 01 से 05 तक) जिन्हें 60 वर्ष की आयु पूर्ण करने के उपरान्त 30 जून, 2021 को सेवानिवृत्त किया जाना था वे 62 वर्ष की अधिवर्षता आयु के लाभ के फलस्वरूप वर्तमान में कार्यरत हैं तथा शेष 02 वैज्ञानिक (तालिका में क्रमशः 06 एवं 07) जो अतिशीघ्र दिनांक 30 जून, 2022 को 60 वर्ष की आयु पूर्ण कर रहे हैं।

साथ ही यह भी सूचित करना है कि वर्तमान में विश्वविद्यालय के मुख्यालय व अनुसंधान केन्द्रों पर गोविन्द बल्लभ पन्त कृषि एवं प्रौद्योगिक विश्वविद्यालय, पन्तनगर में भारतीय कृषि अनुसंधान परिषद, नई दिल्ली (ICAR) द्वारा पोषित रही नार्प (NARP) परियोजना में मूल नियुक्ति वाले

वैज्ञानिक जिनका वेतन दिनांक 01.10.1994 से विश्वविद्यालय के सामान्य आय-व्ययक से आहरित किये जाने हेतु कुलपति, गोविन्द बल्लभ पन्त कृषि एवं प्रौद्योगिक विश्वविद्यालय, पन्तनगर द्वारा स्वीकृति प्रदान की गयी थी (संलग्नक-06) जिन्हें उ०प्र० राज्य विभाजन के फलस्वरूप सरदार वल्लभभाई पटेल कृषि एवं प्रौद्योगिक विश्वविद्यालय, मेरठ की स्थापना के समय हस्थानान्तरित किया गया था। जिनमें से वर्तमान में संलग्नक-05 पर दी गयी तालिका के क्र०सं० 01 से 07 तक अंकित वैज्ञानिक/शिक्षक वर्तमान में विश्वविद्यालय में कार्यरत हैं।

अतः महोदय अनुरोध है कि उ०प्र० शासन के पत्र संख्या 237/2022/कृशिअ-67-400(27)/87 दिनांक 14 जून, 2022 के अनुसार विश्वविद्यालय के मुख्यालय, अनुसंधान केन्द्रों तथा कृषि विज्ञान केन्द्रों पर कार्यरत उक्त वैज्ञानिकों (संलग्नक-04 व 05 में दी गयी तालिकाओं के क्र०सं० 01 से 07 तक) की सेवानिवृत्त आयु के संबंध में शासन के मार्गदर्शन की अतिशीघ्र आवश्यकता है। अतः कृपया उपरोक्तानुसार मार्गदर्शन प्रदान करने की कृपा करें।

संलग्नकः यथोपरि

ह०अ०
22.06.2022
निदेशक, प्रशासन एवं अनुश्रवण"

"Director Administration and Monitoring
Sardar Vallabh Bhai Patel University of Agriculture and Technology, Meerut – 250110

Letter: SVP/ 2022/ Ni.Pr.Anu./ 10673
Dated:22.06.2022
To,
Special Secretary,
Government of Agriculture, Education and Research Department, Uttar Pradesh, Lucknow.

Subject: Relating age and retirement and session benefit in respect of employees and teachers working in agriculture and technical University, U.P.

Sir,

Reference may be had of the letter of State of Uttar Pradesh No.-237/2022/KriShiA-67-400 (27)/ 87 date 14th June, 2022. In that regard it is to be informed that posts have been created for all KVKs working under the aegis of the university, by Indian Council of Agricultural Research and the Government has accorded permission to make appointments thereon. Subject Matter Specialists and Co-ordinators have been appointed in KVK under Chapter XIII 4(d) of the Agricultural and Technical University Act, 1958 by a duly constituted Selection Committee.

In this above regard, I may inform that on the post of Training Associate/ Subject Matter Specialist and Training Organizers/ Programme Co-ordinators, appointments have been made of the employees taking them as teachers under the Agricultural University Act, 1958 vide Chapter XIII 4(d) at the centres which is financed by Indian Council of Agricultural Research, New Delhi. At the level of University, the original post as Training Associate/ Subject Matter Specialists, they have also been styled as 'Assistant Teachers' and thereafter they have been further promoted under Career Advancement Scheme with the approval and accordingly, they have been given their postname styled as 'Associate Professor and Professor'.

This is also to be informed at the same time that 20 agriculture research centres (KVK) that are being run under the aegis of university, two Krishi Vighyan Kendra namely, KVK Hastinapur and KVK Baghara are being run since much before by the NGO and were later on transferred to Govind Vallabh Pant Agriculture and Technology University, Pant Nagar. Thereafter with the division of State of Uttar Pradesh both the Krishi centres along with their employees stood transferred to Sardar Vallabh Bhai Patel University of Agriculture and Technology, Meerut. Likewise, in the past the Agricultre Training Science Centres (KVK) Lakhawati, Bulandshahar that was run under the control of Amar Singh, P.G. College, Lakhawati stood tranferred in certain unavoidable circumstances to Agriculture University Meerut vide letter of State Government No.- 57/67-KrShiA-08/ 500(1)/ 08 date 29th August, 2008. Accordingly the scientists/ employees working under the KVK Lakhawati, Bulandshahar were absorbed with the university under its letter No.- SVBHaPa/2008/ Mu.Ka.A./ 4186 date 24.12.2008 (Appendix 1, 2 & 3).

The directions as have been given vide clause 7 of the Government order No.- 237/2022/KriShiA-67-400 (27)/87 date 14th June, 2022 that those who are basically appointed employees and teachers at the KVK and other projects of ICAR would not be entitled to retirement age benefit and session benefit etc (except those cases where Court's orders are operating) and those employees who have not been appointed as per the rules/ provisions as teachers would not be entitled to session benefits like educational/ academic benefits of retirement age and session benefit that have been given in the past, would be immediately withdrawn and the Government should accordingly be informed.

In above regard, it is to be submitted that out of 7 scientists (Appendix – 4) 5 scientists (Table No.- 1 to 5) who were to retire at the age of 60 years on 30th June, 2021, have been continued in service by giving benefit of age of retirement of 62 years and rest two scientists (Table No.- 6 & 7) would be attaining the age of 60 years very soon on 30th June, 2022.

It is also to be informed at the same time that a project namely, NARP at the headquarters of university and other research centres of the Govind Ballab Pant, Agricultral and Technical University, Pant Nagar was funded by ICAR and the scientists are getting salary from the University budget since 1st October, 1994 under the order passed by the Vice-Chancellor of Govind Ballabh Pant, Agricultral and Technical University, Pant Nagar (Appendix – 6) as they were all transferred to Sardar Vallabh Bhai Patel University of Agriculture and Technology, Meerut upon division of State of Uttar Pradesh. The scientists/ teachers whose details have been given in Table No.- 1 to 7 of Appendix 5 are currently working in the university.

Accordingly, it is requested that appropriate guidance be given regarding the age of retirement of those above scientists (Table No.- 1 to 7 given in Appendix 4 & 5). Appropriate guidance may be given in the light of the Government order dated 14th June, 2022 as they are working in the Research centres and KVK of the University.

Enclosure: As above.

Signature illegible
22.06.2022
Director, Administration and Monitoring."

(English translation done by the Court)

43. However, the Special Secretary to the Government of Uttar Pradesh reiterated the stand taken in the Government order dated 14th June, 2022 vide another letter dated 29th July, 2022 addressed to the agriculture universities of Kanpur Nagar, Ayodhya and Meerut but Vice-Chancellor of the University this time again asserted that such employees working in the KVK were required to be offered benefit of 62 years of age as they are entitled too. This letter of Vice-Chancellor dated 3rd August, 2022 is reproduced hereunder:

"डा० आर०के मित्तल

कुलपति

Dr. R.K. Mittal

Vice Charcellor

सेवा में,

अपर मुख्य सचिव

कृषि, कृषि शिक्षा एवं अनुसंधान अनुभाग,

उ०प्र० शासन, लखनऊ। (उ०प्र०)

विषयः कृषि एवं प्रौद्योगिक विश्वविद्यालय उत्तर प्रदेश में कार्यरत कार्मिकों/शिक्षकों को अधिवर्षता आयु एवं सत्रान्त लाभ के सम्बम्ध में।

महोदय,

कृपया शासन के पत्र संख्या 1246/2022/कृशिअ-67-400(27)-87 दिनांक 29.07.2022 का संदर्भ ग्रहण करने का कष्ट करें जिसके बिन्दु-3 में एक्रिप, नार्प एवं कृषि विज्ञान केन्द्र में कार्य करने वाले कार्मिक को शैक्षणिक संवर्ग से अच्छादित नहीं माना गया है। इस परिपेक्ष्य में पुनः अवगत कराना है कि शासन के उक्त निर्णय से विश्वविद्यालय की शिक्षण शोध एवं प्रसार सम्बंधी गतिविधियाँ प्रभावित होंगी। इसके अतिरिक्त माननीय कुलाधिपति व मा० मुख्यमंत्री, उत्तर प्रदेश द्वारा विश्वविद्यालय का नैक मूल्याकन प्राथमिकता के आधार पर कारये जाने सम्बंधी निर्देश का अनुपालन भी प्रभावित होगा। यहाँ यह भी अवगत कराना है कि वर्तमान में विश्वविद्यालय में एक्रिप परियोजना के अन्तर्गत मात्र 02 वैज्ञानिक ही कार्यरत हैं तथा वर्ष 2007 के बाद से इस परियोजना में कोई नयी नियुक्ति नहीं की गयी है। इसी प्रकार नार्प परियोजना के अन्तर्गत वर्तमान में मात्र 05 वैज्ञानिक की कार्यरत हैं जो गोविन्द वल्लभ पंत कृषि एवं प्रौद्योगिक विश्वविद्यालय, पंतनगर से हस्तानान्तरित हैं तथा जिनका वेतन दिनांक 01.10.1994 से सामान्य आय-व्ययक से आहरित है। भारत सरकार एवं प्रदेश सरकार की किसानों की आय दोगुना करने की महत्वाकांक्षी योजना के अन्तर्गत कृषि विकास योजनाओं के बलूते निर्धारित लक्ष्य प्राप्त करने पर बल दिया जा रहा है। इन स्थितियों में शोध/प्रसार योजनाओं में कार्यरत वैज्ञानिकों को अधिवर्षता आयु 62 वर्ष से घटाकर 60 वर्ष किया जाना अप्रासंगिक है। विश्वविद्यालय के पूर्व पत्र संख्या सवप/2022/नि०प्र०अनु०/16073 दिनांक 22.06.2022 में दर्शाये गये तथ्यों के अतिरिक्त वस्तु स्थिति निम्नवत है-

(अ) शोध योजना (एक्रिप 75:25) में नियुक्त वैज्ञानिकों का चयन सहायक प्राध्यापक के समतुल्य निर्धारित मानक व चयन प्रक्रिया के आधार पर स्वीकृत पद के सापेक्ष किया गया है। इनसे प्रावधानों के अन्तर्गत शोध कार्य सम्पादित कराये जा रहे है। भारतीय कृषि अनुसंधान परिषद द्वारा संचालित परियोजनाओं के वैज्ञानिकों को जो शिक्षकों के समतुल्य हैं, को 62 वर्ष की अधिवर्षता आयु निर्धारित है एवं इनको सत्र लाभ अनुमन्य नहीं है। इस योजना का 75 प्रतिशत व्यय भार भारीय कृषि अनुसंधान परिषद द्वारा ही वहन किया जाता है तथा राज्यांश मात्र 25 प्रतिशत है।

*(ब) प्रसार के अन्तर्गत आई०सी०ए०आर० द्वारा स्वीकृत शत-प्रतिशत वित्त पोषित कृषि विज्ञान केन्द्रों हेतु ट्रेनिंग आर्गेनाइजर वर्तमान में वरिष्ठ वैज्ञानिक एवं अध्यक्ष एवं विषय वस्तु विशेषज्ञ (एस०एम०एस०) का चयन भी वैज्ञानिक के रू में सहायक प्राध्यापक के समतुल्य निर्धारित मानक व चयन व प्रक्रिया के आधार पर स्वीकृत पद के सापेक्ष किया गया है। दिनांक 29.03.2011 के पूर्व नियुक्त एस०एम०एस० की प्रायस्थित के सम्बंध में*Deputy Secretary (AE) ICAR, New Delhi *के पत्रांकः File No. A/Ext/4/17/2019-AE-III दिनांक 24.02.2020 में दिनांक 29.03.2011 के पूर्व नियुक्त एस०एम०एस० की प्रायस्थित ए०जी०पी० रूपये 6000/-मान्य की गयी है (प्रति संलग्न)। माननीय कुलाधिपति की अध्यक्षता में दिनांक 05.11.2020 में राजभवन में आयोजित बैठक के कार्यवृत्त सं० ई-7230/जी०एस०/2020 दिनांक 18.11.2020 के बिन्दु-8 में उल्लेख किया गया है। समस्त कृषि विज्ञान केन्द्र शत प्रतिशत आई०सी०ए०आर० के वित्त पोषित होने की स्थिति में राज्य सरकार का कोई व्ययमार नहीं है।"*

(स) नार्प योजना के अन्तर्गत नियुक्त समस्त वैज्ञानिक गोविन्द वल्लभ पंत कृषि एवं प्रौद्योगिक विश्वविद्यालय, पंतनगर से हस्तानान्तरित है तथा अधिकांश वैज्ञानिक सेवानिवृत्त भी हो चुके हैं (प्रति संलग्न)। इस योजना के अन्तर्गत कार्यरत वैज्ञानिकों का वेतन पंतनगर विश्वविद्यालय के समक्ष अधिकारी की स्वीकृति से दिनांक 01.10.1994 से सामान्य आय-व्ययक से आहरित किया जा रहा है तथा इसके बाद कोई नियुक्ति नहीं की गयी है। अत्यंत सीमित संख्या में शेष वैज्ञानिकों से शोध/शिक्षण कार्य सम्पादित कराया जा रहा है। इसमें भी अतिरिक्त व्ययभार नगण्य है।

अतः उपरोक्त स्थिति की विद्यमानता में शाशन से पुनः अनुरोध है कि विश्वविद्यालय के नैक मूल्यांकन एवं भारत सरकार व उत्तर प्रदेश सरकार की कृषि विकास योजनाओं के समृद्धि की महत्वाकांक्षी योजना के दृष्टिगत उक्त योजनाओं के वैज्ञानिकों को जिनकी नियुक्ति उ०प्र० कृषि एवं प्रौद्योगिक विश्वविद्यालय अधिनियम-1958 के अनुसार सहायक प्राध्यापक के समतुल्य मानक व चयन प्रक्रिया के आधार पर की गयी है, उन्हें 62 वर्ष की

अधिवर्षता आयु का लाभ प्रदान किया जाना उचित होगा, अन्यथा की स्थिति में वैधानिक समस्यायें उत्पन्न होंगी।

संलग्नकः उपरोक्तानुसार

भवदीय,

ह०अ०

(आर०के० मित्तल)"

"Dr. R.K. Mittal
Vice-Chancellor,

To,

Additional Chief Secretary, Agriculture
Agriculture and Research Department,
Government of Uttar Pradesh, Lucknow (U.P.)

Subject: Regarding age of superannuation and session benefits in respect of the employees/ teachers working in agriculture and technical university of Uttar Pradesh.

Sir,

Kindly have regard of the letter of State Government No.- 1246/2022/ KriShiA-67-400(27) – 87 date 29.07.2022 in which vide point No.- 3, the employees working in the AKRIP, NARP and Krishi Vigyan Kendra were stated to be not covered by the teaching facility within the meaning of teacher. It is again to inform that by this letter academic research and extension programme of the University will be affected. Besides above, NACK assessment of University on priority basis, as per the directives issued by the Vice-Chancellor and Hon'ble Chief Minister would be affected. This is to inform that in the University under the AKRIP project only two scientists are working as after 2007, no new appointments have been made. Likewise, in the NARP project only 5 scientists are working. Those scientists who were transferred from Govind Ballabh Pant, Agriculture and Technical University, Pant Nagar and whose salary being withdrawn w.e.f. 1st October, 1994 from the budget of the university. The Government of India and State Government has launched an ambitious programme of attaining the object to double the income of the farmer vide agricultural development schemes. In such circumstances, therefore, to reduce the age from 62 years to 60 years of such scientists working in research and extension programme would not be appropriate as per the last letter of the University dated 22.06.2022 following the fact position:

(a). Scientists to the research scheme (AKRIP 75:25) were appointed akin to the post of Assistant Professor as per the prescribed norms and following the selection procedure and they are conducting research work in the assigned projects. The scientists who are working in the project of Indian Council of Agriculture Research are assigned the age of 62 years as superannuation. However, they are not entitled to session benefits. 75% of such scheme is funded by Indian Council of Agriculture Research and the contribution of State is only 25%.

(b). Under the extension programme the entire project relating to the Krishi Vigyan Kendra 100% finance by the Indian Council of Agriculture Research and among the training organizers currently Senior Scientist and President and Subject Matter Specialists (SMS) have been selected. For the scientists the prescribed norm is the same as prescribed for the Assistant Professor and their selection has been made following the procedure prescribed for Assistant Professor in

respect of those who have not been appointed prior to 29.03.2011, Deputy Secretary (AE) ICAR, New Delhi vide letter No.- File No.A/Ext/4/17/2019 -AE – III date 24.02.2020 has been issued in respect of Subject Matter Specialists appointed prior to 29.03.2011 (copy attached) in which meeting held on 05.11.2020 under the Chairmanship in the Rajbhawan. The minutes of the meeting vide Letter No.- 7230/ G.S./ 2020 dated 18.11.2020 date 18.11.2020 vide clause 8 as referred to this. Since all Krishi Vigyan Kendra is 100% financed by ICAR, there will be no financial burden upon the State Government.

(c) The scientists working under the NARP scheme were transferred from Govind Ballabh Pant, Agriculture and Technical University, Pant Nagar and most of the scientists have already retired (copy attached). The scientists working under this scheme are being paid under the approval of competent authority from the ordinary budget of the University since 1.10.1994 and, therefore no further appointments have been made. So in a limited number the scientists are doing research and academic work and expenditure upon them is negligible.

Thus, under the above circumstances, it would be appropriate to give benefit of 62 years of age of superannuation to such scientists, who have been duly selected as per the norms prescribed for the post of Assistant Professor under the U.P. Agricultural and Technical University Act, 1958 and are working under the ambitious scheme of Central Government and State Government regarding agricultural development as per the NACK assessment of the University.

Enclosure: As above

Yours' sincerely

Signature illegible
R.K. Mittal"

(English translation done by the Court)

44. But the State Government this time not only reiterated again its stand but issued threatenings for action and also recovery under the order dated 10th November, 2022 citing paragraph 7 of the Government order dated 14th June, 2022. The order dated 10th November, 2022 passed by the Under Secretary, Government of Uttar Pradesh to the Vice-Chancellor of universities of Kanpur and Meerut is reproduced hereunder:

"प्रेषक,

संख्या-1544/2022/कृशिअ-67-400(27)/87

अशोक कुमार सिंह,

अनु सचिव,

उत्तर प्रदेश शासन।

सेवा में,

कुलपति,

कृषि एवं प्रौद्योगिक विश्वविद्यालय,

कानपुर/अयोध्या/मेरठ।

कृषि शिक्षा एवं अनुसंधान अनुभाग

लखनऊः 10 नवम्बर, 2022

विषयः कृषि विश्वविद्यालयों को विश्वविद्यालय में कार्यरत कार्मिकों/शिक्षकों को अधिवर्षता आयु एवं सत्रांत लाभ प्रदान किये जाने के संबंध में।

महोदय,

उपर्युक्त विषयक कृषि विश्वविद्यालय, कानपुर पत्रांक-सीएसयूई-255/फा०नं०-1228(1)/2022, दिनांक 20.09.2022 एवं

पत्रांक-सीएसयूई-877/फा०नं०-475(1)/2022, दिनांक 20.09.2022, कृषि विश्वविद्यालय, अयोध्या के पत्रांक-एएनडीयूएटी-07/लेखा-1/वैज्ञा. अधिवर्षता आय/2022/1087, दिनांक 30.07.2022 तथा कृषि विश्वविद्यालय, मेरठ के पत्रांक- सवप/वी.सी./ 5447/2022, दिनांक 03.08.2022 का सन्दर्भ ग्रहण करने का कष्ट करें।

2- अवगत कराना है कि प्रकरण में विश्वविद्यालयों में कार्यरत कार्मिकों को अधिवर्षता आयु एवं सत्रांत लाभ दिये जाने के विषय में विस्तृत रूप से समस्त बिन्दुओं पर स्थिति स्पष्ट करते हुए शासनादेश संख्या-237/2022/कृशिअ-67-400(27)/87, दिनांक 14.06.2022 सक्षम स्तर के अनुमोदनोपरान्त निर्गत किया गया है। विश्वविद्यालय के उक्त संदर्भित पत्रों द्वारा अपेक्षित समस्त बिन्दुओं को भी उपरोक्त शासनादेश दिनांक 14.06.2022 द्वारा स्पष्ट किया गया है।

3- इस संबंध में यह कहने का निदेश हुआ है कि शासनादेश संख्या-237/2022/कृशिअ-67-400(27)/87, दिनांक 14.06.2022 के प्रस्तर-7 में निर्गत निर्देशों की व्यवस्थानुसार कार्यवाही सुनिश्चित की जाय एवं अनावश्यक रूप से शासन में संदर्भ बारम्बार प्रेषित कर शासनादेश के उल्लंघन को जारी रखने की प्रवृत्ति को हतोत्साहित किया जाय, अन्यथा की स्थिति में शासनादेशों द्वारा निर्गत व्यवस्था के विपरीत कार्य किये जाने पर यदि किसी प्रकार की कोई शासकीय/वित्तीय अनियमितता संज्ञानित होती है तो इस हेतु नियमानुसार कार्यवाही करते हुए उक्त अनियमितता हेतु उत्तरदायी प्राधिकारी से अन्य विधिक कार्यवाही के साथ-साथ उपरोक्त से हुई वित्तीय क्षति की वसूली भी सुनिश्चित की जायेगी।

भवदीय,
(अशोक कुमार सिंह)
अनु सचिव।"

"From
Ashok Kumar Singh,
Under Secretary,
Government of Uttar Pradesh.

To,
Vice-Chancellor,
Agricultural and Technical University,
Kanpur/Ayodhya/Meerut.

Agricultural Education and Research Department

Lucknow: 10.11.2022

Subject: Regarding the age of superannuation of session benefit to the employees and teachers working in the agriculture university.

Sir,

In above regard, kindly have reference of the letter- CSUE-255/ PH.No.- 1228(1)/ 2022, Date 20.09.2022 and Letter- CSUE – 877/ Ph.No.- 475(I)/ 2022, Date 20.09.2022, Agricultural University, Ayodhya letter No.- ANDUAT-07/ Acc-1/ Scientist: retiral dues/ 2022/ 1087, date 30.07.2022 and Agricultural University, Meerut vide letter No.- SVP/ V.C./ 5447/2022, Date03.08.2022.

2. It is to inform that in the above regard, Government has clarified its position vide Government order No.- 237/2022/KriShiA-67-400(27)/ 87 date 14.06.2022 regarding age of superannuation and session benefit to the employees working in the University after approval at the competent level. Clarifications have also been made with regard to the points raised in the aforesaid letter of University, vide Government order dated 14.06.2022.

3. In this regard I have been directed to state that compliance of the directives issued under clause 7 of Government order No.- order No.- 237/2022/KriShiA-67-400(27)/ 87, dated 14.06.2022 be ensured and any tendency to reiterate the matter again and again before the State Government should be discouraged, failing which, if any action is found to be contrary to the directives issued whether administrative or financial, then appropriate action shall be ensured lawfully by fixing responsibility of the officer concerned and also recovery shall be ensured from such officers.

Yours' sincerely
(Ashok Kumar Singh)
Under Secretary"
(English translation done by the Court)
(Emphasis added)

45. Thus, from the above it is clear that right from the Government order dated 14th June, 2022 and the last order issued by the State Government dated 10th November, 2022 the stand has been that in view of the definition of Section 2(k) now stood amended in the year 2019 these employees of the KVK would not fall in that category of teachers. The university continued with the stand taken in the letter written by the Director of KVK and the Vice-Chancellor as noticed above but ultimately passed the impugned orders complying with the last order dated 10th November, 2022 of the Under Secretary in which threats were issued of coercive actions.

46. From the above, it is clear that stand of university had not changed but for letter of State Government issuing threats and resultantly University not only passed impugned orders retiring petitioners but later upon filing these writ petitions, now the Universities have filed counter affidavit also siding with the stand of State Government. Paragraph 7 of the Government order dated 14th July, 2022 as quoted above makes the privileges, amenities and facilities of the teaching faculty of the university not applicable to the corresponding position post holders of the KVK only on the ground that in view of the latest definition as incorporated by way of amendment act of 2019, they do not fall in that category. I have already reproduced both the old provision and new provision of Section 2(k) where a teacher is defined.

47. In my considered view, this controversy as to whether the corresponding position holders of KVK with that of the faculty of the university would fall within the definition of teacher or not is no more res integra for the simple reason that amendment having been made in the year 2019 and having not been given retrospective effect in its operation, will operate prospectively only and those who were getting benefits under the old provision as teachers of the university while appointed and working in KVK would continue to enjoy such privileges, amenities and facilities of the university.

48. In the case of Dr. Mithilesh Kumar Pandey (supra) the Division Bench

has very categorically held so regarding prospective operation of the amended provision vide paragraphs 16, 17 and 18 thus:-

"(16) In view of the provisions contained in the amending Act, namely, U.P. Act No. 9 of 2019, since there is no express provision of its applicability from a retrospective date, it will thus operate prospectively. In our considered opinion, since U.P. Act No.9 of 2019 has not been made applicable retrospectively, if a particular category of employees has already been classified or recognized as "Teachers", they will continue to be treated as "Teachers". We have already noticed that as per the powers vested in it in Chapter XII of the First Statutes of the University, the Board of Management in its 28th meeting held on 30.09.1980 has already recognized the Subject Matter Specialists as "Teachers" and thus by operation of U.P. Act No. 9 of 2019 their status as "Teacher", in our opinion, will not change for the reason that U.P. Act No. 9 of 2019 has not been made effective with effect from any retrospective date.

(17) At this juncture, we may refer to Section 6 of U.P. General Clauses Act, 1904 according to which if any U.P. Act repeals any enactment, then unless a different intention appears, the repeal shall not affect the previous operation of any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. Section 6 of U.P. General Clauses Act, 1904 is quoted hereunder:-

"6. Effect of repeal. Where any Uttar Pradesh 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 remedy, or investigation or legal proceeding commenced before repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such remedy may be enforced and any such investigation or legal proceeding may be continued and concluded, and any such penalty, forfeiture or punishment imposed as if the repealing Act had not been passed."

(18) Thus, by substituting new definition of 'Teacher' in Section 2(k) in the Principal Act by way of Act No. 9 of 2019, the old definition of the word "Teacher" stands repealed, however, since there is no express or implied provision in U.P. Act No. 9 of 2019 for its retrospective operation, those employees who were already recognized as "Teachers" will continue to be "Teachers". In the unamended Section 2(k), the words occurring are a person "appointed" or "recognized". Thus before U.P. Act No. 9 of 2019, if a person was appointed as Teacher, he will be a "Teacher" and if any employee though not appointed as Teacher, but is recognized as "Teacher", he shall also be a "Teacher". At the cost of repetition, we may again refer to the decision of the Board of Management of the University taken in its 28th meeting held on 30.09.1980, wherein the Subject Matter Specialists have been recognized as "Teachers". Thus in the

aforesaid view of the matter, the amendment in the definition of the word "Teacher" as occurring in Section 2(k) will not affect the status of the petitioners as "Teachers".”

49. Now interestingly, Division Bench has also noticed the stand of ICAR filed before the Court by means of a short counter affidavit, vide paragraphs 20, 21 and 22 of the judgment which are reproduced hereunder:

“(20) The ICAR has filed a short counter affidavit which also needs to be referred to. According to the short counter affidavit, Krishi Vigyan Kendras are established under the administrative control of a Host Organization which in this case is the University. The said short counter affidavit states that the ICAR provides cent percent financial assistance to Krishi Vigyan Kendras under the 'Salary' and 'General' heads of the annual budget and further that the service conditions of the employees of the Krishi Vigyan Kendras are to be governed by the Rules, Regulations and Policies of the respective host organization. The ICAR in the said short counter affidavit has clearly stated that the University is the Host Organization and at the time of establishment of Krishi Vigyan Kendra, a Memorandum of Understanding was signed between ICAR and the Host Organization according to which all staff of Krishi Vigyan Kendras shall be borne on the establishment of the Grantee (Host Organization) only. It also provides that the administrative control over the staff employed under the Scheme, shall vest in the host institution and that placement of the staff in case the project is terminated shall be the sole responsibility of the Host Organization.]

(21) Para 13 of the short counter affidavit filed by the ICAR, it has been clearly stated that staff of Krishi Vigyan Kendras are the employees of the Host Organization and not that of ICAR. Such stipulation is made in the Memorandum of Understanding signed between the ICAR and the University. The short counter affidavit further refers to a Circular of the ICAR dated 17.06.2015 according to which all staff of Krishi Vigyan Kendras shall be borne on the establishment of the Host Institution and further that the service conditions including recruitment, appointment etc. of the staff of Krishi Vigyan Kendra shall be regulated as per the Rules and Regulations of the Host Institution. In para - 16 of the short counter affidavit, it has been stated that as per Circular dated 17.06.2015 issued by the ICAR, the staff of Krishi Vigyan Kendras are the employees of the respective Host Organizations and in this case, all the employees of Krishi Vigyan Kendras are the employees of th University and their service conditions such as appointment, probation, promotion, disciplinary matters, leave rules and age of superannuation etc. will be governed by the Rules and Regulations of the University. It also mentions that the age of retirement/superannuation is to be decided by the respective Host Organization. Thus, the case of ICAR is that the conditions of service including the age of superannuation will be as per the Rules applicable to the employees of the University and further that the staff working in Krishi Vigyan Kendras are the staff of the Host Organization which in this case is the University.

(22) The State Counsel has argued that the petitioners are the employees of Krishi Vigyan Kendras and not that of the University. However, having regard to the

stand taken by the ICAR and as per the Memorandum of Understanding entered into ICAR which is Funding Agency and the University, it is the Host Institute under whose control the staff of Krishi Vigyan Kendras work. As per the said Memorandum of Understanding, so far as the conditions of service of the staff of Krishi Vigyan Kendras are concerned, the same are to be governed by the Rules and Regulations applicable to the employees of the University."

50. Now the Division Bench proceeds to hold that teaching staff and Scientist of the university are indisputably to retire at the age of 62 years and these persons were also adopted by the Board Management to have amenities like teaching faculties of University and then there was no question to retire him at the age of 60 years and thus vide paragraph 24 finally held that the Government order dated 14th June, 2022, 29th July, 2022 and 10th November, 2022 would not come in the way of such employees working at KVK to retire at the age of 62 years. Accordingly, against the order passed by the Vice-Chancellor retiring such employees of the KVK was set aside. Paragraphs 24 and 25 of the judgment are reproduced hereunder:

"(24) In view of the aforesaid discussion, it appears that while issuing the Government Order dated 14.06.2022, the State Government has not taken into account the fact that Section 2(k) as amended vide U.P. Act No. 9 of 2019 will have only prospective operation and hence it will not affect those employees working in Krishi Vigyan Kendras who were already recognized as 'Teachers' in terms of the decision of the Board of Management of the University. Accordingly, we are of the opinion that in pursuance of the Government Orders/letters dated 14.06.2022, 29.07.2022 and 10.11.2022 the petitioners could not have been made to retire on their attaining the age of 60 years.

(25) For the discussions made and reasons given above, we are of the opinion that the Orders dated 11.11.2022 which are contained in Annexure Nos.3 and 4, whereby the petitioners have been retired on their attaining the age of 60 years, cannot be sustained."

51. I may also refer to my earlier judgment dated 16th August, 2023 given in Writ – A No.- 10622 of 2022 and connected matters relating to Chandra Shekhar Azad University of Agriculture and Technology, Kanpur for the limited purpose that definition of teacher as has stood amended in 2019 would not be having any retrospective effect for Amendment Act being absolutely silent on this aspect. Thus, Legislature in its wisdom deliberately did not make new definition to operate retrospectively.

52. Here in this case there is no issue as to whether Board of Management had passed a resolution or not as no such ground has been taken by university. The only ground taken by the university is that it is going by Government order dated 14th June, 2022 and consequential orders. As I have noticed above the relevant sub-clause (viii) of clause 7 of MOU, which provides that privileges, amenities and facilities shall be available to such KVK employees and petitioners have been offered not only the positions like Assistant Professors and Subject Matter Specialists but were also given benefits of UGC scale meant for teaching faculties of university and also allowances accordingly and some of the petitioners were even promoted under CAS and further that the KVK centres are being

run at a very large scale with a lot of infrastructural facilities to carry out research work both in agricultural fields and the laboratories and further imparting instructions and taking classes for research purposes as an extension programme of university under the ambitious schemes and programmes of agriculture development of Central and State Government.

53. It is neither a case of the university, nor of the State that petitioners did not possess the requisite qualification of Assistant Professor of the University when they were appointed either as Research Associate or Subject Matter Specialist in different sub-disciplines of agriculture science and so also regarding their meeting parameters and attaining qualifications as prescribed by the UGC while they have been given promotion under the Career Advancement Scheme (CAS). I may here refer to the latest UGC regulations dated 18th July, 2018 that provide for Master's degree in the subject with eight years experience as Assistant Professor, which may be teaching in university or college or Research University/ National Level Institutions equal to that Assistant Professor of university or college. The eligibility as prescribed for by the UGC as on date if taken into account of Associate Professor vide Regulations published on 18th July, 2018 is as under:

"II. Associate Professor:

Eligibility (A or B) :

A. I) A good academic record, having a Ph.D. degree with performing ability of high professional standard as certified by an Expert Committee constituted by the University concerned for the said purpose.

ii) Eight years experience of teaching in a University/ College and/ or research in a University/ national-level institutions equal to that of Assistant Professor in a University/ College.

iii). A significance contribution to knowledge in the subject concerned, as evidenced by the quality publications.

OR

B. A traditional or a professional artist, having highly commendable professional achievement in the subject concerned, has a Master's degree, who has:

i) Been recognized artist of Stage/ Radio/ TV;

ii) Eight years of outstanding performance in the field of specialisation;

iii) Experience of designing new courses and/ or curricula;

iv) Participated in Seminars/ Conferences in reputed institutions; and

v) The ability to explain with logical reasoning the subject concerned and adequate knowledge to teach theory with illustrations in the said discipline."

(Emphasis added)

54. I do not find any difference in discharge of duties in terms of research work done by the faculty members of the University and such employees of the KVK, at least there is no such pleadings either by University or by the State Government. Whatever short counter affidavit was filed by ICAR in the matter decided by Division Bench of this Court at Lucknow, would obviously will be its stand here also because before the same High Court the Council cannot take two different stand in similar matters. Mr. Mehta, learned Senior Counsel, of course, raised a point that ICAR should have been a party being a funding agency, but I do not find there to be any direction by ICAR that it was withdrawing salary part of fund, meant to be paid to such teachers, if retiring at the age of 62 years. In such circumstances,

petitioners are definitely not aggrieved by any action of ICAR. Neither there is any order by ICAR, nor any relief is claimed against it. Thus, ICAR is neither a necessary party, nor even a proper party. The letter of the Director, ICAR, Kanpur that has been filed along with counter affidavit by the State respondents for interpreting the MOU, I find it to be based on a legal advise. Any interpretation of MOU is either to be done by the Court in the event of dispute or by the signatories to or the parties to the MOU after holding consultation. There is nothing to show that this interpretation was done after the Council held any such discussion in its meeting of Board of Directors by holding consultation with the grantee university on the issue and, therefore, such legal advice cannot be taken to be the stand of the Council or of the University. This letter has thus no significance or relevance to the matter in issue. Such a legal advise to interpret MOU can neither have any legal force, nor can validate any action of State or university, impugned herein this petition.

55. An autonomous body can be creation of a statute, Central or State, a society under the Society Registration Act, a company under the Company's Act or a body registered under the Indian Trust Act. Autonomous body has its own governing body and has complete autonomy in its administration and management and if not substantially funded i.e. 75% substantive funding, it may have its own sets of rules. Autonomous body can enter an agreement with another body by signing MOU and then it is the memorandum of understanding that governs the field for which it is signed. The government which is neither party to the MOU, nor funding the project, can have no say in so far as service conditions of employees appointed and working under the MOU. The parties to MOU only shall have say in such matters. Here in the case in hand ICAR is funding authority to the project and has signed MOU laying down condition that employees shall be appointed by the University and shall be entitled to the same privileges, amenities and facilities as admissible to the employees of the university holding corresponding positions. So long as Council does not stop funding for such Scientists and Subject Matter Specialists if they are allowed the benefit of age of 62 years for superannuation and MOU remains intact, the government that has no stake in that, cannot take a contrary stand.

56. The University being an autonomous body if extended academic benefits, amenities and other service benefits like age of retirement and session benefits to those involved in research in agriculture science at Krishi Vigyan Kendras run under its aegis, more especially when no state government budget is involved, it cannot be forced by the State government to withdraw such benefits. Clause '7' of the government order dated 22.6.2022 is highly misplaced interpretation of teachers and an attempt to define KVK staff. Once the University had taken a clear stand in its two replies, it could not have been threatened to follow government order dated 22.6.2022. The universities have been virtually terrorized and it is no doubt, an un-holistic attempt to make inroads into the autonomy of such institutions to make them subordinate. This is absolutely untenable.

57. I further find that university has acted simply on dictates of the Government without applying its own mind and without referring to its earlier stand in the matter

which, therefore, renders the order bad in law for want of due application of mind. If one looks at the order dated 11th November, 2022 impugned in the writ petition, one would definitely conclude that recitals therein are clearly indicative of non-application of mind by the authority of an autonomous authority despite having taken contrary stand to what Government had dictated earlier. The university virtually laid its authority in the feet of the Government. For better appreciation the order impugned dated 11th November, 2022:

"कार्यालय निदेशक, प्रशासन एवं अनुश्रवण
सरदार बल्लभ भाई पटेल कृषि एवं प्रौद्योगिक विश्वविद्यालय मेरठ- 250110
पत्रांकः संबंध/2022/नि०प्र० अनु०/11475
दिनांक 11 नवम्बर 2022

कार्यालय आदेश

विशेष अपील संख्या 75/2022 में माननीय उच्च न्यायालय इलाहाबाद द्वारा पारित निर्णय दिनांक 21.03.2022 के समादर में उत्तर प्रदेश शासन द्वारा निर्गत शासनादेश संख्या 237/2022/ कृशिअ- 67-400(27)87 दिनांक 14.06.2022 पत्र संख्या 1246/2022/ कृशिअ-67-400(27)87 दिनांक 29 जुलाई 2022 एवं पत्र संख्या 1544/2022 कृशिअ-67-400(27)87 दिनांक 10.11.2022 के अनुपालन में डा० अनिल कुमार कटियार कृषि विज्ञान केन्द्र बधरा मुजफ्फरनगर प्रथम (मूल नियुक्ति भारतीय कृषि अनुसंधान परिषद नई दिल्ली द्वारा स्वीकृत पद ट्रेनिंग एसोसिएट) की 60 वर्ष की अधिवर्षता पूर्ण करने के फलस्वरूप सक्षम स्तर के अनुमोदनोपरान्त तत्काल प्रभाव से आज दिनांक 11.11.2022 के अपरान्ह से कृषि विज्ञान केन्द्र की सेवाओं से सेवानिवृत्त करते हुए कार्य मुक्त किया जाता है। यह आदेश सक्षम अधिकारी के अनुमोदन उपरांत जारी किया जा रहा है।

ह० अ०
निदेशक, प्रशासन एवं अनुश्रवण"

"Office of Director, Administration and Monitoring
Sardar Vallabh Bhai Patel, Agricultural and Technical University, Meerut-250110
Letter:Sambhand/2022/Ni.Pr.Anu./11475 Date:11th November, 2022

Office Order

State of Uttar Pradesh vide letter No.- 237/2022/KriShiA-67-400 (27) 87 dated 14.6.2022, letter No.- 1246/2022/ KriShiA-67-400(27)/87 dated 29th July, 2022 and letter No.- 1544/ 2022/ KriShiA-67-400(27)87 dated 10.11.2022 issued in terms of judgment dated 21st March, 2022 passed by the Hon'ble High Court, Allahabad in Special Appeal No.- 75 of 2022, Engineer Dr. Anil Kumar Katiyar, Krishi Vigyan Kendra, Badhra, Muzaffarnagar-I (Principal appointment as Training Associate upon the post created by the Indian Council of Agricultural Research) is being retired and being relieved today on 11.11.2022 with immediate effect upon attaining the age of 60 years with approval at the competent level.

Sd. illegible
Director, Administration and Monitoring"
(English translation done by the Court)

58. This is very unfortunate that finding no answer to the stand of university in its previous two letters, the State Government threatened university of

adverse action and recovery. This Court fails to understand as to how the State Government that was not party to MOU could have taken any action against university for violation of any term and condition of MOU and that too without any enquiry and as to how it could have ordered for recovery of money funded by ICAR without there being any objection by ICAR. There was no involvement of State Government in running KVK and payment of salary of KVK men. The State Government having found no means to cow-down university fell prey to false ego of its advisers and officials and gagged the mouth of Director and Vice-Chancellor of university to pass impugned orders to retire petitioners at the age of 60 years. This is an absolutely arbitrary exercise of power by State Government and in my considered view beyond its competence in the matter of MOU between ICAR and university, both the autonomous bodies and that too in the absence of resolution of ICAR supporting such questionable interpretation.

59. Thus, petitioners, therefore, are held entitled to all such benefits including the benefit of age of superannuation at par with the corresponding position holders in the teaching faculty of the university.

60. I may hasten to clarify here that by this judgment I am not holding petitioners to be part of the teaching faculty of the university as they are not teachers of the university in stricto sensu for not being appointed to sanctioned strength of the University but since they are appointed by the university upon a post of Scientist/ Research Associate/ Subject Matter Specialist and are further given benefits under the CAS as has been made applicable by the UGC to the university and that MOU requires university to give all privileges, amenities and facilities of the corresponding position holders of the university to men employed for KVK, and ICAR is providing fund for their salary and allowance, they are held entitled to all such privileges, amenities and facilities as are admissible to the Assistant Professor, Associate Professor and Professor of the university.

61. In view of the above, writ petitions succeed and are allowed.

62. The orders impugned passed in respect of the petitioners retiring them at the age of 60 years in respective petitions hereby quashed.

63. The status of petitioners in the Krishi Vigyan Kendra of their respective universities shall stand restored up to the age of 62 years. They will be retiring at the age of 62 years and shall be entitled to all service benefits including the arrears of salary for the period till they have attained or would be attaining the age of superannuation at the age of 62 years, as the case may be.

(2024) 1 ILRA 691
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.01.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-B No. 24 of 2024

Ram Keval ...Petitioner
Versus
D.D.C., Bahraich & Ors. ...Respondents

Counsel for the Petitioner:
Rama Kant Dixit, Ram Vishal Tripathi

Counsel for the Respondent:
C.S.C., Vijayendra Prakash Tripathi

Civil Law - U.P.Consolidation of Holdings Act, 1953 - Section 9A(2) - Limitation Act, 1963 - Section 5 - Petition has been filed challenging order dated 12.07.2023, whereby opposite party no. 2, condoned delay in filing objection so as to advance substantial justice and order dated 27.10.2023, whereby opposite party no. 3 dismissed two revisions, upheld order passed by opposite party no. 2, as such, scope of interference by High Court is limited - Registered sale deed dated 23.06.1984 in favour of opposite party no. 3, is still in existence, not set aside till date, while petitioner's claim rests on subsequent sale deed dated 04.07.1998 - Suit for cancellation of earlier sale deed remains pending - Denial to explanation given in application for condonation of delay for condoning delay, including date of knowledge of entry in revenue records and consolidation proceedings, is vague, as in objection details of case, basis of denial not indicated - Thus, Consolidation Officer rightly exercised jurisdiction in condoning delay, hence, impugned orders suffer from no infirmity. (Para 24, 31)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Ajay Dabra Vs Pyare Lal & ors. reported in 2023 SCC OnLine SC 92, (Paras 12 to 14)

2. Bhivchandra Shankar More Vs Balu Gangaram More reported in (2019) 6 SCC 387, (Paras 15, 16)

3. Ramji Dass & ors. Vs Mohan Singh, 1978 ARC 496

4. N. Balakrishnan Vs M. Krishnamurthy; (1998) 7 SCC 123, (Paras 9 to 11)

5. Esha Bhattacharjee Vs Managing Committee of Raghunathpur Nefar Academy & ors. reported in (2013) 12 SCC 649, (Para 21)

6. Brijesh Kumar & ors. Vs St. of Har. & ors. reported in (2014) 11 SCC 351, (Paras 6 to 10)

7. Wander Vs Antox India Pvt. Ltd.; 1990 Supp SCC 727, (Paras 13, 14)

8. Mohammad Shafeeq Vs Mirza Mohammad Husain; (2002) 9 SCC 460, (Para 3)

9. S. Kumar Vs S. Ramalingam, (2020) 16 SCC 553, (Paras 14, 15)

10. Kanwar Raj Singh (D) Th. Lrs. Vs Gejo. (D) Th. Lrs & ors. ; 2024 SCC OnLine SC 1, (Paras 5 to 11)

11. Ram Saran Lall Vs Domini Kuer; 1961 SCC OnLine SC 133

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Ram Vishal Tripathi, learned Counsel for the petitioner, Sri Vijayendra Prakash Tripathi, learned Counsel appearing for the Caveator and Sri Hemant Kumar Pandey, learned State Counsel.

2. In view of order proposed to be passed, issuance of notice to the private-respondent(s) is hereby dispensed with.

3. The present petition has been filed for the following main relief:-

"I. Issue a writ order or direction in the nature of CERTIORARI quashing thereby the impugned order dated 27/10 / 2023 passed by opposite party no.1 and also the order dated 12/7/2023 passed by the opposite party no. 2 by which the objection and revision filed by the petitioner has been rejected, as contained in Annexure No. 1 & 2 to this writ petition.

II. Issue a writ order or direction in the nature of MANDAMUS commanding the opposite parties may not create any hindrance in peaceful possession of the petitioner over the land in question."

4. By means of the present petition the petitioner has assailed the order dated 12.07.2023 passed by the opposite party

no.2/Consolidation Officer-III, Sadar, District Bahraich in Case No. 202354081546030324 (Jawala Prasad Versus Ram Kewal, whereby the opposite party no.2 has condoned the delay in filing the Objection under Section 9A(2) of U.P.Consolidation of Holdings Act, 1953 (in short 'Act of 1953'). The operative portion of the same reads as under:-

"उभय पक्ष के तर्क पूर्ण कथन को सुनकर तथा दिये गये तथ्यों व मियाद के प्रार्थनापत्र पर परीक्षण उपरान्त पाया गया कि वादी ज्वाला प्रसाद द्वारा दिया गया नामान्तरण हेतु आपत्ति दिनांक 26.09.2014 तथा मियाद प्रार्थनापत्र में आपत्ति का जो कारण दर्शाया गया है, वह चकबन्दी प्रक्रिया की जानकारी नहीं होने के आधार तथा समय से अनभिज्ञता का आधार लिया गया है। चकबन्दी प्रक्रिया में दाखिल वाद मियाद का प्रश्न लचीला होने का कई कारण बनता है, प्रकरण पर परीक्षण का तथ्य इंगित कर साक्ष्यों के आधारित अभिलेखों पर निर्णय का आधार समाप्त नहीं किया जाना भी प्रर्याप्त कारण है, जिसके अनुसार बिलम्ब मर्षित किया जाना न्यायसंगत है। प्रश्नगत वाद में सम्बन्धित खाते पर प्रतिवादी पक्ष के विभाजन आदेश दिनांक 26.0202016 को मियाद के बिन्दु पर बिलम्ब की छूट प्रदान की गयी है, जैसा की मूल पत्रावली संलग्न है। आदेश पत्रक अनुसार दिनांक 14.11.2017 के अनुसार श्रीमती चन्द्रकला द्वारा दिए गये बैनामें के निस्तारण के सम्बन्ध में वाद अभी भी न्यायालय सिविल जज बहराइच के न्यायालय में लम्बित होकर विचाराधीन है। इस कारण ज्वाला प्रसाद द्वारा प्रस्तुत मियाद बाहर आपत्ति को पोषणीय माना गया है। प्रकरण में प्रस्तुत माननीय सर्वोच्च/उच्च न्यायालय द्वारा दिये गये विधि व्यवस्थाओं के अनुसार सारवान न्याय के दृष्टिगत परिसीमा अधिनियम में मियाद के बिन्दु पर न्याय जहॉ लम्बित है, किसी प्रकार के अनुतोष से वंचित नहीं किया जा सकता हैं। ज्वाला प्रसाद का मियाद हेतु दिया गया प्रार्थनापत्र निरस्त करने का कोई प्रर्याप्त कारण नहीं है, अतः मियाद का लाभ का छूट प्रदान किया जाता है। आपत्ति प्रार्थनापत्र रामकेवल पुत्र छोटेलाल दिनांक 20.09.2017/17.05.2017 तथा श्यामू आदि दिनांक 26.05.2022/06.06.2022 अन्य प्रार्थनापत्र बाबत वादी ज्वाला प्रसाद मियाद के बिन्दु पर तदनुसार निरस्त कर निस्तारित किया जाता है। दावा ज्वाला प्रसाद दिनांक 26.09.2014 पर आपत्ति रामकेवल पुत्र छोटे लाल दिनांक 20.09.2017/05.10.2017 प्रस्तुत है। अग्रेतर कार्यवाहीः वादबिन्दु निर्धारण हेतु पत्रावली दिनांक 19.07.2023 को पेश हो।"

5. A challenge has also been made to the order dated 27.10.2023 passed by the opposite party no.1/Deputy Director of Consolidation, Bahraich (in short 'DDC'), whereby the opposite party no.1 dismissed the two revisions i.e. Revision No.0368/2023, Computerized Case No. 202354081500000368 (Shyam and Others Versus Jawala Prasad and Others) and Revision No. 0369/2023, Computerized Case No. 202354081500000369 (Ram Kewal Versus Jawala Prasad and Others) and up held the order of opposite party no.2 passed on 12.07.2023. The relevant portion of the order dated 27.10.2023 reads as under:-

"उपर्युक्त दोनों निगरानियों में पक्षकार एवं आराजी एक ही होने के कारण निस्तारण की सुविधा हेतु दोनो निगरानियां एकजाई की जाती है। नि० सं०ः564/202354081500000368 श्यामू आदि बनाम ज्वालाप्रसाद आदि अग्रणी पत्रावली होगी।

उभयपक्षों के विद्वान अधिवक्तागण की बहस ग्राहयता बिन्दु पर सुनी गयी। पक्षों द्वारा दाखिल लिखि बहस का अध्ययन किया गया।

पत्रावलियों का अवलोकन किया गया। पत्रावली का अवलोकन किया गया। पत्रावली के अवलोकन से स्पष्ट है कि चकबन्दी अधिकारी द्वारा दिनांक 12-7-2023 को पक्षो को सुनकर पत्रावली में मियाद का लाभ दिया गया है। पत्रावली में चकबन्दी अधिकारी द्वारा गुण दोष पर अंतिम आदेश नहीं पारित किया गया है। निगरानीकर्तागण को परीक्षण न्यायालय में सुनवाई का अवसर प्राप्त है। मा० सर्वोच्च न्यायालय एवं मा० उच्च न्यायालय की अनेकों विधि व्यवस्थाये है कि वाद का निस्तारण गुण दोष पर किया जाय न कि तकनीकी आधार पर। मियाद के बिन्दु पर उदार दृष्टिकोण अपनाना चाहिए। ऐसी में चकबन्दी अधिकारी द्वारा पारित आदेश दिनांक 12-7-2023 में किसी प्रकार के हस्तक्षेप की आवश्कता प्रतीत नही होती है। दोनो निगरानियां ग्राहयता बिन्दु पर निरस्त किये जाने योग्य है।"

6. Brief facts of the case are to the effect that Smt. Chandrakala w/o Sri Brij Lal and Sri Sanehi s/o Pyare, executed a registered sale deed on 23.06.1984 in favour of Jawala Prasad/opposite party no.3 and thereafter thereafter Smt. Chandrakala also executed a sale deed in favour of petitioner/Ram Kewal on 04.07.1998.

7. Smt. Chandrakala also instituted a suit for cancellation of registered sale deed dated 23.06.1984 i.e. Suit No. 217/1987 and this suit was decreed ex-parte on 13.08.1987 and thereafter on an application for restoration of final order dated 13.08.1987 was moved and the said restoration application was allowed and the judgment and order dated 13.08.1987 was recalled and the suit for cancellation of registered sale deed is pending before the competent court of jurisdiction till date and from the averments made in the present petition it is apparent that this fact has not been denied. The effect of pendency of the suit would be that registered sale deed dated 23.06.1984 is still in-existence.

8. The opposite party no.3 on 24.09.2014 on coming to know about the fact that in the revenue records the name(s) Sanehi and Ram Keval (petitioner) have been shown, that he contacted an Advocate on 25.09.2014 and thereafter preferred an objection under Section 9A(2) of the Act of 1953 along with an application for condonation of delay on 26.09.2014.

9. The contents of the application for condonation of delay being relevant is extracted herein under :-

"निवेदन है कि प्रार्थी आपत्तिकर्ता ने आराजी नम्बरी गाटा सं० 293 रक्बा 1.493 हे० स्थित ग्राम बनकटा पर०-तह०, जि०-बहराइच को सनेही व चन्द्रकला के जरिये बैनामा लिया था तथा मौके पर काबिज व दाखिल है। आपत्तिकर्ता चकबन्दी प्रक्रिया से अनभिज्ञ है। दिनांक 24-9-014 चकबन्दी लेखपाल से सम्पर्क किया तो पता चला की खाते पर सनेही व रामकेवल का नाम दर्ज है तब वकील से दिनांक 25-9-14 को सम्पर्क किया और आज आपत्ति दाखिल कर रहा है। आपत्तिकर्ता ने जानबूझकर आपत्ति दाखिल करने में कोई गलती नहीं किया है बल्कि यह गलती न जानकारी बस हुई है, जो सहवन है तथा हस्व की दफा-5 भारतीय मियाद अधिनियम के तहत क्षमा के योग्य है। आपत्ति जानकारी की तिथि से अन्दर मियाद है।

अतः निवेदन है कि प्रा० पत्र स्वीकार करते हुए आपत्तिकर्ता को मियाद का लाभ प्रदान करते हुए आपत्ति का निस्तारण गुण दोष के आधार पर किये जाने की कृपा की जावे कृपा होगी।"

10. It is not in dispute that the objection under Section 9A(2) of the Act of

1953 was filed prior to publication of notification under Section 52 of the Act of 1953, which was published on 9.10.2018.

11. In response an objection dated 20.09.2017 was filed, which is extracted herein under:-

"निवेदन है कि प्रार्थना पत्र ज्वाला प्रसाद दिनांकित 26.9.14 बिल्कुल असत्य एवं मनगढ़न्त है, क्योंकि इसी आराजी से सम्बन्धित वाद देवीपाटन मण्डल गोण्डा में विचाराधीन था जिसमें ज्वाला प्रसाद ने ही आवेट किए जाने मुकदमा का दिया है और इन्हीं के प्रार्थना पत्र पर उक्त विचाराधीन वाद आवेट हुआ है तो ज्वाला प्रसाद का यह कहना कि ज्वाला प्रसाद चकबन्दी प्रक्रिया से पूर्णतया अनभिज्ञ है गलत है क्योंकि मुझमें चकबन्दी प्रक्रिया का देवीपाटन मण्डल गोण्डा के न्यायालय पर ज्ञान ज्वाला प्रसाद ने ही करवाया है तथा ज्वाला प्रसाद काफी चालाक व फितरती व्यक्ति है तथा पढ़ा लिखा है तथा सही तथ्यों को छिपाने में काफी माहिर है तथा बनकटा में धारा-4 का प्रकाशन काफी पहले हो चुका है तथा ज्वाला प्रसाद ने अपने मियाद प्रार्थना पत्र में मियाद के विषय में पर्याप्त कारण नहीं दर्शाया है। अतएव प्रार्थना पत्र मियाद ज्वाला प्रसाद दिनांकित 18-9-14 निरसत किया जाना आवश्यक है। ग्राम में धारा 4 का प्रकाशन 2013 में ही हो चुका है।

अतः श्रीमान जी से अनुरोध है कि प्रार्थना पत्र / आपत्ति प्रार्थी स्वीकार करके मियाद प्रार्थना पत्र दिनांकित 18.9.14 प्रस्तुत द्वारा ज्वाला प्रसाद निरस्त किये जाने की कृपा की जावे। कृपा होगी।"

12. It is apparent from the objection dated 20.09.2017, quoted above, that it is completely vague as in the same to establish the facts that opposite party no. 3 was having knowledge of the consolidation proceedings related to Gata in issue i.e Gata no. 293/1.493 Hectare, the details of the case, which was pending before Commissioner, Devi Patan Mandal, Gonda, have not been indicated.

13. Assailing the impugned orders dated 12.07.2023 and 27.10.2023, the learned Counsel for the petitioners stated that the delay for the period of about five years was not properly explained despite the same the opposite party no.2 condoned the delay vide order dated 12.07.2023 and DDC without taking note of the fact that delay of about five years, was not properly explained, affirmed the order of opposite party no.2 vide order dated 27.10.2023. As such the indulgence of this Court is required. In support of his contention he has placed reliance on the judgment passed by the Hon'ble Apex Court in the case of ***Ajay Dabra Versus Pyare Lal and others*** reported in ***2023 SCC OnLine SC 92***, relevant paragraphs of which read as under:-

"12.This Court, while emphasizing the scope of Section5of theLimitation Act, in the case ofMahant Bikram Dass Chelav.Financial Commissioner, Revenue, Punjab, Chandigarh (1977)4 SCC 69has held:

"21. Section5of theLimitation Actis a hard task-master and judicial interpretation has encased it within a narrow compass. A large measure of case-law has grown around Section 5, its highlights being that one ought not easily to take away a right which has accrued to a party by lapse of time and that therefore a litigant who is not vigilant about his rights must explain every day's delay. These and similar considerations which influence the decision of Section 5 applications are out of place in cases where the appeal itself is preferred within the period of limitation but there is

an irregularity in presenting it. Thus, in the instant case, there was no occasion to invoke the provisions of Section5,Limitation Act, or of Rule 4, Chapter I of the High Court Rules. If the Division Bench were aware that Rule 3 of Chapter 2-C is directory, it would have treated the appeal as having been filed within the period of limitation, rendering it inapposite to consider whether the delay caused in filing the appeal could be condoned."

13. This Court in the case ofBasawarajv.Special Land Acquisition Officer (2013) 14 SCC 81while rejecting an application for condonation of delay for lack of sufficient cause has concluded in Paragraph 15 as follows:

"15. The law on the issue can be summarized to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature." 14.Therefore, we are of the considered opinion that the High Court did not commit any mistake in dismissing the delay condonation application of the present appellant."

14. Opposing the present petition learned Counsel for the side opposite stated that in the facts and circumstances of the case particularly that earlier registered sale deed dated 23.06.1984 has not been cancelled till date and in view of this fact and the law settled in this regard that earlier sale deed would prevail over the later sale deed, the opposite party no.3/Jawala Prasad possess rights over the property in issue and as such the opportunity of hearing to contest the case on merit is required else the opposite party no.3 would suffer irreparable loss and injury.

15. It is also stated that while dealing with the issue of condonation of delay, a liberal approach should be taken by the competent authority/court and in the instant case the opposite party no.3, was not heard before the authority and his right would be affected if the opportunity of hearing is denied because his right over the property in issue is based on the registered sale deed executed by Chandrakala and Smt. Sanehi dated 23.06.1984 and the claim of the petitioner is based upon the subsequent sale deed dated 04.07.1998 executed by Smt. Chandrakala.

16. He also submitted its proper explanation was given to condone the delay, which was not replied in specific terms and taken note of entire aspect of the case, the delay was condoned vide order dated 12.07.2023 affirmed vide order dated 27.10.2023. As such, no interference is required in the matter.

17. On the issue of condonation of delay he referred the paragraphs no. 15 and 16 of judgment passed by the Hon'ble Apex Court in the case of **Bhivchandra Shankar More v. Balu Gangaram More** reported in **(2019) 6 SCC 387**, which reads as under:-

"15.It is a fairly well-settled law that "sufficient cause" should be given liberal construction so as to advance sustainable justice when there is no inaction, no negligence nor want of bona fides could be imputable to the appellant. After referring to various judgments, inB. Madhuri[B. Madhuri Goudv.B. Damodar Reddy, (2012) 12 SCC 693 : (2013) 2 SCC (Civ) 546] , this Court held as under:

"6. The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which serves the ends of justice. No hard-and-fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years courts have repeatedly observed that a liberal approach needs to be adopted in such matters so that substantive rights of the parties are not defeated only on the ground of delay."

16.Observing that the rules of limitation are not meant to destroy the rights of the parties,inN.Balakrishnanv.M.Krishnamurthy[N.Balakrishnanv.M.Krishnamurthy, (1998) 7 SCC 123], this Court held as under:-

"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maximinterest reipublicae up sit finis litium(it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time……"

18. Considered the submissions advanced by learned Counsel for the parties and perused the records.

19. The law on the issue of dealing with the applications for condonation of delay is well settled. This Court as also Hon'ble Apex Court in various judgments have held that an opportunity of hearing should be given and the hearing should not be shut down and in the said judgments, it is also settled that liberal, pragmatic, justice oriented and non pedantic approach should be taken by the Courts concerned while dealing with the applications for condonation of delay so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned. The Courts concerned while dealing with such applications should also consider the fact that whether the delay has sufficiently been explained or not. The

manner of exercising discretion in matters relating to condonation of delay is fairly well settled and it has been consistently held that while exercising discretion in such matters, the words "sufficient cause" under Section 5 of The Limitation Act, 1963, should be construed in a liberal manner and in the absence of anything showing malafide or deliberate delay as dilatory tactics, the Court should normally condone the delay. It is also settled principle of law that the discretion if exercised by the Courts concerned then the Appellate Courts should not interfere in the discretion exercised by the Courts concerned, if the discretion so exercised has been exercised judicially and not arbitrarily.

20. The Hon'ble Apex Court in the case of ***Ramji Dass and others v. Mohan Singh, 1978 ARC 496*** has held that as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing. In that case the appeal was filed against an ex-parte decree after eight years and the District Court as well as the High Court had rejected the matter on the ground of delay. However, setting aside the order of the High Court, Hon'ble Apex Court observed as under:

"... we are inclined to the view that, as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing. Therefore, we think that the order of the High Court should not have been passed in the interest of Justice which always informs the power under S. 115 C.P.C. ..."

21. The manner of exercising discretion by Courts in matters relating to condonation of delay was subject matter of consideration in the case of ***N. Balakrishnan Vs. M. Krishnamurthy; (1998) 7 SCC 123***, wherein Hon'ble Apex Court observed as under:-

"9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal

remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain v. Kuntal Kumari, AIR 1969 SC 575 and State of W.B. v. Administrator, Howrah Municipality, (1972) 1 SCC 366 ."

22. In the case of ***Esha Bhattacharjee v. Managing Committee of Raghunathpur Nefar Academy and others reported in (2013) 12 SCC 649***, the issue before the Apex Court was that whether the High Court rightly condoned the delay of 2449 days in challenging the interim order dated 25.02.2004, which was duly communicated to the authorities and even for compliance of the same, the District Inspector of Schools, Howrah on 24.01.2006, directed the school authorities to comply with the directions issued vide order dated 25.02.2004. The Apex Court after considering the earlier judgments allowed the appeal and set aside the order of the High Court, condoning the delay. In the case of ***Esha Bhattacharjee (supra)***, the Apex Court in para 21 of the judgment culled out the principles on the issue of condoning the delay, which are as under:-

"21. From the aforesaid authorities the principles that can broadly be culled out are:

21.1. (i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.

21.2. (ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. (iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.

21.4. (iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

21.6. (vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief

because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.

21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

21.8. (viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.

21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go by in the name of liberal approach.

21.10. (x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.

21.11. (xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.

21.12. (xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.

21.13. (xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude."

23. In the case of ***Brijesh Kumar and others v. State of Haryana and others reported in (2014) 11 SCC 351***, the Hon'ble Apex Court observed as under:-

"6. The issues of limitation, delay and laches as well as condonation of such delay are being examined and explained everyday by the courts. The law of limitation is enshrined in the legal maxim interest reipublicae ut sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties, rather the idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

7. The Privy Council in General Accident Fire and Life Assurance Corpn. Ltd. v. Janmahomed Abdul Rahim [(1939-40) 67 IA 416 : (1941) 53 LW 212 : AIR 1941 PC 6] , relied upon the writings of Mr Mitra in Tagore Law Lectures, 1932 wherein it has been said that:

A law of limitation and prescription may appear to operate harshly and unjustly in a particular case, but if the law provides for a limitation, it is to be enforced even at the risk of hardship to a particular party as the Judge cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognised by law.

8. In P.K. Ramachandran v. State of Kerala [(1997) 7 SCC 556 : AIR 1998 SC 2276] , the Apex Court while considering a case of condonation of delay of 565 days, wherein no explanation much less a reasonable or satisfactory explanation for condonation of delay had been given, held as under:

"6. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power

to extend the period of limitation on equitable grounds."

9. While considering a similar issue, this Court in Esha Bhattacharjee v. Raghunathpur Nafar Academy [(2013) 12 SCC 649 : (2014) 1 SCC (Civ) 713 : (2014) 4 SCC (Cri) 450] laid down various principles inter alia: (SCC pp. 658-59, paras 21-22)

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"21.5. (v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.

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21.7. (vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.

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21.9. (ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said principle cannot be given a total go-by in the name of liberal approach.

***

22.4. (d) The increasing tendency to perceive delay as a non-serious matter and, hence, lackadaisical propensity can be exhibited in a nonchalant manner requires to be curbed, of course, within legal parameters."

10. The courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. However the court while allowing such application has to draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the court for condoning the delay. This Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathetic grounds alone."

24. Needless to say that this petition has been filed challenging the order dated 12.07.2023, whereby, the C.O. exercised its discretionary jurisdiction and condoned the delay in filing the objection so as to advance substantial justice and the order dated 27.10.2023, whereby the D.D.C. has affirmed the order dated 12.07.2023, as such, the scope of interference by this Court is limited.

25. It is only where, therefore, there is complete non-application of mind in condoning delay which is inexorable, or where no reasons for condonation of delay are forthcoming in the order passed by the court below, this Court would ordinarily interfere.

26. On the scope of interference with discretionary orders even in appeal, the Hon'ble Supreme Court holds thus, in ***Wander v.Antox India Pvt. Ltd.; 1990 Supp SCC 727:***

"13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the

trademark on which the passing-off action is founded. We shall deal with these two separately.

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721).

"... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130] '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'."

The appellate judgment does not seem to defer to this principle."

27. Interfering with an order of condoning the delay, the Hon'ble Supreme Court in ***Mohammad Shafeeq v. Mirza Mohammad Husain; (2002) 9 SCC 460***; observed as under:-

"3. In our opinion, the High Court has taken too technical a view of the error committed by the appellant in pursuing the remedy available to him under the law. The appellant had been prosecuting his remedy diligently and there is nothing to doubt his bona fides. These aspects were taken into consideration by the learned Additional District Judge while condoning the delay in filing the revision. In our opinion, the High Court ought not to have interfered with the order of the Additional District Judge, condoning the delay in filing the revision, being an order passed in exercise of discretion vested in the learned Additional District Judge and for that reason, was not open to interference by the High Court in exercise of its supervisory jurisdiction under Article 227 of the Constitution."

28. It would be apt to indicate the principles related to execution and registration of sale deed.

(a) The earlier sale deed would prevail over the subsequent sale deed. The transferor/vendor cannot prejudice the rights of the transferee/vendee by any subsequent dealing with the property. This proposition is expressed in the equitable maxim "qui prior est tempore potior est jure". This means that "the first in time prevails over the others" and in other words "he who is earlier in time is stronger in

law". It would also be apt to indicate the principle "nemo dat quod non habet" which means "no one can give what they do not have" in other words "no man convey a title than what he has". When a man in possession a property has created an interest in favour of someone, he cannot later deviate from it and create another interest without being free from previous transfer. If there are successive transfers of the same property, the later transfer is subject to the prior transfer.

(b) Section 48 of the Transfer of Property Act, 1882 embodies this principle in legislation. Section 48 is founded upon the above said principle(s) including that no man can convey a title than what he has. If a person has already affected a transfer, he cannot derogate from his grant and deal with the property free from the rights created under the earlier transaction. Section 48 is an absolute in its terms. It determines the priority when there are succeeding transfers. It says that where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their fullest extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

(c) The Hon'ble Apex Court in the case of ***S. Kumar v. S. Ramalingam, (2020) 16 SCC 553***, observed as under:-

"14.Section 48 of the Transfer of Property Act, 1882, relied upon by the learned counsel for the appellants, reads thus:

"48.Priority of rights created by transfer.—*Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."*

The said provision contemplates that where a person i.e. Rajasekaran has created different rights in or over the same property i.e. 16 ft wide strip of land and such rights cannot be exercised to their full extent together, then each later created right shall be subject to the rights previously created. The exception is if special contract or reservation binding the earlier transferee is executed. It will mean that the exclusive right conferred on the plaintiff in the sale deed dated 31-5-1988 will not be legal till such time the earlier transferee i.e. Defendant 2 has a special contract or reservation which binds her. Since the right of access to Defendant 2 was reserved in the sale deed dated 1-4-1976, therefore, the vendor could not confer exclusive right to the plaintiff vide sale deed dated 31-5-1988.

15.The plaintiff has to maintain the 16 ft wide passage in any case in terms of the recital in his sale deed dated 31-5-1988. Therefore, if Defendant 2 or her transferees use the passage, then such use of passage by Defendant 2 or her transferees cannot be said to be causing any prejudice to the plaintiff."

(d) With regard to the issue of date of registration of sale-deed reference can be made to the judgment passed in the case of ***Kanwar Raj Singh (D) Th. Lrs. Versus Gejo. (D) Th. Lrs and Others; 2024 SCC OnLine SC 1***, wherein after considering the decision of the Constitution Bench in the case of ***Ram Saran Lall v. Domini Kuer; 1961 SCC OnLine SC 133***, the Hon'ble Apex Court observed as under:-

*"**5.**The High Court, in the impugned judgment, has relied upon Section47of TheRegistration Act, 1908(the Registration Act), which reads thus:*

***"47. Time from which registered document operates.**—A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."*

6.On plain reading of Section 47, it provides that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof was required. Thus, when a compulsorily registerable document is registered according to the Registration Act, it can operate from a date before the date of its registration. The date of the operation will depend on the nature of the transaction. If, in a given case, a sale deed is executed and the entire agreed consideration is paid on or before execution of the sale deed, after it is registered, it will operate from the date of its execution. The reason is that if its registration was not required, it would have operated from the date of its execution.

7.Now, we come to the decision of the Constitution Bench in the case ofRam Saran Lall(Supra). In paragraph 8 of the judgment, the Constitution Bench held thus:

"8.We do not think that the learned Attorney-General's contention is well founded. We will assume that the learned Attorney-General's construction of the instrument of sale that the property was intended to pass under it on the date of the instrument is correct.Section 47 of the Registration Act does not, however, say when a sale would be deemed to be complete. It only permits a document when registered, to operate from a certain date which may be earlier than the date when it was registered. The object of this section is to decide which of two or more registered instruments in respect of the same property is to have effect.The section applies to a document only after it has been registered. It has nothing to do with the completion of the registration and therefore nothing to do with the completion of a sale when the instrument is one of sale. A sale which is admittedly not completed until the registration of the instrument of sale is completed, cannot be said to have been completed earlier because by virtue of Section 47 the instrument by which it is effected, after it has been registered, commences to operate from an earlier date. Therefore we do not think that the sale in this case can be said, in view of Section 47, to have been completed on January 31, 1946. The view that we have taken of Section 47 of the Registration Act seems to have been taken in Tilakdhari Singh v. Gour Narain [AIR 1921 Pat 150]. We believe that the same view was expressed inNareshchandra Datta v.Gireeshchandra Das [ILR (1935) 62 Cal 979] and Gobardhan Bar v.Guna Dhar Bar [ILR (1940) 2 Cal 270]."

8. The Constitution Bench held that Section 47 of the Registration Act does not deal with the issue when the sale is complete. The Constitution Bench held that Section 47 applies to a document only after it has been registered, and it has nothing to do with the completion of the sale when the instrument is one of sale. It was also held that once a document is registered, it will operate from an earlier date, as provided in Section 47 of the Registration Act.

9. Section 54 of the Transfer of Property Act, 1984 (the Transfer of Property Act) reads thus:

***"54. "Sale" defined**.—"Sale" is a transfer of ownership in exchange for a*

price paid or promised or part-paid and part-promised.

***Sale how made.**—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.*

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

***Contract for sale.**—A contract for the sale of immoveable 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."

10.Every sale deed in respect of property worth more than Rs. 100/- is compulsorily registerable under Section 54 of the Transfer of Property Act. Thus, a sale deed executed by the vendor becomes an instrument of sale only after it is registered. The decision of the Constitution Bench only deals with the question of when the sale is complete; it does not deal with the issue of the date from which the sale deed would operate. Section 47 of the Registration Act does not deal with the completion of the sale; it only lays down the time from which a registered document would operate.

11.Now, coming to the facts of this case, the consideration was entirely paid on the date of the execution of the sale deed. The sale deed was registered with the interpolation made about the description/area of the property sold. The first defendant admittedly made the said interpolation after it was executed but before it was registered. In terms of Section 47 of the Registration Act, a registered sale deed where entire consideration is paid would operate from the date of its execution. Thus, the sale deed as originally executed will operate. The corrections unilaterally made by the first defendant after the execution of the sale deed without the knowledge and consent of the purchaser will have to be ignored. Only if such changes would have been made with the consent of the original plaintiff, the same could relate back to the date of the execution. It is not even the first defendant's case that the subsequent correction or interpolation was made before its registration with the consent of the original plaintiff. Therefore, in this case, what will operate is the sale deed as it existed when it was executed."

29. Now, reverting to the facts of the case. Undisputed the registered sale deed dated 23.06.1984 in favour of opposite party no. 3/Jawala Prasad is still in-existence as has not been set aside till date and the claim of the petitioner is based upon the subsequent sale deed dated 04.07.1998. The suit regarding cancellation of sale deed is still pending before the trial court.

30. Further, the denial to explanation given in the application for condonation of delay for the purposes of condoning the delay including the date of knowledge of the entry in revenue records and also the knowledge of consolidation proceedings is completely vague as in the objection the details of case, basis of denial, have not been indicated.

31. Having considered the facts of the case, indicated above, particularly the facts related to two sale deeds and the principles

related in this aspect and the facts that the explanation given in the application for condonation of delay has not been refuted in specific terms by giving details of the case, the basis of objection, and the law on the issue of condonation of delay including the law regarding interference by the higher court in the order condoning the delay, this Court feels that the matter is liable to be decided on merits and Consolidation Officer, Bahraich has rightly exercised its power and condoned the delay and the observations made in the impugned orders are just and proper and being so no interference is required in the impugned order dated 12.07.2023 passed by Consolidation Officer, Bahraich and order dated 27.10.2023 passed by Deputy Director of Consolidation, Bahraich.

32. For the reasons aforesaid, the present petition is liable to be ***dismissed***. It is dismissed accordingly. Cost made easy.

(2024) 1 ILRA 706
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.12.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-B No. 390 of 2023

Smt. Rama Devi & Anr. ...Petitioners
Versus
D.D.C., Hardoi & Ors. ...Respondents

Counsel for the Petitioners:
Anurag Shukla

Counsel for the Respondents:
C.S.C., Anurag Narain Srivastava, Dilip Kumar Pandey, Rahul Srivastava, Sudhanshu Tripathi

Jurisdiction of Consolidation Authorities – Post-Section 10 and 20 Proceedings – The petitioners challenged orders of the Consolidation Officer, Settlement Officer of Consolidation (S.O.C.), and Deputy Director of Consolidation (C.) for recording names and partitioning land purchased post-consolidation proceedings – Held, after conclusion of proceedings under Sections 10 and 20 of the U.P. Consolidation of Holdings Act, 1953, the Consolidation Officer retains jurisdiction under Section 12 to record names and partition land based on transactions post-dating the revised records, as per *Diwakar Rai Vs Dy. Director of Consolidation*. (Paras 6, 11, 15)

Section 11-A Bar – Inapplicability – The petitioners argued that orders under Section 9-A(2) were barred post-Section 20 notification – Held, Section 11-A does not apply to claims arising after Section 10 and 20 proceedings, such as the sale deed dated 09.03.2022; Section 12 governs such claims, and citing a wrong provision (Section 9-A instead of Section 12) does not vitiate the proceedings if the authority has jurisdiction, following *Ram Sunder Ram Vs Union of Indi*(Paras 5, 6, 15)

Partition of Joint Holdings – Consolidation Officer's Power – The petitioners and respondent no. 5 jointly purchased land, and the Consolidation Officer partitioned it – Held, under Sections 9-C, 12, and 44-A of the Act, the Consolidation Officer is empowered to partition joint holdings, even post-Section 20, when a cause of action arises after revised records are published, as supported by *Harihar Prasad Pandey Vs Dy. Director of Consolidation*. (Paras 11, 14, 15)

Chak Allotment – Consideration of Boring and Evidence – The petitioners challenged the allotment of a chak adjacent to Kharanja (road) to respondent no. 5 – Held, the allotment was justified based on documentary evidence, including electricity bills and sale deeds, confirming respondent no. 5's boring on the northern side of Gata No. 519, while petitioners' sale deeds indicated no boring; both parties received chaks adjacent to Kharanja (road), satisfying equitable distribution under Section 19. (Paras 4, 19, 20, 21, 15)

Waiver of Jurisdictional Objection – The petitioners did not raise the plea of jurisdiction under Section 11-A before the S.O.or – Held, failure to object to the Consolidation Officer's jurisdiction at the initial stage constitutes waiver, and the orders merged with appellate decisions, rendering the jurisdictional challenge unsustainable, as per *St. of U.P. Vs Phool Singh* and *Tungal Singh Vs Dy. Director of Consolidation*. (Paras 14, 15)

Petition Dismissed.

List of Cases cited:

1. Gafoora Vs Dy. Director of Consolidation, (1975) 2 SCC 568

2. Baburam Vs Dy. Director of Consolidation, Writ B No. 331 of 2023 (All HC, 25.04.2023)

3. Diwakar Rai Vs Dy. Director of Consolidation, 2005 SCC OnLine All 1378

4. Sudhir Kumar Goswami Vs Dy. Director of Consolidation, 2011 SCC OnLine All 1320

5. Ram Milan Vs Additional Commissioner (Admin) Devi Patan, 2019 SCC OnLine All 5478

6. Harihar Prasad Pandey Vs Dy. Director of Consolidation, 1979 SCC OnLine All 867

7. Ram Sunder Ram Vs Union of India, (2007) 13 SCC 255

8. N. Mani Vs Sangeetha Theatre, (2004) 12 SCC 278

9. St. of U.P. Vs Phool Singh, 1974 Unreported Revenue Cases 502

10. Tungal Singh Vs Dy. Director of Consolidation, 1969 Rev Dec 54 (All)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri Anurag Shukla, Advocate, counsel for petitioner, Sri Anurag Narayan Srivastava, Advocate, counsel for the Respondent No. 5 and Sri Hemant Kumar Pandey, Learned standing counsel.

2. In view of the order proposed to be passed by this Court, notice to other private-respondents is dispensed with.

3. The present petition has been filed for the following main reliefs:-

"(i) to issue a writ, order or direction in the nature of Certiorari quashing the impugned order of Dy. Director of Consolidation dated 06-04-23, impugned order of Settlement Officer of Consolidation order dt. 27-09-2022 as well as without jurisdiction orders passed by the consolidation officer dt. 22-07-22 and 10-08-22, contained as **Annexure no. 1, 2, 3 and 4** to this Writ Petition, with all consequential effects.

(ii) to issue a writ, order or direction in the nature of Mandamus commanding the Respondents not to interfere in the peaceful possession, use and occupation of purchased share of Khata no. 422"

4. The brief facts of the case, as appears from record, are as under:-

(i) The Gata No. 519 area 0.5110 Hectare Gata No. 517 area 0.0381 Hectare, Gata No. 257 area 0.0220 Hectare and Gata No. 519 area 0.0800 Hectare were purchased by petitioner no.1/ Smt. Rama Devi and respondent no. 5/ Smt. Sarita Devi through registered sale deed dated 09.03.2022. Boundaries indicated in this sale deed are as under:-

East-	Land Sushil
West-	Kharanja (road)
North-	Kharanja (road)
South-	Land Ahibaran and Others

(ii) The sale deed dated 09.03.2022 was executed after conclusion of proceedings under Section 10 and 20, respectively, of U.P. Consolidation of Holdings Act, 1953 (in short 'Act of 1953'),

(iii) Undisputedly the proceedings under Section 10 and 20. of the Act of 1953, were concluded on 31.08.2020 and 05.03.2021, respectively.

(iv) After becoming the owner of the land in dispute i.e. Gata No. 519, an application was moved under Section 9A(2) of the Act of 1953, which was registered as Case No. 402/21-22 (Sarita Devi Versus Rama Devi and Others).

(v) Vide order dated 22.07.2022 the respondent no. 3/Consolidation Officer Bilgram, District Hardoi in short (C.O.), after considering the fact that the name of Laxmi Devi wife of Munna Lal (vendor of sale deed dated 09.03.2023) was recorded in the revenue records in regard to Gata No. 517/0.0381 Hectare, Gata No. 519/0.5100 Hectare, Gata No. 257/0.0220 Hectare (total area 0.611 Hectare) and that of sale deed dated 09.03.2022 , as also the report dated 02.06.2022 of Assistant Consolidation Officer, directed to indicate the name of Respondent No. 1/Smt. Sarita Devi and Petitioner No. 1/Smt. Rama Devi in Form 23 of Chak No. 422 according to their share indicated in the sale deed dated 09.03.2022.

(vi) Through sale deed dated 09.03.2022, the petitioner no.1/Smt. Rama Devi and respondent no. 5/Smt. Sarita Devi became the owner of (vkB vkuk) 1/2 share each of the total area of land purchased.

(vii) It appears that after the order dated 22.07.2022, the petitioner no. 1/Smt. Rama Devi and respondent no.5/Smt. Sarita Devi preferred application(s) under Section 21(1) of the Act of 1953, which were registered as Case No. 224 (Sarita Devi Versus Gaon Sabha and Others) and Case No. 228 (Smt. Rama Devi Versus State).

(viii) The respondent no. 5/Smt. Sarita Devi in her application stated that Chak be provided adjacent to Kharanja (road) after taking boring into account.

(ix) The petitioner No.1/Smt. Rama Devi in her application also claimed that Chak be provided adjacent to Kharanja (road).

(x) The respondent no.3/C.O. vide order dated 10.08.2022 decided both the cases i.e. Case No. 224 (Sarita Devi Versus Gaon Sabha and Others) and Case No. 228 (Smt. Rama Devi Versus State).

(xi) Vide order dated 10.08.2022, the Chak was provided to respondent no.5/Smt. Sarita Devi adjacent to Kharanja (road) situated at Northern side of the land purchased through sale deed dated 09.03.2022. This Chak was provided after taking note of the fact that the boring of respondent no.5/Smt. Sarita Devi is situated at Gata No. 519.

(xii) A chak adjacent to Kharanja (road) situated at Southern side was also provided to the petitioner no.1/Smt. Rama Devi.

(xiii) The order dated 10.08.2022 on reproduction reads as under:-

"मैंने पत्रावली चक भूचित्र एवं अभिलेखों का अवलोकन किया तथा उपस्थित पक्षों को सुना।

पत्रावली एंव अभिलेखों से स्पष्ट है कि जो0 च0 अ0 23 भाग के चक संख्या 422 लक्ष्मीदेवी पत्नी स्व0 मुन्नूलाल नि0 ग्राम हैवतपुर के नाम अंकित है। स0 च0 अ0 वाद संख्या 18/29–04–22 धारा 12 में आदेश हुआ है कि चक संख्या 422 की गाटा संख्या 519/रकबा 0/381 हे0, 519/0.511 कुल 2 कि0 रकबा 0.5491 हे0 व गाटा संख्या 257/0.220 हे0 व गाटा संख्या 519 मि0 रकबा 0.0800 हे0 से विक्रेता लक्ष्मी देवी पत्नी मून्नूलाल के स्थान पर क्रेती श्रीमती सरिता देवी पत्नी निर्भय कुमार नि0 हैवतपुर व श्रीमती रामदेवी पत्नी स्व0 रामकिशोर नि0 ग्राम का नाम दर्ज किया गया है च0 अ0 वाद संख्या 209/30–06–22 द्वारा गाटा संख्या 519 मि0/0.0800 हे0 की मालियत 90 पैसा निर्धारित की गई

तथा च0 अ0 वाद संख्या 402/22–07–22 धारा 9 क (2) द्वारा चक संख्या 422 का विभाजन अचक भूमि छोड़कर सरिता देवी, रामदेवी प्रत्येक) भाग दर्ज है जो0 च0 अ0 23 भाग 1 के चक संख्या 422 मूल गाटा संख्या 519 मि0 आदि पर मूल्यांकन 49.42 का चक प्रदिष्ट किया गया है आपत्ति करती सरिता देवी ने व रामदेवी ने भूमि बैनामा से क्रय किया है तथा बैनामा के आधार पर सरिता देवी को चक उत्तर तरफ रास्ता से मिलाकर बोरिंग लेते हुये तथा रामदेवी को दक्षिण तरफ रास्ते से लगा हुआ चक की मांग उचित है आपत्तियां स्वीकार किये जाने योग्य है अतः आदेश हुआ कि :–

आदेश

ग्राम हैवतपुर परगना व तहसील बिलग्राम जिला हरदोई के चकदार संख्या 422 श्रीमती सरिता देवी व श्रीमती रामदेवी की चक आपत्तियों को स्वीकार किया जाता है संलग्न संशोधन तालिका जिस पर मेरे सदिनांक हस्ताक्षर है आदेश का अंग होगी इस संशोधन से चक संख्या 422, 422अ, 422व, नाली तथा बच संशोधित होते हैं संशोधित उद्धरण जारी हो स्थल पर सीमांकन हो। यही आदेश रामदेवी बनाम सरकार पर लागू होगा।

पत्रावली बाद अमलदरामद दाखिल दफ्तार हो।"

(xiv) The order dated 10.08.2022 was challenged by petitioner no.1/Smt. Rama Devi before the respondent no.2/S.O.C., by means of an appeal bearing Appeal No. 431 of 2022 Computerized Case No. 20225410330000 1406 (Rama Devi Versus Gaon Sabha) under Section 21 (2) of the Act of 1953. The respondent no.2/S.O.C., decided the appeal vide order dated 27.09.2022. The relevant portion of order dated 27.09.2022 reads as under:-

"ग्राम के अभिलेख व चक–भूचित्र का अवलोकन एवं परीक्षण किया गया। अभिलेखों के अवलोकन से स्पष्ट है कि चकबन्दी अधिकारी वाद संख्या 402/22–07–2022 अन्तर्गत

धारा–9 क (2) में चक संख्या 422 का विभाजन सरिता देवी 1/2 व रामदेवी 1/2 भाग दर्ज किये जाने का आदेश पारित किया गया। अपीलाण्ट चकदार संख्या 422ब श्रीमती रामदेवी पत्नी स्व0 रामकिशोर के नाम मूल गा0सं0 519 में 1/2 अंश मू0 29.34 पैसा अंकित है। बाद कटौती अपीलाण्ट को अवर न्यायालय द्वारा मूल गा0सं0 519 मि0 आदि को लेकर मू0 28.17 पैसा का सिंगल चक प्रस्तावित किया गया है। गा0सं0 519 के सम्बन्ध में चकबन्दीकर्ता का स्पाट मेमो पत्रावली में संलग्न है, जिसमें उल्लेख किया है कि गा0सं0 519/0.6110 हे0 हरदोई से बिलग्राम जाने वाली सड़क मार्ग से ग्राम के अन्दर पश्चिम की ओर जाने वाले परिक्रमा मार्ग पर दक्षिण ओर स्थित है। गाटा संख्या 519/0.6110 हे0 समतल, दो फसला, अच्छी पैदावार व सिंचित है। गा0सं0 519 में एक सम बोरिंग मय विद्युत कनेक्शन के हैं, जो जोत चकबन्दी आकार पत्र–2क में खातेदार के नाम अंकित है। स्पाट–मेमो में गा0सं0 519 में उत्तर पूरब कोने के पास एक समर सेबिल मय विद्युत कनेक्शन होने का उल्लेख किया गया है। अपीलकर्ती की मुख्य मांग उसका चक भूखण्ड संख्या 517, 519, 257 मूल को लेकर तरफ पश्चिम दोनो खडण्जे पर बनाये जाने की है। उक्त भूखण्ड हरदोई–बिलग्राम हाइवे पर तरफ पश्चिम लिंक रोड खडण्जा पर पड़ता है। उक्त खडण्जा पूरब–पश्चिम लम्बाई की दिशा में है। अभिलेखों के अवलोकन से स्पष्ट है कि गा0सं0 257 चकबन्दी पृथक गाटा है व गा0सं0 519 हाइवे पर न होकर हाइवे से पश्चिम ओर को जाने वाले परिक्रमा मार्ग पर दक्षिण की ओर स्थित है। उक्त गाटा हाइवे से लगभग 65 मीटर दूरी पर स्थित है। अपीलकर्ता का चक गा0सं0 513 चकमार्ग (खडण्जा) से लगा हुआ प्रदिष्ट है। गा0सं0 519 में उत्तर पूरब कोने के पास एक समर सेबिल स्थित है। पत्रावली में उपलब्ध साक्ष्यों से स्पष्ट है कि वर्तमान में समर सेबिल का विद्युत कनेक्शन श्रीमती सरिता के नाम है एवं उनके द्वारा विद्युत बिल का भुगतान भी किया जा रहा है। अवर न्यायालय द्वारा समर सेबिल लेते हुए सरिता को चक प्रदिष्ट किया गया है। यह भी स्पष्ट है कि चकबन्दी अधिकारी द्वारा चक संख्या 422 का विभाजन सरिता देवी 1/2 व रामदेवी 1/2 भाग दर्ज किये जाने का अदेश वाद संख्या 402 अंतर्गत धारा–9क(2) ता0फै0 दिनांक 22.07.2022 को पारित किया गया इसके पश्चात् श्रीमती रामदेवी निवासी ग्राम बलेन्दा ने अपने 1/2 भाग में से 1/2 भाग यानी कुल का 1/4 भाग का बैनामा दिनांक 30.07.2022 को पवन पुत्र रामस्वरूप निवासी हैबतपुर को कर दिया था, जिसमें उन्होने स्वयं लिखा है कि कोई पेड़, कुंआ, बोरिंग नहीं है। ऐसी स्थिति में अपीलकर्ती की मांग के अनुसार संशोधन किया जाना उचित नहीं प्रतीत होता है। तद्नुसार प्रस्तुत अपील निरस्त किये जाने योग्य है।"

(xv) Being aggrieved, the petitioner no.1/Smt. Rama Devi preferred a revision under Section 48(1) of the Act of 1953, which was registered as Case No. 1512 of 2022, Computerized Case No. 202254103300001512 (Rama Devi Versus Sarita Devi and Others). The revisional authority i.e respondent no.1/D.D.C. dismissed the revision vide order dated

06.04.2023. The relevant portion of order dated 06.04.2023 reads as under:-

"मैंने उभय–पक्षों के विद्वान अधिवक्ता द्वारा दिये गये तर्कों को सुना। निगरानीकर्ता ने तर्क दिया है कि मुन्नू के स्थान पर लक्ष्मीदेवी पत्नी मुन्नूलाल के नाम से दर्ज हुई तथा दिनांक 09.03.2022 को लक्ष्मी देवी ने प्रस्तावित चक को सरिता देवी पत्नी निर्मल व श्रीमती रामदेवी पत्नी रामकिशोर को विक्रय कर दिया, जिसका दाखिला खारिज भी हो चुका है एवं चकबन्दी अधिकारी ने धारा–9 क(2) के अन्तर्गत प्रत्येक का विभाजन 1/2 अंश कर दिया। भूमि का विक्रय प्रस्तावित अंश से किया गया था तथा रामदेवी पत्नी रामकिशोर से 1/4 अंश का क्रय पवन कुमार पुत्र रामस्वरूप ने किया, जिसका भी दाखिल खारिज हो गया है। रामदेवी ने पुनः जीशान अहमद को 1/4 अंश बेच दिया। गा0सं0 519 में समर बोरिंग है, जिसमें पैसा रामदेवी व सरिता दोनो ने मिलकर लगाया है, किन्तु पवन व रामदेवी का चक पीछे बना दिया गया है, चक को सड़क से जोड़ा जाये। उत्तरवादी ने तर्क दिया है कि रामदेवी ने प्रथम बैनामा दिनांक 30.07.2022 को किया था, जिसमें पेड़ व बोरिंग का उल्लेख नहीं है, उसके बाद रामदेवी ने पुनः बैनामा जीशान अहमद को कर दिया और इस बैनामें में खेत की चौहद्दी में पूरब खेत अहिबरन, पश्चिम सम्पर्क मार्ग, उत्तर खेत सरिता देवी और दक्षिण खेत अनुरूद्ध अंकित है। इस प्रकार स्पष्ट है कि रामदेवी की भूमि सड़क खडण्जा पर नहीं थी, जो बैनामा किया है बैनामेंदारों वहीं काबिज हैं। कनेक्शन सरिता देवी के नाम है। इस प्रकार चकबन्दी अधिकारी/बन्दोबस्त अधिकारी चकबन्दी के आदेश सहित है।

मैंने ग्राम के अभिलेख व चकभूचित्र का अवलोकन किया गया। रामदेवी ने अपनी भूमि का विक्रय जीशान अहमद के हक में कर दिया है। निगरानीकर्ता रामदेवी ने अपने विक्रय में जो विक्रीत गाटे की चौहद्दी दर्शायी है, उससे स्पष्ट है कि रामदेवी के चक के उत्तर ओर सरिता देवी आदि का खेत और पश्चिम ओर खडण्जा, पूरब ओर खेत अहिबरन व दक्षिण ओर खेत अनुरूद्ध सिंह का है, वहीं पर चक बनाया गया है। रामदेवी ने भूमि का विक्रय कर दिया है। इनकी मांग के अनुसार यदि चक बनाया जायेगा तो सरिता देवी का चक दक्षिण ओर नाली आकार का हो जायेगा। ऐसी दशा में प्रस्तावित चक में कोई भी संशोधन किया जाना उचित नहीं है। निगरानी स्वीकार किये जाने योग्य नहीं है। उपरोक्त विवेचना के आधार पर आदेश हुआ कि :–

आदेश

निगरानी संख्या– 606/2023 रामदेवी आदि बनाम श्रीमती सरिता देवी आदि हैबतपुर, परगना–बिलग्राम, तहसील––बिलग्राम, जिला–हरदोई निरस्त की जाती है।

पत्रावली बाद अमलदरामद दाखिल–दफ्तर हो।"

(xvi) It would be relevant to refer here that after the order dated 22.07.2022 whereby the respondent no.3/C.O. directed the concerned official to indicate the name of petitioner no.1/Smt. Rama Devi and respondent no. 5/Smt. Sarita Devi in Form-23, the petitioner no.1/Smt. Rama Devi sold half of her share to one Pawan Kumar (petitioner no.2 in the present petition) through registered sale deed dated 30.07.2022 specifically mentioning therein that no tree, well or boring is situated over land under the sale deed.

(xvii) The petitioner no.1/Smt. Rama Devi further executed a sale deed on 23.12.2022 in favour of one Jishan Ahmad son of Akeel Ahmad and this sale deed also indicates that no tree, well or boring is situated over land sold. The boundaries indicated in the sale deed are as under:-

East - Land of Ahibaran] West - Kharanja (road), North - Land of Sarita Devi (respondent no.5) and South - Land of Anirudh Singh.

(xviii) The sale-deed dated 23.12.2022 was executed after the order dated 27.09.2022 passed in appeal by respondent no.2/S.O.C. In this sale-deed, the boundaries have been indicated in terms of the order dated 10.08.2022 passed by the respondent no. 3 affirmed vide order dated 27.09.2022 passed by the respondent no. 2.

(xix) It would be relevant to note that the respondent no. 2/S.O.C. asked for a report for the purposes of disposal of appeal and in response, the report dated 26.09.2022 was submitted before the respondent no. 2/S.O.C. This report specifically indicates that the boring of respondent no. 5/Smt. Sarita Devi is situated over Gata No. 519 and this boring is on northern side of land, which is

adjacent to Kharanja (road) connecting Hardoi-Bilgram Road.

(xx) The sale-deed(s) executed by the petitioner No. 1/ Smt. Rama Devi also proves the fact that no boring was there over the share of the petitioner No. 1/Smt. Rama Devi.

(xxi) It transpires from the order dated 27.09.2022 passed by the respondent no. 2/S.O.C. and order dated 06.04.2023 passed by the respondent no. 1/D.D.C. that after considering the boring and area purchased the chak was allotted to opposite party No. 5/Smt. Sarita Devi adjacent to Kharanja (road) connecting Hardoi-Bilgram Road, which is on northern side of Chak No. 422. Accordingly, the petitioner No. 1/Smt. Rama Devi was provided chak adjacent to Kharanja (road) on western side of Chak No. 422.

(xxi) It further transpires from the order dated 06.04.2023 passed by the respondent no. 1/D.D.C. that while dismissing the revision preferred by the petitioner No. 1/Smt. Rama Devi, the Revisional Authority/D.D.C. also considered the boundaries indicated in the sale-deed executed by the petitioner No. 1/Smt. Rama Devi in favour of Jeeshan Ahmad on 23.12.2022, according to which the land of respondent no. 5/Sarita Devi is situated, on northern side, and Kharanja (road) is situated on western side of the land.

(xxii) It is also to be indicated that the plea of jurisdiction based upon section 11-A was not taken by the petitioner no.1/Rama Devi either before S.O.C. or D.D.C.

5. In the aforesaid background, the present petition, as indicated by the counsel for the petitioner, has been filed on the following grounds:-

(a) After publication of notification under Section 20 of U.P. Consolidation of Holdings Act, 1953 (in short "Act of 1953"), the Consolidation Officer was having no power to pass an order under Section 9-A of the Act of 1953, which includes the orders dated 22.07.2022 and 10.07.2022.

(b) The application/objection preferred by the opposite party no. 5/Smt. Sarita Devi on account of bar provided under Section 11-A of the Act of 1953, which was decided vide order dated 22.07.2022.

(c) The claim, if any, could be entertained in respect of change/transfer only.

(d) The order dated 10.08.2022 is nullity in view of bar indicated under Section 11-A of the Act of 1953.

(d) The order passed under Section 21 of the Act of 1953 is unsustainable, as the objection itself was not maintainable after confirmation of Provisional Consolidation Scheme under Section 23 of the Act of 1953.

(e) In nutshell, as appears from aforesaid, the orders impugned have been challenged on the ground that the same have been passed without there being any authority under the law.

(f) The allotment of plot over the property jointly purchased through registered sale deed dated 09.03.2022 is completely erroneous rather illegal in view of section 19 of the Act of 1953 according to which the co-sharers should be provided the share adjacent to road (Kharanja) and not providing the Chak to the petitioner no.1/Smt. Rama Devi adjacent to Kharanja situate at northern side is in violation of principle settled by this Court as also by Hon'ble Apex Court.

6. Opposing the present petition, Sri Anurag Narain Srivastava, learned counsel appearing for respondent No.5/Smt. Sarita Devi, (contesting respondent) and Sri

Hemant Kumar Pandey, learned standing counsel of state of U.P., submitted as under:-

(a) The property was purchased jointly by petitioner no.1/Smt. Rama Devi and respondent no. 5/Sarita Devi after conclusion of proceedings under Section 20 of the Act of 1953. through registered sale deed dated 09.03.2022.

(b) If it is presumed that Section 9-A(2) of the Act of 1953 would not be attracted even in that eventuality, Section 12 of the Act of 1953 would apply. Proceedings under Sections 9-A(2) and 12 of the Act of 1953 can be instituted before the respondent No. 3/C.O. and mere indicating a wrong provision would not vitiate the entire proceedings, as the respondent No. 3/C.O. is competent enough to deal with Sections 9-A(2) and 12 of the Act of 1953.

(c) The purchaser, who has purchased the property after conclusion of proceedings under Sections 10 or 20 of the Act of 1953 can approach the Consolidation Officer under Section 12 of the Act of 1953 to get the property partitioned or the name recorded.

(d) In view of Section 44-A of the Act of 1953, higher Authority under the Act of 1953 can exercise the power and jurisdiction vested in subordinate Authorities to it and being so the bar under Section 11-A of the Act of 1953 would not be attracted.

7. Learned Counsel for the petitioner in supports of his contention placed reliance on the following judgments:

(a) Gafoora and Another v. Dy. Director of Consolidation; (1975) 2 SCC 568

(b) Judgment dated 25.04.2023 passed by this Court in Writ B No. 331 of 2023 Baburam and other v. Dy. Director of Consolidation, Hardoi)

8. In the Case of **Gafoora (Supra)**, the Hon'ble Apex Court observed as under;

3.The short question that arises for consideration is whether the High Court is correct in not interfering with the order of the Deputy Director (Consolidation) under Article 226 of the Constitution. The jurisdiction under Article 226 is well settled. The High Court will interfere only if some order is passed by an authority in excess of jurisdiction or there is a manifest error of law apparent on the face of the records. The principal question that was canvassed before the Deputy Director (Consolidation) was whether failure to prefer objection within the time-limit prescribed under Section 9(2) of the Act would entitle an aggrieved party to agitate the matter beyond the prescribed period without explaining the cause of delay in preferring the objection and obtaining a proper order of condonation of delay from the appropriate authority. It is clear from the records that no objection was preferred within the prescribed time. The Deputy Director (Consolidation) refused, if we may say so, rightly to accept that the appellants had earlier lodged any objection on November 21, 1966. That being the position, there was no material whatsoever before the Settlement Officer (Consolidation) for exercising his jurisdiction to condone the delay for lodging objection under Section 9(2) of the Act. Section 11-A bars all objections in respect of claim to land, partition of joint holdings and valuation of plots, etc. relating to the consolidation area which have been raised under Section 9 or which might or ought to have been raised under that section but have not been so raised.

These questions under Section 11-A cannot be raised or heard at any subsequent stage of the consolidation proceedings. That being the position there is no error of law in the order of Deputy Director (Consolidation) nor is there any excess of jurisdiction committed by him in disposing of the matter as he did in exercise of his revisional power under Section 48.

9. In the Case of **Baburam (Supra)**, the Court observed that all the co-tenure holders/co-sharers should be provided a chak adjacent to road.

10. The side opposite placed reliance on the following judgments:

(a) Diwakar Rai v. Dy. Director of Consolidation; **2005 SCC OnLine All 1378**.

(b) Sudhir Kumar Goswami v. District Director of Consolidation ; **2011 SCC OnLine All 1320.**

(c) Ram Milan and Others vs. Additional Commissioner (Admin) Devi Patan and Others; **2019 SCC OnLine All 5478.**

(d) Harihar Prasad Pandey v. Deputy Director of Consolidation; **1979 SCC OnLine All 867.**

11. In the Case of **Diwakar rai (Supra)**, the Court observed as under:

"**4**. From a perusal of scheme of Consolidation of Holdings Act, it crystallizes that annual register is subjected to revision and record are prepared under section 10 of the U.P. Consolidation of Holdings Act. Section 10 of the Act being germane is quoted below.

"10. Preparation and maintenance of revised annual registers. - (1) The annual register shall be revised on the basis of the orders passed under sub-section (1) and subsection (2) of Section 9-A. It shall thereafter be prepared in the form prescribed and published in the unit.

(2) Where any entry in the annual register, published under sub-section (1), is modified in pursuance of an order passed under this Act or under any other law; a reference to the order alongwith an extract of its operative portion shall be noted against the said entry."

It is further explicit from a perusal of the scheme that in case any cause of action arises thereafter, the same shall be dealt with according to provision embodied in section 12 of the Act. Section 12 being relevant is quoted below.

"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 interest 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 subsection (1) as if it were a matter raised under the aforesaid sections."

Section 12 as quoted above, envisages that all matters relating to changes and transactions affecting rights or interests recorded in the revised records published under section 10 (1) for which a cause of action had not arisen and proceedings under sections 7 to 9 were started or were in progress, may be raised before Asstt. Consolidation Officer as and when they

arise but not later than the date of notification under section 52 or under subsection (1) of Section 6. After allotment of chaks, proceedings came to a close and possession was handed over.

5. In the present, it brooks no dispute that Gorakh Rai, father of the petitioners and contesting Opp. Parties was recorded in the final revised record and cause of action arose his death and all the three sons of Gorakh Rai succeeded their respective ⅓rd shares in the chak, and by this reckoning, the cause of action for partition arises after preparation of final record under section 10 of the Act and hence the dispute could be raised under section 12 of the Act. It is further obvious from perusal of section 12 (2), that the provisions of sections 7 to 11 shall mutatis mutandis apply to the decision of any matter raised under sub-section (1) of section 12 if it were a matter raised under the aforesaid section. In this perspective, considering that sections 7 to 11 have been made applicable to the provisions of section 12 of the Act, a dispute shall be deemed to have arisen within the province of section 12 of the Act. The matter of partition of holding is contemplated under section 9-C of the U.P.C.H. Act which runs as under:

"Partition of Joint Holdings. - (1) The Assistant Consolidation Officer, or the Consolidation Officer, may partition joint holdings under Section 9-A, notwithstanding anything to the contrary contained in Section 178 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or any other law, and may also partition the same suo motu.

(2) The partition of joint holdings shall be effected on the basis of shares, provided that where the tenure holders concerned agree, it may be effected on the basis of specific plots."

6. The provisions for partition applicable to the holding of a tenure holder under sections 9 and 12 of the U.P. Consolidation of Holdings Act will also be applicable to a chak of which a tenure holder was given possession after preparation of new record of right under section 27 in case a cause of action arose thereafter and before notification under section 27 in case a cause of action arose thereafter and before notification under section 52 of the U.P. Consolidation of Holdings Act.

7. At this stage, new revenue records are prepared under section 27 of the U.P. Consolidation of Holdings Act. And right, title and interest of tenure holder cease to exist in the erstwhile plots and same rights are created under section 30 of the U.P. Consolidation of Holdings Act. In this regard, section 30 (a), (b) and (e) of the U.P. Consolidation of Holdings Act may be referred and the same being relevant are excerpted below.

"30 Consequences which shall ensue on exchange of possession. - With effect from the date on which a tenure holder enters, or is deemed to have entered into possession of the chak allotted to him, in accordance with the provisions of this Act, the following consequences shall ensue-

(a) the rights, title, interest and liabilities-

(i) of the tenure-holder entering, or deemed to have entered into possession, and

(ii) of the former tenure-holder of the plots comprising the chak, in their respective original holdings shall cease; and

(b) the tenure holder entering into pos session, or deemed to have entered into pos

session, shall have in his chak the same rights, title, interests and liabilities as he had in the original holding together with such other benefits of irrigation from a private source, till such source exists, as the former tenure holder of the plots comprising the chak had in regard to them;

(c) & (d) xxx xxx

(e) the encumbrances, if any, upon the original holding of the tenure-holder entering, or deemed to have entered, into possession, whether by way of lease, mortgage or otherwise, shall, in respect of that holdings, cease, and be created on the holdings, or on such part thereof, as may be specified in the final Consolidation Scheme.

Under section 30 (b) of the U.P. Consolidation of Holdings Act, it is clearly provided that a tenure holding entering possession or deemed to have entered into possession shall have in his chak the same right, title, interest and liabilities as he had in the original holding together with such other benefits of irrigation from a private source till such source exists as the former tenure holder of the plots comprising the chak had in regard to them. Section 30 (e) of the Act also makes it clear that encumbrances if any upon the original holding of the tenure holder entering or deemed to have entered into possession, whether by way of lease, mortgage or otherwise shall in respect of the holding cease and be created on the holdings or on such part thereof as may be specified in the finai consolidation scheme. It is clear from the U.P.C.H. Act that a tenure holder in whose favour the final records were published under section 10 of the U.P.C.H. Act and new records of rights are prepared under section 27 he will have the same rights, in so far as new holding after allotment of chak is concerned.

8. In view of the above, this Court does not agree with the arguments of the learned counsel for the petitioner that right of parti tion is available to a tenure holder of the hold ings and not of chak holdings. Once the pos session is given on the basis of new record of right, chak attains the status of a holding and same rights which had accrued to a tenure holder on the basis of final record prepared under section 10 will accrue to the same ten ure holder in so far as chak which is called as holding after handing over possession on the chak allotted to a tenure holder in the con solidation scheme.

9. In the galaxy of the above provisions and regard being had to scheme of U.P. Consolidation of Holdings Act, it leaves no manner of doubt that the provision of partition of a joint holding is applicable on all fours to the partition of a chak if cause of action or changes arise at all stages i.e. on publication of record under section 9, after preparation of revised record under section 12 or after possession is handed over after carvation of chak and preparation of new record of rights under section 27 of the U.P.C.H. Act. The right of parties will apply till a notification under section 52 of the U.P. Consolidation of Holdings Act is made. In the present case Gorakh Rai father of the petitioner and contesting Opp. Parties was the tenure holder in whose name chak was allotted and who had taken possession of the new chak in accordance with law. The aforesaid Gorakh Rai died before notification under section 52 of the U.P. Consolidation of Holdings Act and chak which became holding of Gorakh Rai after taking possession was inherited by petitioner and contesting Opp. Parties. The cause of action arose thereafter as all the brothers were not ready to keep the holding joint and hence

application was moved and chak was partition. This Court does not agree with the argument of the learned counsel for the petitioner that chak cannot be partitioned.

10. On merits also, it is borne out from the record as also from a perusal of order dated 26.7.1996 passed by Collector/District Deputy Director Consolidation that compromise relied upon by the petitioner was not acceptable to all the parties. The order passed by District Deputy Director Consolidation refusing to act on the compromise between the parties has attained finality and cannot be dug out for being acted upon. It would appear that by the impugned order, the partition was effected in such manner that all the three brothers got their land after partition one main road and canal and as such the impugned orders do not suffer from any blemish of error of law apparent on the face of record. However, as is clear from the materials on record that one of the brother had already constructed a house. While taking into reckoning the house constructed on apart of land in dispute, in case partition is effected that portion of the land on which house was constructed may be allocated to the share of that brother. This will not impinge upon the partition already made in accordance with law. In case the brother concerned who had constructed house on a particular land, was not allotted the house over the land allotted by the impugned order, he may move application before Deputy Director consolidation for redressal or his grievance to that extent only."

12. In the Case of **Subhir Kumar Goswami (Supra)**, the Court observed as under:

Having heard learned counsel for the petitioner Sri Singh and Sri Sharma for the respondents, it is true that if a matter relating to a title is contested after the revision of records through the proceedings under Section 12, then they would proceed in the same manner as if it was an objection under Section 9-A(2) by virtue of sub-section (2) of Section 12. To that extent, Sri Sinha is right.

In the instant case, the cause of action as disclosed by the petitioner is that he is contesting the title of his own father over the land in dispute. The contention of the petitioner is that the name of his father was entered in revenue records only as a 'Karta' of the family and therefore, taking undue advantage of this status, he had no authority to dispose of the entire holding in favour of a third person, even beyond his share. The holding was being described in the impleadment application as a holding in representative capacity in the name of the petitioner's father.

According to the respondents counsel if this is the plea of the petitioner, then he is contesting the bumidhari rights of his father on the ground that the petitioner has an independent right. This cause of action, therefore, was available to the petitioner, as soon as Section 9 proceedings were initiated, and the proceedings under the Consolidation of Holdings Act for decision of rights had commenced. At that stage, the petitioner had full opportunity to file his objection under Section 9-A(2) claiming his independent right. If the petitioner wanted a declaration against his own father then the remedy to the petitioner was to file an objection under Section 9-A(2). It is this opinion, which has been expressed in the judgment dated 4th July, 2011.

The judgments on scrutiny namely the decision in the case of *Raj Bahadurv.Board*

of Revenue, 1979 RD 50 at Page 53 recites as under:-

"It does not, however, seem to follow from these provisions that the Legislature intended that even where members of a Hindu Joint Family were peacefully in joint possession and did not desire any partition, or where co-sharers were under a family arrangement peacefully in separate possession over their respective areas and did not desire any change in the recorded entry, the consolidation authorities were required to record their respective shares or necessarily to effect partition even if not required for ensuring proper consolidation, or that if the non-recorded co-parceners did not seek to get their names or shares specified, their title should get extinguished. The case of co-sharers who are in undisturbed cultivatory possession of different areas according to their shares can not be equated with one of trespassers or persons claiming adverse possession."

In the instant case, the petitioner contends that the cause of action arose when the sale deed came to be executed in favour of contesting respondent by his father and also when the contesting respondent moved an application under Section 12 of the U.P. C.H. Act, 1953 for mutation. It is at that stage that the petitioner filed an impleadment application in order to contest the said proceedings under Section 12. The issue therefore is as to when did the cause of action arose for the petitioner.

A perusal of the pleadings that are on record, the cause of action to the petitioner did arise when the vendee of his father proceeded to get his name mutated meaning thereby when the father of the petitioner sold the property. In such a situation and keeping in view the ratio of the decision in the case ofRaj Bahadur(supra) it cannot be said that the cause had already arisen to the petitioner at the stage of Section 9 of the U.P. C.H. Act.

The bar of Section 11-A of the U.P. C.H. Act, would obviously restrict the rights of petitioner to file an objection had the cause arisen earlier at the stage of Section 9. The aforesaid situation therefore makes it clear that the petitioner had no cause of action to file an objection at the stage of Section 9, and accordingly, the observation made by me in the judgment dated 4thJuly, 2011, is clearly an error apparent on the face of record without noticing the provisions of sub-section (2) of Section 12 as also the authorities referred to hereinabove. The judgment dated 4thJuly, 2011, therefore, deserves to be reviewed and accordingly, the same is hereby recalled.

The writ petition is restored to its original number.

In view of the writ petition having been restored, Sri Chandan Sharma prays for time to file a counter affidavit.

Let an affidavit be filed by Monday. Put up on Monday."

The petitioner contends that as a matter of fact he had no cause of action in the year 1995 when the proceedings under The Uttar Pradesh Consolidation of Holdings Act had commenced and the notification was issued under Section 9 inviting objections. The provisions of sub-section (2) of Section 9 are quoted hereunder to appreciate the said controversy.

"9. (2) Any person to whom a notice under sub-section (1) has been sent, or any other person interested may, within 21 days of the receipt of notice, or of the publication under sub-section (1), as the case may be, file, before the Assistant Consolidation Officer, objections in respect thereof disputing the correctness or nature

of the entries in the records or in the extracts furnished therefrom, or in the Statement of Principles, or the need for partition.

This provision gives a period of 21 days from the date of notification to any other person interested to file an objection in case there is a dispute relating to the correctness or nature of entries on record or the need for partition. Thus, the publication under Section 9 gives the first opportunity to file objections. The objections have to be filed under Section 9-A of the Act. For the purpose of partition of holdings, the provisions of Section 9-C are available if a partition is claimed on the basis of shares. On the basis of any such order passed under the aforesaid provisions, the records are revised with liberty to the parties to file appeals against any such decision under Section 11 of the Act. If an aggrieved person fails to file an objection then a bar comes to operate under Section 11-A which is quoted hereunder:-

"11-A. Bar on objection.—NO question in respect of—

(i) claims to land,

(ii) partition of joint holdings, and

(iii) valuation of plots, trees, wells and other improvements, where the question is sought to be raised by a tenure-holder of the plot or the owner of the tree, well or other improvements recorded in the annual register under Section 10,

relating to the consolidation area, [which has been raised under Section 9 or which might or ought to have been raised under that section], but has not been so raised, shall be raised or heard at any subsequent stage of the consolidation proceedings.]"

The submission of the petitioner is that the petitioner had no cause of action when the notification under Section o was issued as there was no dispute between him and his father at that point of time regarding the entry individually standing in the name of the father. In such a situation, there was neither any occasion to file an objection under Section 9-A and correspondingly there was no occasion for the bar under Section 11-A to operate against the petitioner.

Learned counsel submits that the cause of action arose long thereafter when the sale-deed came to be executed by the petitioner's father in favour of the respondent No. 4 in the year 2006. The sale-deed was executed on 9.10.2006. It is when the respondent No. 4 moved an application for recording of his name on the basis of the sale-deed that the cause of action arose. The provisions of Section 12 of the Act are quoted hereunder for an appropriate reference:-

"12. Decision of matters relating to changes and transactions affecting rights or interest 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 u 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 u 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."

A perusal of the said provisions indicates that if any change relating to a transaction affecting the right or interest of the recorded tenure holder intervenes, then all such matters have to be dealt with under the said provision. The Section clearly

provides that the same would be attracted where a cause of action relating to such transaction had not arisen when proceedings under Sections 7 to 9 were started or were in progress. Learned counsel submits that the petitioner's claim is clearly protected under the said provision as no cause of action had arisen when the proceedings of Section 9 had been initiated or concluded. It is almost after more than 11 years of the notification under Section 9 that the transaction of sale took place in 2006 between the father of the petitioner and the respondent No. 4 giving rise to an application under Section 12 of the Act. He, therefore, contends that the section gives a right to raise a dispute in relation to all such matters which has to be decided as if it was an objection as understood under Section 9 of the Act, inasmuch as sub-section (2) of Section 12 declares that such an objection will be decided as sections 7 to 11 mutatis mutandis apply to such proceedings.

Learned counsel, therefore, submits that the impleadment and the objection raised by the petitioner, whatever worth it was, had to be entertained and the objection had to be decided by the Consolidation Officer. The petitioner submits that the Consolidation Officer has erroneously refused to exercise his discretion and jurisdiction for no valid reason which is contrary to the provisions of Section 12 of the 1953 Act. The contention in short is that whatever be the nature of the objection of the petitioner, his impleadment could not have been rejected and his objection had to be decided on merits after allowing him to lead evidence. Reliance has been placed by the learned counsel for the petitioner on the decisions that were referred to at the time of the disposal of the review application and have been noted in the order dated 27.7.2011.

Sri Sharma, learned counsel for the contesting respondent No. 4, contends that the cause of action even otherwise had arisen to the petitioner if he was not on good terms with his father and for that the appropriate forum was an objection to be filed under Section 9-A(2) of the Act. He contends that the petitioner having failed to have availed of the said opportunity, there is a statutory bar operating against him. Hence the objection cannot be entertained at the stage of Section 12. In short, the submission is that if the cause of action had arisen earlier, as is evident from the nature of the dispute, then the filing of the objection under Section 12 by the answering-respondent cannot be the stage of raising any objections in view of the bar as pointed out herein above. He has invited the attention of the Court to the Supreme Court decision in the case ofNarendra Singhv.Jai Bhagwan, AIR 2005 SC 582.

The position that emerges is that the impleadment sought by the petitioner would be entertainable on the issue relating to the occasion of the arrival of the cause of action to file an objection before the consolidation authorities. There is nothing on record to demonstrate that the petitioner and his father were on cross terms when the notification under Section 9 of the 1953 Act came to be issued in 1995. There is no material to indicate that the petitioner had any cause of action or any cause of action was disclosed otherwise demonstrating a rift between the father and the son upto 2006. On the contrary, the petitioner submits that he had set up a filling station on the land in dispute after it was purchased in the year 1993 in the name of his father and there being no dispute between them at that point of time, there was no reason to approach the consolidation authorities for declaration of any such right or separation of his share. In the absence of any such material, it cannot be said that the petitioner had a cause of

action at the stage of Section 9 of the Act. To the contrary, the dispute appears to have surfaced in the year 2006 after the execution of the sale-deed.

The petitioner promptly moved his impleadment application as well as his objection which is on record. The filing of the civil Suit will not bar the right of the petitioner to file an objection so long as the consolidation operations had not come to an end on the date when the respondent No. 4 moved an application under Section 12 of the Act or the date on which the petitioner filed his impleadment application. The bar of Section 11-A or Section 49 would, therefore, not operate and the petitioner will have a right to move an objection. The petitioner had disclosed the nature of the right claimed by him. In such a situation, the observations made by this Court in the case ofRaj Bahadurv.Board of Revenue, 1979 RD 50, as extracted herein above in the order dated 27.7.2011 would be squarely applicable. The decision in the case ofRam Pal Singhv.Khandey, 1976 RD 162, is not an authority on the proposition which has emerged on the facts of the present case where the observations made in the case ofRaj Bahadur Singh(supra) are more appropriate. The said decision has also been further approved in the case ofRati Ramv.Rajvir, 1991 ALJ 58. I am, therefore, of the opinion that the impleadment application coupled with the objection filed by the petitioner had to be entertained more so keeping in view the ratio of the decision in the case ofNarendra Singh(supra) which clearly requires that the matter has to be raised before the revenue authority.

13. In the Case of **Ram Milan** (Supra), the Court observed as under:

10.On a bare reading of Section 12, it is evident that 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. The wide sweep of this provision is evident from the language used therein but more of it later. Sub-section (2) of Section 12 further provides that the provisions of Sections 7 to 9 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. In addition to the language used in Sub-section 1 of Section 12 which demonstrates the width of the scope of proceedings under Section 12 which covers all matters relating to changes and transfers affecting any of the rights and interest recorded in the revised records published under Sub-section 1 of Section 10, the language used in Sub-section 2 which makes Section 7 to 9 applicable to proceedings under Section 12, makes its amply clear that all rights and interest in lands which are the subject matter of consolidation operations can be adjudicated in proceedings under Section 12. The only caveat being that the cause of action should have arisen after publication of the revised records under sub-section 1 of Section 10 and should not have arisen when proceedings under Section 7 to 9 were started or were in progress. The language used in this provision when read conjointly with Section 7 to 9 of the Act, 1953 makes it very clear that rights and interest in a holding can be adjudicated at different stages depending as to when the cause of action had arisen. If the cause of action had

arisen when the proceedings under Section 7 to 9 had started or were in progress, then, the claim to right and interest in an agricultural holding would be made under Section 9-A(2), however, once the revised records are published under Section 10(1) then the bar of Section 11-A of the Act, 1953 comes into play in respect of such claim for which the cause of action had arisen as aforesaid i.e. prior to publication under Section 10(1). If the cause of action arises subsequently i.e. after the publication under Section 10(1) and did not arise earlier when the proceedings under Section 7 to 9 had started or were in progress then, the remedy lies under Section 12, therefore, for the S.D.M. to say that the proceedings under Section 12 are summary proceedings is based on a misconception as if, the said proceedings are only for the purposes of mutation. The proceedings under Section 12 are not only for mutation of names but also for determination and adjudication of rights and interests in holdings as stated herein above which is not permissible under Section 34 of the Act, 1901.

14. Relevant paras of the Case of Harihar Prasad (**Supra**), are as under:

2. The only question for consideration in this writ petition is whether an objection under Section 9-A(2) of U.P. Consolidation of Holdings Act (hereinafter referred to as Act) filed before the Consolidation Officer is maintainable?

5.I have considered the contentions raised by the learned counsel for both the parties. Under the provisions of the Act the Asstt. Consolidation Officer is empowered to receive the objection filed under Section 9A of the Act and in undisputed cases, he is competent to pass final orders. But in disputed cases, he shall forward the cases to the Consolidation Officer, who is empowered to dispose of the same according to law. Section 9A of the Act is as follows:—

"Disposal of cases relating to claims to land and partition of joint holdings—

(1) The Assistant Consolidation Officer shall—

(i) where objection in respect of claims to land or partition of joint holdings are filed, after hearing the parties concerned; and

(ii) where no objections are filed, after making such enquiry as he may deem necessary, settle the disputes, correct the mistakes and affect partition as far as may be by conciliation between the parties appearing before him and pass orders on the basis of such conciliation.

(2) All cases which are not disposed of by the Assistant Consolidation Officer under sub-section (1), all cases relating to valuation of plots and all cases relating to valuation of trees, wells or other improvements, for calculating compensation therefor, and its apportionment amongst co-owners, if there be more owners than one, shall be forwarded by the Assistant Consolidation Officer to the Consolidation Officer, who shall dispose of the same in the manner prescribed.

(3) The Assistant Consolidation Officer, while acting under sub-section (1) and the Consolidation Officer, while acting under sub-section (2), shall be deemed to be a court of competent jurisdiction, anything to the contrary contained in any other law for the time being in force notwithstanding."

6.This section makes it clear that the Asstt. Consolidation Officer's function is that of a pre-trial authority. He can, no doubt, pass final orders in undisputed cases. But in other cases, he tries to find out whether there is a dispute and attempts to

bring about a compromise and can only report the matter to the Consolidation Officer, the trial court which takes evidence and adjudicates, if no compromise is possible. In other words, in a contested case, the Asstt. Consolidation Officer is only a pretrial court and the Consolidation Officer alone is the competent court to pass the final orders regarding the title of the parties. Therefore, even if an objection under Section 9A of the Act is entertained by the Consolidation Officer, in absence of the reference made by the Asstt. Consolidation Officer, the entertainment by the Consolidation Officer cannot be said to be without jurisdiction.

7.A reference has also been made by the learned counsel for the petitioners to the decisions inBhagwativ.Deputy Director of Consolidation(Civil Misc. Writ. No. 4978 of 1971, decided on 5-4-1976), which was followed inRam Naginav.Deputy Director of Consolidation(Writ Petn. No. 4569 of 1970, decided on 17-5-1979). In these cases, the provision of Section 44A of the Act was taken into consideration which runs as follows:—

44A. "Powers of subordinate authority to be exercised by a superior authority—Where powers are to be exercised or duties to be performed by any authority under this Act or the rules made thereunder, such powers or duties may also be exercised or performed by an authority superior to it."

8.The above provisions of Section 44A make it clear that a superior authority may exercise powers as are given in the Act to an authority inferior to it. Therefore, it was held that the Consolidation Officer was entirely within the power to entertain the objection and the decision in the case ofNand Kumar Tewariv.Deputy Director of Consolidation(1969 Rev Dec 58) relied upon by the learned counsel for the respondents was distinguished on this basis.

9.There is yet another aspect of the case. The objection filed by the petitioners was received by the Consolidation Officer, no objection was raised on behalf of the respondents regarding its maintainability. The case was decided by the Consolidation Officer on merit. The question of maintainability was also not challenged in appeal as well by the respondents. The Settlement Officer (Consolidation) heard and decided the case on merit. The result was that the order of the Consolidation Officer merged in that of the Settlement Officer (Consolidation). The objection was taken for the first time before the Deputy Director of Consolidation in revision regarding the maintainability of the objection received by the Consolidation Officer. If a party does not take objection as for the jurisdiction at the very initial stage, then it would be deemed that he had waived the objection. InState of U.P.v.Phool Singh(1974 Unreported Revenue Cases 502), the Division Bench of this Court has observed as follows:—

"It is well settled that if a court acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, i.e. an appeal would the to the Court to which it would lie if its order was with jurisdiction. Where an order of-the trial court had been upheld on appeal by a Court of competent jurisdiction the mere fact that the trial court had acted without jurisdiction will not justify interference treating the appellate order also as a nullity. Evidently, the appellate Court in a case which properly conies before it on appeal, is fully competent to decide whether the trial was with or without jurisdiction, and it has jurisdiction to decide the matter rightly as well as wrongly. If it affirms the

conviction and thereby decides wrongly that the trial court had the jurisdiction to try and convict, it cannot treated as a nullity, Held that the initial lack of jurisdiction in the entertainment of the objection by the Consolidation Officer vanished when the matter was decided by the Settlement Officer on appeal."

10.In the case of *Tungal Singhv.Deputy Director of Consolidation*(1969 Rev Dec 54 (All)), it has been held that where an objection as to the procedure and jurisdiction of the Consolidation is not taken, it gives rise to an estoppel.

15. Upon due consideration of the facts and circumstances indicated above and the law propounded in the judgments referred above this court finds that there is no merit in the present petition. It is for the following reasons.

(a) It is settled principle of law that mentioning wrong provision would not be fatal if the authority is having power to decide the subject in issue.

(b) In other words, it is well settled principle of law that mentioning wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.

(c) In the case of Ram Sunder Ram Versus Union of India and Others reported in (2007) 13 SCC 255, the Hon'ble Apex Court has observed as under:-

"19. … It appears that the competent authority has wrongly quoted Section 20 in the order of discharge whereas, in fact, the order of discharge has to be read having been passed under Section 22 of the Army Act.

'9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.' (SeeN. Maniv.Sangeetha Theatre[(2004) 12 SCC 278] , SCC p. 280, para 9.)

Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act. Therefore, the order of discharge of the appellant from the army service cannot be vitiated on this sole ground as contended by the learned counsel for the appellant."

(d) In the case of In*N. Maniv.Sangeetha Theatre*[(2004) 12 SCC 278] it is stated:

"9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."

(e) In the instant case admittedly the land in issue was purchased through registered sale deed dated 09.03.2022 i.e. after conclusion of proceedings under Section 10 and 20, respectively, of the Act of 1953. The land in issue was purchased jointly by petitioner no.1/Smt. Rama Devi and respondent no.5/ Smt. Sarita Devi. Thus, the Cause of action to get the name mentioned in the revenue record and to get

the land partitioned arose after conclusion of proceeding under Section 10 and 20 of the Act of 1953 and being so the bar of Section 11-A, as per this Section itself and as observed in the judgments referred above, would not be attracted.

(f) In the aforesaid background of the case and to remove further litigation between the parties the partition of the land jointly purchased by petitioner no.1/Smt. Rama Devi and respondent no.5/ Smt. Sarita Devi was required. It was also required that name of vendees of sale deed dated 09.03.2022 be recorded in the records during consolidation proceedings.

(g) After conclusion of proceedings under Section 10 of the Act of 1953, the name in the records can be introduced/ entered in the light of provisions as envisages under Section 12 of the Act of 1953 and in the instant case the order regarding entering the names of petitioner no.1/Smt. Rama Devi and respondent no.5/ Smt. Sarita Devi was pased on 22.07.2022 by C.O. and this order was not challenged by the petitioner no.1/Smt. Rama Devi before S.O.C. or D.D.C.

(h) The land can also be partitioned by Consolidation Authorities under the Act of 1953. In the instant case admittedly the land was purchased after conclusion of proceedings under Section(s) 10 and 20 of the Act of 1953.

(i) No doubt that for seeking partition the concerned has to first approach the Assistant Consolidation Officer under Section 9-A of the Act of 1953 and in the instant case the application(s) were preferred by petitioner no.1/Smt. Rama Devi, registered as Case No. 228, and by respondent no.5/ Smt. Sarita Devi, registered as Case No. 224, under Section 21(1) of the Act of 1953 before the Consolidation Officer and this authority in view of provisions of the Act of 1953 including Sections 9-C,12 and 44A is empowered to do needful as observed in various pronouncements referred above.

(j) The petitioner no. 1/Smt. Rama Devi herself approached the C.O. by instituting the case no. 228 and she accepted the order dated 22.07.2022, whereby the C.O. directed to indicate the names of petitioner no. 1/Smt. Rama Devi and respondent no. 5/Smt. Sarita Devi in the record as she did not challenge the same before S.O.C or D.D.C.

(k) Thus, taking note of the above including the settled principle related to mentioning of wrong provision this Court is of the view that the orders passed by the Consolidation Officer i.e order dated 22.07.2022 and order dated 10.08.2022 affirmed vide order dated 27.09.2022 passed by S.O.C. and order dated 06.04.2023 passed by D.D.C. are sustainable in the eyes of law.

(m) In regard to the allotment of Chak, after due consideration of facts and circumstances of the case particularly related to the boring of respondent no. 5/Smt. Sarita Devi and the documentary evidence filed in support thereof i.e. documents related to electric connection including the electricity bill and the contents of sale deed(s) dated 22.07.2022 and 23.12.2022 executed by petitioner no.1/Smt. Rama Devi wherefrom it is evident that there was no tree, well or boring over the land sold as also the boundary indicated in the sale deed dated 23.12.2022, this Court finds that the land allotted to the respondent no. 5/Smt. Sarita Devi adjacent to Kharanja (road) connecting Hardoi-Bilgram Road and allotment of land to the petitioner no.1/Smt. Rama Devi adjacent to Kharanja (road) on western side of land purchased through sale deed dated 09.03.20222 is justified. Both the parties have provided land adjacent to

Kharanja (road). Thus, the demand of petitioner no.1/Smt. Rama Devi to provide land over Kharanja (road) connecting Hardoi-Bilgram Road is unsustainable in law.

For the reasons aforesaid, the present petition is ***dismissed.***

(2024) 1 ILRA 725
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.12.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-B No. 2255 of 1982

Sabhai & Anr. ...Petitioners
Versus
D.D.C., Faizabad ...Respondent

Counsel for the Petitioners:
H.S. Sahai, Kamlesh Kumar, Ravindra Kumar Yadav, Vijay Kumar Tiwari

Counsel for the Respondent:
C.S.C., A.N. Verma, I.D. Dwivedi, K.P. Singh, Riyaz Ahmad, S.P. Singh,Sachindra Dwivedi, Shachindra Dwivedi

Civil Law - U.P. Tenancy Act, 1939 – Section 180(2) - Adverse Possession – Burden of Proof – The petitioners claimed rights over Khata No. 162 based on adverse possession, relying on entries in Khasra and Khatauni – Held, the burden lies on the claimant to prove adverse possession through evidence that entries were made per the U.P. Land Records Manual, including issuance and service of Form PA-10 to the recorded tenure holder and Land Management Committee; petitioners failed to produce such evidence, rendering entries legally invalid, as per *Gurmukh Singh Vs Dy. Director of Consolidation*. (Paras 24, 33, 35, 37, 44)

Evidentiary Value of Revenue Entries – The petitioners relied on Khasra and Khatauni entries to establish possession – Held, entries in column-9 of Khatauni lack evidentiary value if not made in accordance with Paragraphs A-80, A-81, and 102-C of the U.P. Land Records Manual, particularly without proof of PA-10 service; petitioners' failure to produce PA-10 or testimony from revenue officials invalidated their claim, as supported by *Jamuna Prasad Vs Dy. Director of Consolidation*. (Paras 21, 24, 35, 37, 44)

Estoppel – Failure to Challenge Findings – The petitioners did not challenge the Assistant Settlement Officer's finding that Dukhi and Khelawan were sons of Ghurai in the revision before the Deputy Director of Consolidation – Held, they are estopped from raising this issue in writ proceedings, as the finding became final, per *Balchan Vs Dy. Director of Consolidation*. (Paras 24, 32)

Framing of Issues – Adequacy – The petitioners argued that the Consolidation Officer failed to frame proper issues on adverse possession – Held, Issues 1 and 2 framed by the Consolidation Officer adequately addressed possession and sirdari rights, requiring petitioners to prove lawful possession via PA-10 evidence, which they failed to do, as clarified in *Sattan Vs Dy. Director of Consolidation*. (Paras 13, 40)

Oral Evidence and Adverse Possession – The petitioners contended that oral evidence supporting possession was ignored – Held, while adverse possession can be proved by oral and documentary evidence, the absence of PA-10 evidence and failure to produce revenue officials to substantiate entries rendered oral evidence insufficient, as per *Mangu Vs Dy. Director of Consolidation*. (Paras 26, 36, 39)

Unrebutted Averments in Writ Petition – The petitioners argued that unrebutted averments in the petition should be deemed admitted – Held, findings in consolidation proceedings must be based on evidence before the authorities, not uncontroverted writ petition averments; petitioners failed to demonstrate perversity in the authorities' findings, as per *Azadar Hussain Khan Vs Dy. Director of Consolidation*. (Paras 26, 41)

U.P. Tenancy Act, 1939 – Section 180(2) - Inapplicability – The petitioners raised a plea

under Section 180(2) regarding the absence of an eviction suit – Held, this plea is misconceived as it was not raised in pleadings and the case rested solely on adverse possession, which requires proof of hostile possession, not merely absence of eviction, as per *Ram Naresh Misra Vs Sita Ram*. (Paras 27, 42)

Writ Petition Dismissed.

List of Cases cited:

1. Gurmukh Singh Vs Dy. Director of Consolidation, 1996 SCC OnLine All 823

2. Jamuna Prasad Vs Dy. Director of Consolidation, 1980 SCC OnLine All 569

3. Balchan Vs Dy. Director of Consolidation, 2015 SCC OnLine All 1080

4. Sattan Vs Dy. Director of Consolidation, 2017 SCC OnLine All 1829

5. Mangu Vs Dy. Director of Consolidation, 2010 SCC OnLine All 3233

6. Azadar Hussain Khan Vs Dy. Director of Consolidation, 2021 SCC OnLine All 580

7. Ram Naresh Misra Vs Sita Ram, 2021 SCC OnLine All 425

8. Indrapal Singh Vs Dy. Director of Consolidation, 2019 SCC OnLine All 4553

9. Shashi Prabha Vs Dy. Director of Consolidation, 2020 SCC OnLine All 636

10. Hazari Vs Mathura, 1991 SCC OnLine BoR (UP) 27; 1992 RD 79

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard learned counsel for the petitioners, Sri Hemant Kumar Pandey, learned counsel for the State-respondents as also Sri Shachindra Dwivedi, learned counsel for the contesting opposite party.

2. By means of present petition, the petitioners have assailed the order dated 25.09.1978 and 27.03.1982 passed by the respondent No.2-Assistant Settlement Officer Consolidation, Faizabad and respondent No.1-Deputy Director of Consolidation, Faizabad, respectively.

3. Before proceeding in the matter, this Court finds it appropriate to indicate that Writ Petition No.1220 (Consolidation) of 1981 was filed by Musai, Ram Prasad and Bans Raj and the same was dismissed on 28.04.2016 and has not been restored.

4. Brief facts of the case are to the effect that the name of one Ghurai was recorded in the revenue record related to Khata No.162 situated at Nathmalpur, Hateria, Pargana-Birhar, Tehsil-Tanda, District-Faizabad now Amebdkar Nagar. The land/plots indicated in Khata No. 162 is the subject matter of this petition. These plot(s) have been indicated in the impugned order dated 27.03.1982 passed by Deputy Director of Consolidation as Gata No.301/1, 301/2, 301/3, 301/4, 313, 362/1, 362/2, 537/1, 537/2, 523/1 523/2, 552/1, 552/2 and 373/2 and total area 2-17-0.

5. In the basic year Khatauni of Khata No. 162 names of Dukhi and sons of Khelawan namely Ram Hans, Ram Singar and Ram Pyare were recorded.

6. It is to be noted that the case of the side opposite is that the Ghurai was the father of Dukhi and Khelawan.

7. With regard to Khata No.162 before the Consolidation Officer one objection was filed present petitioners and another objection was filed by Musai and Others. Petitioners in their objection indicated that the name of Dukhi S/o Ghurai and Ram Hans, Ram Singar, Ram Pyare all sons of Khelawan have wrongly

been indicated in the revenue record. In the objection filed by the petitioners they also stated that entry in the revenue record in favour of Dukhi and legal heirs of Khelawan in fact is a forged entry as father of Dukhi and Khelawan was Shiv Baran. In support of this contention they filed the copy of statement dated 23.09.1966 of Dukhi recorded in Case No. 1977 under Section 9 of the U.P. Consolidation of Holdings Act, 1953 (in short "Act of 1953") and copies of compromise filed in Case No. 9006 and 894 under Section 9 of the Act of 1953 related to Khata No. 86 situated at Village-Tikuria Bujurg.

8. It is apparent that before the Consolidation Officer the claim of the petitioners was mainly based upon the plea of adverse possession.

9. In another objection preferred by Musai and one Smt. Karma, they claimed their right over Khata No.162 by saying that they are actual legal heirs of Ghurai. Smt. Karma claimed herself as daughter of the Ghurai and Musai claimed himself as son of Karma.

10. With regard to claiming rights over the land, in issue i.e. Khata No.162, as stated, the petitioners based their claim on entries in Khasra of Fasli Year(s) 1366-1377, 1366-1367 and 1377-1379 and Khatauni of Fasli Year 1359.

11. It is indicated that Khasra and Khatuani bears an entry based upon PA-10 with date and dairy number. On the basis of entries in the Khasra and Khatauni the petitioners claimed themselves as recorded Sirdar.

12. The oral evidence was adduced by the petitioners to support their claim. On the other side, the oral evidence was also adduced by Smt. Karma, Musai and others before the Consolidation Officer. Dukhi S/o Ghurai and sons of Khelawan also adduced the evidence before the Consolidation Officer.

13. It would be apt to refer here that for proper adjudication of the case/objections the Consolidation Officer framed following four issues:-

"पक्षों के उपरोक्त कथन व आपत्तियों के आधार निम्न बिन्दु बनाये गये:-

1. क्या श्री सभई व छवि नाथ पुत्रगण महदेवगण संख्या- 301 गाटा संख्या 301/3, 353/1, 362/1 व 573/2 व 537/2 के आदि चक के भूमि पर सीरदार है।

2. क्या श्री सभई व छविनाथ उपरोक्त गाटा संख्या 1 की 1 को दिये गये भूमि कब्जे के आधार अपनी कार्यवाही सीरदार है।

3. क्या गाटा संख्या 162 पर की भूमि पर अंकित खातेदारों के नाम फरजी दर्ज है और इस भूमि के सब भाग पर मालिक मुसई आदि है।

4. क्या मुसई आदि घुरई की लड़की के लड़के हैं और घुरई वारिस है सबूतो के आधार पर आराजी निजाई दिया जाता है अन्य किसी तनकी पर बल नहीं दिया गया है तनकी 2-4 श्री मुसई ने अपने बयानों में बताया है कि विवादित भूमि घुरई की थी। जिसके माल लड़की करमा थी जो विजयी से व्याही थी और उनसे वह तथा राम प्रसाद व बंश राज नाबालिग थे और उनकी माँ बेवा थी अतः घुरई के मरने पर खेती की देखभाल हेतु ही दुखी व खेलावन को बुला लिया था। जिन्होंने धोखा देकर घुरई के स्थान पर अपना नाम बतौर वारिस घुरई के लड़के बना कर अपने नाम दर्ज करा लिया। यह कि दुखी व खेलावन ग्राम टिकोरिया बुर्जुग के रहने वाले हैं और जब ये बंस राज व राम प्रसाद बालिग हुए है उन्होंने स्वयं भूमि जोतना आदि शुरू कर दिया

और प्रतिवादी से कोई सम्बन्ध नहीं रहा है इन्होंने निम्न बंशावली दी है:-

अन्तू
/
/---------- /---------- /-
राम कली घुरई माता
/
मु० करमा लड़की
/
- /---------- /---------- /-
मुसई राम प्रसाद बंश राज

श्री मुंसई के इन बयानों की पुष्टि में मु० करमा ने अपने बयानों में बताया है कि वह घुरई की लड़की व विजयी की पत्नी तथा मुसई आदि की माता है।"

14. It would also be apt to refer here that in the order of Consolidation Officer it has specifically been indicated that no other issue was pressed by the parties appearing before the Consolidation Officer.

15. The Consolidation Officer, upon due consideration particularly favourable entries made in the documents filed by the petitioners observed rather held that the entry in favour of Dukhi and Others is completely forged. The Consolidation Officer also rejected the claim of Smt. Karma, Musai and Others, who filed second objection before the Consolidation Officer under 9-A of the Act of 1953.

16. The order of Consolidation Officer dated 29.11.1977 was challenged by Musai and Others as also by Dukhi and Others by preferring the appeal(s) before the Settlement Officer of Consolidation, Faizabad now Ayodhya.

17. The appeal filed by Dhukhi was registered as Case No.11718 (Dukhi & Others vs. Musai & Others) and the appeal filed by Musai & Others was registered as Case No.11962 (Musai and Others vs. Dukhi and Others). The appeals filed under Section 11(1) of the Act of 1953 were clubbed together and decided by the Appellate authority namely Assistant Settlement Officer of Consolidation vide common order dated 25.09.1978.

18. The Assistant Settlement Officer of Consolidation after considering the oral statement of Smt. Karma and Musai specifically observed that Ghurai and others whose claim was based upon the entry in the revenue record of basis year were residing with Ghurai and Musai and Others were not in possession of the property in dispute recorded in the Khatuani of Khata No.162.

19. The Assistant Settlement Officer of Consolidation also observed that Musai and Others in their claim have specifically stated that Dukhi and Others were in possession of the property, in issue, for last 10 years and after considering these statement(s) held that Smt. Karma failed to establish that she is the daughter of Ghurai, whereas Dukhi and Khelawan are sons of Ghurai.]

20. The relevant portion of the order dated 25.09.1978 passed by the Assistant Settlement Officer of Consolidation, reads as under:-

"दुखी वगैरह अपीलान्टस की तरफ से यह तर्क पेश किया गया कि आराजी निजाई घुरई की पैदा करदगी है तथा अपीलान्ट घुरई के ही लड़के हैं व वादी घुरई के मरने पर काबिज व दखिल हुए। विपक्ष में मुसई वगैरह की तरफ से

तर्क पेश किया गया कि आराजी निजाई घुरई की पैदाइश अवश्य है मगर घुरई के कोई लड़का पैदा नहीं हुआ लेकिन घुरई की लड़की श्रीमती कम्सा उनके लड़के मुसई राम प्रसाद व बंशराज हैं। घुरई के जीवन काल में ही मुसई वगैरह घुरई के साथ रह कर आराजी निजाई पर काबिज व दखील हुई तथा घुरई के मरने पर मुसई का कब्जा दखल हुआ।

मुसई का भी कथन है कि दुखी व खेलावन को घुरई अपने साथ ले आये तथा अपने साथ खेती बारी की देख भाल के सिलसिले के लिए उनको रखा व घुरई के मरने के बाद दुखी से विवादित भूमि पर गैर कानूनी नाम दर्ज करा लिया। जब कि दुखी का विवादित भूमि पर कब्जा दखल नहीं रहा। पक्षी ने यह स्वीकार किया कि आराजी निजाई घुरई की ही पैदा करदगी है। अपने बयान की पुष्टि में नकल खतौनी 1337 फसली खाता 63, 82 व 9/3 व नकल खतौनी 1344 फ० खाता 10/3 व 26/5 पेश है जिसमें आराजी निजाई घुरई के नाम जिमन 5 में दर्ज है अतः उपरोक्त प्रमाणों से यह स्पष्ट है कि आराजी निजाई घुरई की है पैद करदगी है। अपीलान्टस दुखी ने यह तक पेश किया कि आराजी निजाई घुरई वगैरह की पैदा करदगी है व घुरई दुखी व खेलावन के पिता है घुरई के मरने के बाद उनका नाम वरासतन दर्ज हुआ। अपने कथन की पुष्टि में नकल खतौनी 1360 फ० खाता 71 व खाता 53/6, 65/99, 73/48 पेश किया है।

जिसमें विवादित भूमि पर अपीलान्टस दुखी व खेलावन पुत्रगण घुरई के नाम इन्द्राज है। नकल खतौनी 1362 फ० खाता 43 व 42/7 पेश किया है जिसमें दुखी के पिता का नाम घुरई ही दर्ज है। उपरोक्त प्रमाणों से यह स्पष्ट है कि दुखी व खेलावन घुरई के ही लड़के हैं। विपक्ष ने यह तर्क पेश किया कि दुखी वगैर घुरई के लड़के नहीं है। महज कागजात में गलत इन्द्राज है मुसई वगैरह ने अपने कथन की पुष्टि में कोई प्रमाण पेश नहीं किया बल्कि तर्क पेश किया कि दुखी ग्राम टिकरिया बुजुर्ग के शिव बरन के लड़के हैं व इस तर्क की पुष्टि में नकल बयान दुखी पुत्र शिव बरन दिनांक 23-9-66 मुकदमा नम्बर 1977 धारा 9 राम अवतार बनाम दुखी व नकल सुलहनामा दिनांक 4-7-77 बावत उपरोक्त मुकदमा व नकल सुलहनामा दिनांक 7-4-77 मुकदमा नम्बर 9006, व 8940 धारा 9 बावत खाता 86 ग्राम टिकुरिया बुजुर्ग पेश किया है। जिसमें दुखी वगैरह के पिता का नाम शिव बरन लिख गया है।

इसी इन्द्राज के आधार पर मुसई वगैरह का यह कथन है कि दुखी व खेलावन ग्राम टिकुरिया बुजुर्ग के शिव बरन के ही लड़के हैं। दुखी वगैरह ने अपने बयानों में शिव बरन की आराजी से अपना कोई सम्बन्ध नहीं बताया तथा यह भी बयान किया कि यदि उसके नाम से उक्त जमीन दर्ज भी है तो वह महज गलत दर्ज है व उसका यह भी कथन है कि उक्त ग्राम में दुखी पुत्र शिव बरन करके दर्ज है। व उसका यह कथन है कि युक्त ग्राम में दुखी पुत्र शिव बरन करके दर्ज है जब कि मेरे पिता का नाम घुरही हैं। यद्यपि दुखी वगैरह का यह तर्क व बयान न्याय संगत नहीं है लेकिन दुखी के नाम 1360 फ० के पूर्व से विवादित भूमि पर इन्द्राज है जिस पर उसके पिता का नाम घुरई दर्ज है।

इस प्रकार इतने लम्बे अर्से के इन्द्राज को महज मौखिक साक्ष्य से गलत नहीं माना जा सकता है। मुसई वगैरह ने यह तर्क पेश किया कि घुरई की लड़की श्रीमती करमा श्रीमती करमा के ही लड़के मुसई वगैरह ही हैं। लेकिन मुसई वगैर ने श्रीमती करमा को घुरई की लड़की साबित करने के लिए पैदा इशीनफल पेश नहीं किया है। जब कि दुखी वगैरह ने नकल पैदाइशी दिनांक 3-2-1390 नकल पैदाइशी दिनांक 5-10-10 ई० नकल पैदाइशी दिनांक 13-4-15 ई० पेश किया है।

जिसमें उपरोक्त तीनों पैदाइशी तिथियों में अन्तू के लड़की पैदा होना दर्ज है। अतः उपरोक्त नकल पैदाइशी परमाणों से यह साबित

हो जाता है कि घुरई (लड़का) के अलावा अन्तू के तीन लड़कियां भी पैदा हुई व दुखी वगैरह ने तर्क पेश किया कि मौजूदा श्रीमती कर्मा ने जो बयान दिया है व उसको मुसई वगैरह घुरई की लड़की बताते हैं वह घुरई की बहन है जो मर चुकी है। श्रीमती करमा को घुरई की लड़की साबित करने का कोई प्रमाण मुसई वगैरह ने पेश नहीं किया।

मुसई वगैरह ने अपने मूल दावा दिनांक 13-11-75 में यह स्वीकार किया है कि घुरई अर्सा 37, 38 साल हुए फौत कर गये अतः मुसई के दावे के मुताविक घुरई 1930 व 1935 ई० के बीच मरे अतः उस समय भी घुरई के मरने पर मौजूदा मुसई वगैरह कानूनी वारिस नहीं होते हैं मुसई के गवाह नेवारू थे जो ग्राम नसीरपुर सिंह पट्टी के निवासी हैं। उक्त गवाह ने अपने बयान में यह स्वीकार किया कि श्रीमती कर्मा ने गवाही देने के लिए उससे कहा था लेकिन विवादित भूमि चौहद्दी की जानकारी उसको नहीं है। इस प्रकार श्रीमती कर्मा को जब गवाह निसाई जौजे का निवासी नहीं तथा श्रीमती कर्मा व उसके पिता की जानकारी व उनकी पैदाइश के सम्बन्ध में वह कुछ नहीं जानता तो श्रीमती कर्मा स्वयं पेश हुई हैं। तथा उसने अपने को घुरई की लड़की बताया। तथा अपने बयान में यह भी बताया कि दुखी की माता का नाम सोनकली है जो ग्राम टिकुरिया बुजुर्ग में रहती है लेकिन दुखी व खेलावन जब छोटे थे घुरई ले आवे व घुरई के मकान में रहते हैं। लेकिन मुसई वगैरह ने अपने दावे में यह दिखाया है कि घुरई के मरने के 10 साल बाद दुखी वगैरह को खेती के इन्तजाम के लिए निजाई मौजा में लाया गया। व उसके विपरीत मुसई वगैरह की तरफ से यहाँ बयान दिया गया कि घुरई अपने जीवन में दुखी व खेलावन को नाबालिगी की हालत में अपने मकान में ले आये थे। तथा मुसई वगैरह का दावा व उसके गवाहान का बयान एक दूसरे के विरोधी हैं। श्रीमती कर्मा ने अपने बयान में यह भी स्वीकार किया कि विवादित भूमि का लगान कभी नहीं दिया है। मुसई ने स्वयं अपने बयान में आराजी निजाई की चौहद्दी एवं उस पर बोई जाने वाली फसलों से अनाशिज्ञता जाहिर की है। तथा यह भी स्वीकार किया कि दुखी वगैरह घुरई के ही मकान में रहते हैं। वह स्वयं घुरई के मकान में नहीं रह या रही हैं तथा विवादित भूमि की लगान दुखी को देना बताया है। अतः मुसई वैगरह के बयानों से यह स्पष्ट है कि निजाई मौजे में कभी नहीं रहे और न विवादित भूमि पर उनका कब्जा दखल रहा।

मुसई निजाई मौजे के मुख्य नागरिक प्रधान ग्राम सभा को भी नहीं जानते हैं तथा यह भी स्वीकार किया कि इस ग्राम में कभी किसी को वोट नहीं दिया है अतः मुसई के स्वयं के बयानों से यह स्पष्ट हो जाता है कि निजाई मौजे के निवासी नहीं हैं और न विवादित भूमि पर उसका कभी कब्जा दखल रहा है। मुसई वगरहा ने अपने मूल दावे में यह दिखाया कि उसकी माता श्रीमती कर्मा अपने ससुराल में रहती थी तथा लड़का बाहर बगरज रोज रहता था। दुखी वगैरह को आराजी निजाई की देख भाल करने के लिए निजाई मौजा में घुरई के मकान में रख लिया था इस लिए दुखी वगैरह ने आराजी निजाई पर अपना नाम बतौर वारिस दर्ज करा लिया। जब कि दुखी वगैरह घुरई के लड़के नहीं है। मुसई के उपरोक्त आरोप निराधार एवं असत्य प्रतीत होते हैं जब कि वह स्वयं बालिग रहा तथा अपनी जायदादें दीगर शख्स को (विवादित भूमि की) देखभाल करने के लिए देने का कोई औचित्य प्रतीत नहीं होता है।

<u>उपरोक्त विवेचन के आधार पर श्रीमती कर्मा घुरई की लड़की साबित नहीं है तथा दुखी व खेलावन घुरई के लड़के साबित हैं।"</u>

21. After holding that Dukhi and Khelawan are sons of Ghurai, the Settlement Officer of Consolidation proceeded to consider the case of the present petitioners/appellants and after considering the evidence as also Para 80,

102-C of U.P. Land Record Manual and the provisions pertaining to PA-10, Settlement Officer of Consolidation in its order dated 25.09.1978, impugned herein, observed that based upon the entry in the Khatuani in absence of PA-10, the possession of the property can not be considered to be valid possession so far as the plea of adverse possession is concerned. The relevant portion of the same reads as under:-

"गाटा संख्या 301/1, 0-4-16, व 323/1, 0-3-13, व 332/1, 0-3-0, 362/1 0-1-17, 373/2, 0-3-12, 537/2, 0-3-0 पर सुभई व छविनाथ का पड़ताली कब्जा दर्ज है। विद्वान चकबन्दी अधिकारी स्तर पर सुभई वगैरह को गासिबाना कब्जे के आधार पर सीरदारी माना गया। इसके भी विरुद्ध दुखी वगैरह ने अपील दायर की है अपनी अपील में विद्वान चकबन्दी अधिकारी के आदेश को निरस्त करने के विवरण दे दिये हैं।

मुसई वगैरह ने कोई अपील प्रस्तुत नहीं किया। दुखी वगैरह की तरफ से यह तर्क पेश किया गया कि आराजी निजाई के हड़पने के लिए व अपीलान्टस के पेरशान करने की गरज से मुसई वगैरह ने सुंभई वगैरह को अपनी संजिश में करके कब्जे का फरजी इन्द्राज करा कर मुकदमा दायर कराया।

इसलिए विद्वान चकबन्दी अधिकारी द्वारा सुभई वगैरह को वरासत में दर्ज करने के बावजूद मुसई वगैरह ने कोई अपील दायर नहीं की उपरोक्त आरोपों का भली-भाँति अवलोकन करने से यह बखूबी स्पष्ट हो जाता है कि मुसई वगैरह व सुभई वगैरहा को अपनी साजिश में करके मुकदमा लड़ा रहे हैं। जैसा कि वजह है कि मुसई वगैरह अपनी कथित नामा का जायदाद पर सुभई वगैरहा के खिलाफ अपील प्रस्तुत नहीं की।

सुंभई वगैरह ने विवादित भूमि पर अपना कब्जा साबित करने के लिए नकल खसरा 1359 फ० पेश किया है जिसमें गाटा संख्या 301/2, 0-3-1, 352/3 0-3-0, व 537/2 0-3-0 पर मारफत सहदेव वगैरह का नाम खाना कैफियत पर दर्ज है। नकल खसरा 1386 फ० लगायत 1370 फ० पेश किया है जिसमें मौजूदा आराजी निजाई पर सहदेव के कब्जे का इन्द्राज लेखपाल की दिनचर्या मय दिनांक के गाटा संख्या 373/2, को छोड़ कर शेष नम्बरान पर कब्जे का इन्द्राज है। 1367 फ० में सहदेव के नाम कब्जे के इन्द्राज व 1368 फ० लगायत 1376 फ० सहदेव के नाम श्रेणी 9 का इन्द्राज है। सहदेव ने नकल खतौनी 1378 लगायत 1379 फ० हिस्सा दोयम पेश किया जिसमें आराजी निजाई पर सहदेव पुत्र बिहारी का नाम श्रेणी-9 में इन्द्राज है उपरोक्त कब्जे के इन्द्राज की लैंड रिकार्ड मैनुअल के पैरा ए-80 व 102 - सी के तहत नहीं है जानकारी असत्य काश्तकारान का कब्जा के इन्द्राज है।

जरिये प०क० 10 बजाये खास नहीं कराई गयी। इस प्रकार गैर कानूनी कब्जे के इन्द्राज से सुभई वगैरह को कोई कानूनी बल नहीं मिलता है कब्जे के इन्द्राज की जानकारी असल काश्त करान के बजाय खस कराना आवश्यक होता है। यदि कब्जे के गैर कानूनी इन्द्राज गैर कानूनी है। तथा असल काश्त कार को कब्जे की जानकारी जरिये प० क० 10 बजाये खास नहीं कराया गया। ऐसी स्थिति में कितने की लम्बी अवधि के कब्जे के इन्द्राज क्यों न ही फिर भी काबिजदार को कोई कानूनी बल नहीं मिल सकता और न ही ऐसे कब्जे के इन्द्राज से सीरदारी का हक ही साबित होता है।

अतः उपरोक्त विवेचन के आधार पर मुसई वगैरह द्वारा प्रस्तुत अपील बावत गाटा संख्या 323 व 353 खारिज की गयी व दुखी वगैरह द्वारा प्रस्तुत स्वीकार की गयी। विद्वान चकबन्दी अधिकारी द्वारा पारित आदेश दिनांक 19-11-77 निरस्त करके खाता निजाई 162 की सम्पूर्ण भूमि पर दुखी वगैरह का नाम पूर्ववत कायम हो। वाद अमल दरामद पत्रावली दाखिल दफ्तर हो।"

22. After observing/holding aforesaid, the Assistant Settlement Officer of Consolidation dismissed the appeal of Musai & Others and allowed the appeal of Dukhi and Others and set aside the order of Consolidation Officer, dated 19.11.1977.

23. Being aggrieved, the petitioners preferred the Revision No.896/764/630 under Section 48 of the Act of 1953, which was dismissed by the respondent No.1 vide order dated 27.03.1982.

24. A perusal of the facts indicated in the order dated 27.03.1982, which have not been refuted by the petitioners by filing the copy of the memo of revision, it is apparent that before the Revisional Authority the petitioners did not take plea related to the finding of the Assistant Settlement Officer of Consolidation, according to which, Dukhi and Khelawan were held as sons of Ghurai. On other hand, it appears that plea of adverse possession was taken to claim their rights over the land of Khata No.162. The revisional authority, after observing that there is no evidence on record from which it can be deduced that the notice (PA-10) was served on the main tenants, held that the claim of revisionist(s)/petitioners is not sustainable and thereafter dismissed the revision vide order dated 27.03.1982. The relevant portion of the same reads as under:-

"Learned counsels for the parties were heard and the records were perused carefully. Revisionists set up two cases. Their first case was that their father was in virtual occupation of the land in 1356 F 1359 F and that on the basis of above entries, they became Sirdar from Adhivasi after the abolition of Zamindari. Alternatively they pleased in their second case tht they have perfected their title on the basis of adverse possession. With regard to the first case, the revisionists have filed extract of Khasra for 1359 F in which their father Sahdeva is recorded in remarks column as Marfat Sahdeva. No other evidence is there on the record in this aspect. AS opposed to it, Dukhi and others have filed extracts of Khatauni for 1356F and 1359F. These pieces of evidence show that they are recorded in class 4 in these years over the disputed land. In addition to this, they have filed rent receipts in supports of their case. Musai etc. too have admitted in their statements that Dukhi etc. are in possession over the land. In view of this there does not appear to be any force in the first case of the revisionists. As regards the case of adverse possession, revisionists have filed extracts of Khasra for 1366F to 1367F and again from 1368F and 1379F and 1379F. In 1366F and 1367 F, Sahdeva is recorded qubiz with date diary and PA-10 over plot No.373/2 and qubiz over other plots. Same is the position in 1367 F. There after he is recorded under clause 9 upto 1379F. Lower appellate Court has said that these entries are not in accordance with the provisions Land Record Manual. Revisionists have not brought on record any piece of evidence to show that PA-10 was ever served on the main tenant. So these entries will certainly not be termed to be regular. Another important circumstances in this respect leads me to conclude that the revisionists have not come, with clear hands in this court. Musai etc. directed their appeal against Dukhi etc. but not against Sabhai etc. for reasons best known to them. Lower appellate court seems to be correct in holding that Musai etc. are in collusion with Sabhai etc. to grab the disputed land one way or the other. In view of these findings, I do not find any force in this revision."

25. In the aforesaid background of the case, present petition has been filed challenging the order(s) dated 25.09.1978 and 27.03.1982.

26. The submission of the learned counsel for the petitioners can be summarized in following manner:-

(i) Dukhi and Khelawan were not the sons of Ghurai, as such, their claim was unsustainable before the authorities under the Act of 1953.

(ii) The entries made in copies of Khasra and Khatauni filed by the petitioners before the Consolidation Officer indicates and proves that the petitioners were in possession of the land recorded in Khata No.162 as these documents bear particulars related to Form PA-10 i.e. diary number, date and serial number and as such, it was established before the authorities under the Act of 1953 that the petitioners were in possession as Sirdar and being so the rejection of claim by the Assistant Settlement Officer of Consolidation and the revisional authority i.e. Deputy Director of Consolidation is unsustainable.

(iii) The proper issue to prove the adverse possession was not framed by the Consolidation Officer, as such, Assistant Settlement Officer of Consolidation and/or Deputy Director of Consolidation, if was of the opinion that the petitioners failed to prove adverse possession, then, the matter should have been remanded back to the Consolidation Officer for deciding the matter afresh after framing proper issue with regard to plea of adverse possession.

(iv) The averments regarding possession over the property specifically indicated in the present petition has not been refuted, as such, the same should be treated as admitted and based upon the same, interference in the impugned order be made.

(v) The Assistant Settlement Officer of Consolidation and Deputy Director of Consolidation completely discarded the oral evidence adduced by the petitioners, which was duly considered by the Consolidation Officer and based upon the same, the Consolidation Officer passed the order favourable to the petitioners.

(vi) The Assistant Settlement Officer of Consolidation and Deputy Director of Consolidation failed to consider the oral evidence related to the issue of adverse possession and it is settled law that adverse possession can be proved by adducing oral as also documentary evidence.

27. Sri Shachindra Dwivedi, learned counsel appearing on behalf of opposite party Nos.6 to 9 and Sri Hemant Kumar Pandey, learned counsel for the State submitted as under:-

(i) In the instant case, the findings recorded by the authorities under the Act of 1953 are to be looked into on the basis of records available and being so the submission of the learned counsel for the petitioners that un-rebutted averments made in this petition should be taken as true is completely fallacious.

(ii) It is settled law that plaintiff can succeed only on the strength of his own case and he can not succeed on the weaknesses of the defense. Further, even ex-parte proceedings or if the Court proceeds to decide the matter under Order 8 Rule 10 of C.P.C., the duty is cast upon to plaintiff to prove his case. The plaintiff has to prove his case by adducing the evidence and only then the Court would pass the decree in favour of the plaintiff. In absence of proper evidence, the Court would dismiss the case.

(iii) In the instant case, challenging the order(s) of the authorities under the Act of 1953 the petitioners have to satisfy on the basis of pleadings and material available on record that the findings recorded by the authorities under the Act of 1953 are completely perverse. For showing perversity, the petitioners have to indicate the relevant pleadings and evidence related to the same, as such, the submission of learned counsel for the petitioners that un-controverted averments in the petition be taken as true and the judgment be set aside is completely fallacious and unsustainable in the eye of law.

(iv) The finding of Assistant Settlement Officer of Consolidation which is to the effect that the Dukhi and Khelawan are sons of Ghurai was not assailed by the petitioners in the revision before the Deputy Director of Consolidation, as such, they are estopped from challenging this finding, at this stage, under writ jurisdiction.

(v) The name of Dukhi and legal heirs of Khelawan was there in the revenue record of basic year of Khata No.162 and the petitioners were before the authorities under the Act of 1953 claimed their right over the same based upon the plea of adverse possession, as such, petitioners were under obligation to prove their case beyond doubt as per law which is required to get a favourable order based upon the plea of adverse possession.

(vi) To prove the adverse possession in these proceedings, the law has already been settled. The adverse possession in these proceedings can be proved, as per law by proving the facts that notice (PA-10), as per the mode and manner prescribed, was duly served upon the concerned, who, in the present case, were Dukhi and Khelawan or his legal heir and this burden was not dischraged by the petitioners before the Consolidation Officer and accordingly, the Assistant Settlement Officer of Consolidation interfered in the order which was subsequently affirmed by the Deputy Director of Consolidation.

(vii) At this stage, Shri Tiwari, learned counsel for the petitioners stated that in fact, the petitioners were in possession over the property, in issue, i.e. property indicated in Khata No. 162 and no suit for eviction against the petitioners was filed as per law by the person aggrieved and this aspect was also not taken note of by the authorities who passed the impugned orders. In this regard, he has referred Section 180(2) of U.P. Tenancy Act, 1939 (in short "Act of 1939).

(viii) Opposing the above contention based upon the Section 180(2) of Act, 1939, learned counsel for side-opposite says that the case of the petitioners was based upon the doctrine of adverse possession and as such, the petitioners were required to prove their case by placing appropriate evidence as per law which was not placed.

(ix) To prove the facts pertaining to PA-10, the petitioners were required to place on record PA-10 as also oral evidence of the official concerned to prove the fact that the notice/P.A.-10, as per mode and manner prescribed, was duly served upon the recorded persons and in the instant case, no revenue official was produced as a witness and the case of the petitioners is only based upon the entries in the Khasra and Khatauni which are not sufficient evidence so as to come to the conclusion that the petitioners were in possession of the property indicated in Khata No. 162.

(x) The Assistant Settlement Officer of Consolidation and Deputy Director of Consolidation rightly held that the petitioners have failed to prove the plea of adverse possession and it is for the reason that PA-10 was not produced.

(xi) The petitioners were required to prove the entries on the Khasra and Khatauni placed by them before the Consolidation Officer by appropriate witnesses and in the instant case, the concerned revenue official was not produced before the Consolidation Officer to prove the entries over the said documents related to PA-10. Thus, findings recorded by the authorities under the Act of 1953 are justified and proper.

(xii) The Consolidation Officer while deciding the objections framed proper issues particularly Issue Nos. 1 and 2 and according to these issues the petitioners were under obligation to prove the possession over the land in issue which can be proved only by way of producing proper evidence related to PA-10 and concerned revenue official, however, the same was not done by the petitioners.

(xiii) In view of aforesaid, the petition is liable to be dismissed having no merits.

28. Learned counsel for the petitioners has placed reliance on the following judgments:-

(i) In the case of **Shashi Prabha vs. Dy. Director Of Consolidation Budaun And 3 Others; 2020 SCC OnLine All 636;** this Court observed as under:-

"22. In A.V. Papayya Sastry v. Govt. of A.P., reported in (2007) 4 SCC 221, the Supreme Court was pleased to held that if any judgement or order is obtained by fraud it cannot be said to be a judgement or order.

The relevant portion of the aforesaid judgement is quoted below :-

"19. Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed;"

Fraud avoids all judicial acts, ecclesiastical or temporal."

(ii) Relevant paras of order passed by Board of Revenue, U.P., in the case of **Hazari vs. Mathura; 1991 SCC OnLine BoR (UP) 27; 1992 RD 79**; are as under:-

*"**5.** I have heard the learned counsel for the parties. Sri N.K. Saxena, learned counsel for the appellant has contended that the entry made in class 9 is not in accordance with law and para A-80 and A-81 of the Land Records Manual. His second submission is that the court below has not considered the oral evidence and this failure on the part of the court below is sufficient enough to set aside its order. Sri R.K. Yadav, learned counsel for the respondent has submitted that there was no provision for the issuance of PA-10 from 1958 to 1965 and that the respondent was in continuance possession from 1369 to 1381-F. The appellant had full knowledge of the respondent's possession over the land in dispute and that Shiv Prasad son of the appellant used to issue receipts to the respondents in token of receiving the rent and so the plaintiff's right of asami, if any, has been extinguished.*

***6**. I have carefully considered the arguments advanced before me and have also perused the record. The learned Additional Commissioner has allowed the appeal on the ground that the possession of the respondent is proved from the fact that he got constructed a bandhi on the land in dispute and that the respondent used to pay rent regularly. He did not appear to have had attached any importance to the issuance of PA-10 on the ground that the plaintiff had knowledge about the possession of the respondent and the entry made in class 9 was fictitious. In the Khatauni 1366-68F, the appellant Hazari is*

recorded as asami in class 3 and the respondent Gopal in class 9. In the Khasra 1369-80F, Gopal is recorded in class 9 against the plot in dispute. Similar entry has been made in khasra 1381-88F. However, there is no reference of issuance of PA-10 or PA-24. Shiv Prasad, son of the appellant Hazari issued rent receipts to the respondent on 3.7.69, 3.3.75, 28.9.70 and 28.12.77 in token of having received the rent. These documents are sufficient to prove that the respondent was in possession of the plot in dispute. The rent receipt dated 17.9.68, 3.3.69, 18.5.75, 26.8.67, 18.1.71 and 3.9.75 and 13.12.78 go to show that he used to pay rent to the Government. The respondent has also filed form 17 issued by the Department of Soil Conservation. In this form, the respondent Gopal is shown as beneficiary of the Bandhi to be constructed on plot No. 178, 185 and 249/7. Krishna Kumar Purohit, Accountant of the Soil Conservation Department appeared in the witness box and deposed that the bandhi was constructed by the department on plot No. 178, 185 and 249/7. He further deposed that the amount incurred in the construction was also got deposited from Gopal. The appellant has also filed form 12 issued by the Soil Conservation Department. This is a notice issued to the plaintiff Hazari for the construction of bandhi over so many plots including plot No. 178. It is apparent from this document that the actual beneficiary of the bandhi was the respondent who paid the costs of construction. These documents strengthened the case of the respondent that he was in actual possession and that he was not a rank trespasser."

(iii) In the judgment passed in **Writ Petition No. 2141 (Consolidation) of 1981 (Heshamullah And Others vs. Chakbandi, Pratapgarh And Others The U.P. Sanchalak);** this Court held as under:-

"Most importantly the D.D.C. has been persuaded by the fact that the entry in the revenue record pertaining to 1375F allegedly for the first time in favour of Abdul Majid was not in accordance with the Land Record Manual as the requisite diary number at P.A.10 entry are not mentioned nor the process prescribed under the Rules had been followed, but, he failed to appreciate the fact that if the name of Abdul Majid was existing as a Class9 entry in Khasra 1363F then at that time the provisions contained in paragraph A-80 and A-81 of Chapter A-V of the Land Records Manual had not come into force and were inserted only subsequently vide notification dated 18.1.1958 nor did he consider as to what would be the effect of this aspect of the matter if there was a Khasra of 1363 F on record with a Class9 entry in favour of petitioner's father Abdul Majid."

(iv) In the case of **Mangu vs. D.D.C & Others; 2010 SCC OnLine ALL 3233**, this Court observed as under:-

"I have very carefully gone through the orders passed by the respondent nos. 2 and 3 but 1 find that that although the respondent nos. 2 and 1 have given good reasons for holding khasra entries could not be relied upon as they were not made in accordance with the provisions of Land Record Manual and without issuing notice of P.A. form 10, neither the Settlement Officer Consolidation nor the Deputy Director Consolidation after recording the above finding examined the oral evidence adduced by the petitioner. In Shiva Nandan Vs. Board of Revenue. U.P. 1980 R.D. (73) it has been held that the adverse possession can be proved by documentary evidence or by oral evidence. In Ram Naresh Vs. Deputy Director Consolidation 1978 R.D.

118, it has been held that oral evidence of possession can not be ignored particularly while reversing a finding. In 2007 (102) RD 240 Bhaua Vs. Deputy Director of Consolidation, Banda and others this court again held that the revisional court could not have ignored the oral evidence supporting possession for more than 30 years. In 2007 (102) RD 101 Birju Vs. Deputy Director of Consolidation Gorkahpur and others, this court again took a similar view. Thus law is settled that the adverse possession can be proved by both oral as well as documentary evidence and in case this is not done the order ignoring the oral evidence particularly when reversing a finding can not be sustained. A perusal of the order of the Consolidation Officer shows that while holding the claim of 11 the petitioner over the land in dispute on the basis of adverse possession he had relied upon documentary as well as oral evidence. But the respondent No. 2 totally failed to take into consideration the oral evidence of the petitioner while reversing the finding recorded by the Consolidation Officer in his order holding that petitioner had perfected his title over the land in dispute on the basis of adverse possession.

The failure of the respondent No. 1 to rectify the error committed by respondent No. 2 has vitiated the order of respondent No. 2 also."

(v) In the case of **Bramhanand Rai And Anr. vs. Dy. Director Of Consolidation, Ghazipur & Others; 1986 SCC OnLine ALL 84**, this Court observed as under:-

"The petitioners had led both oral as well as documentary evidence in support of their claim that they have been in continuous possession of the land in dispute ever since the execution of lease by Mahadeo Rai in their favour on 27-5-1950, but none of the three consolidation authorities have considered evidence of the petitioners which was of great evidentiary value."

(vi) In the case of **Azadar Hussain Khan And Others vs. Deputy Director Of Consolidation, Faizabad And Others; 2021 SCC OnLine All 580**, this Court observed as under:-

24. This court, in the case of Pramod Kumar Chaturvedi Versus State of U.P. and others (Supra), has held that when the counter affidavit was not filed, it is axiomatic that the respondents no. 4 has nothing to say against the allegations and therefore the averments, by reason of remaining uncontroverted have to be treated as correct in view of law laid down by the Apex Court in its decision reported in AIR 1973 SC 627, 1982 SCC (2) 471 and 1987 SCR (4) 73.

25. In view of above since no counter affidavit has been filed by the opposite party no.3, the allegations made in the writ petition are uncontroverted and it can be safely presumed that the allegations made in the writ petition are true otherwise it would have been rebutted by the other side.

29. Learned counsel for the side opposite placed reliance on the following judgments:-

(i) In the case of **Gurmukh Singh and Ors. vs. Dy. Director of Consolidation/A.D.M. (F. and R.) and others; 1996 SCC OnLine All 823**, this Court held as under:-

"5. It is clear from para 102-C of the Land Records Manual that the entries will

have no evidenciary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correct- ness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is claiming adverse possession against the recorded tenure holder and he de- nies that he had not received any P.A. 10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure holder was duly given notice in prescribed form P.A. 10. Para A-81 itself provides that the notice will be given by the Lekhpal and he will obtain the signature of the Chairman, Land Management Committee as well as from the recorded tenure holder. It is also otherwise necessary to be provided by the person claiming adverse possession. The law of adverse possession contemplates that there is not only continuity of possession as against the true owner but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a person comes in possession of the land of another person, he cannot establish his title by adverse possession unless it is further proved by him that the tenure holder had knowledge of such ad- verse possession."

(ii) In the case of **Jamuna Prasad vs. The Deputy Director of Consolidation and Ors.; 1980 SCC OnLine All 569**, this Court held as under:-

"6. Learned counsel for the petitioner argued that there was a presumption of correctness about the entries in the revenue records and the onus lay on the respondents to prove that the entries showing the petitioner's possession had not been made in accordance with law. This contention is untenable. First- ly, it is not possible for a party to prove a negative fact. Secondly, the question as to whether a notice in the form of P.A. 10 was issued and served on the pe- titioner also is a fact which was within his exclusive knowledge. A perusal of Paragraphs A-80 and A-81 of the Land Record Manual would show that P.A. 10 has to be issued to the chief tenant, the sub- tenant as well as persons in actu- al possession as contemplated by columns 3, 4 and 5 respectively of Form P.A. 10. Paragraph A-81 provides that the Lekhpal shall fill in first five column and hand over a copy of the list to the Chairman of the land management commit-tee. He shall also prepare extracts from the list and issue to the person or per- sons recorded in columns 3, 4 and 5 thereof and obtain their signatures on the copy of the list retained by him. In the instant case the petitioner could have easily produced the extracts of the entries in P.A. 10 served on him. No attempt was made to file the same and the presumption must be drawn that such extract was not served on the petitioner. Further, Paragraph A-80 of the Land Record Manual provides that a copy of the entry should be communicat-ed to the Pradhan of Goan Sabha or Gaon Panchayat and signature for receipt of the copy should also be obtained. There is no evidence on the record to prove compliance of these provisions. The petitioner has not been able to ex-plain as to why he failed to examine such evidence. The matter is also clinched by the admission of the petitioner's own witness, namely, Ram Gopal in cross- examination that P.A. 10 with regard to the petitioner's possession was not issued."

(iii) In the case of **Balchan and Ors. Versus Dy. Director of Consolidation**

Mau and 2 Ors.; 2015 SCC OnLine All 1080, this Court observed as under:-

"10. Second claim was that they were in adverse possession over the land in dispute for more than statutory period as such had become sirdar under Section 210 of U.P. Act No. 1 of 1951. First document, khatauni 1367 F was filed to prove adverse possession, after date of vesting, which contains an amaldaramad of the order of Su- pervisor Kanoongo dated 13.11.1959, recording the names of the petitioners in column-9. Paragraph-A-81-A of U.P. Land Records Manual requires to issue/serve notice in PA-10 to land holder and Chairman of Land Manage- ment Committee. There is no evidence to prove that before making entry in column-9, procedure as given un- der Paragraph-A-81-A of U.P. Land Records Manual was followed. This Court in Jamuna Prasad v. DDC, 1981 RD 112 and Gurumukh Singh v. DDC, 1997 RD 276 and in several judgments have held that if PA-10 was not issued to land holder and Chairman of Land Management Committee, before recording possession of third person, then such entry has no evidentiary value. Thus respondents-1 and 2 have not committed any illegality in ignoring these documents."

(iv) This Court in the case of **Mata Badal Singh And Others vs. District Deputy Director Of Consolidation/Collector And Others; 2015 SCC Online All 7855** held as under:-

"8. In reply to the aforesaid arguments, the counsel for the respondent submitted that it is incorrect to say that possession over transferred land was not delivered to Ghirau at the time of sale deed dated 09.08.1966. The father of the petitioners was not in actual possession rather a forged entry has been made in his favour in column-9 of the khatauni. When Ghirau filed application for mutation of his name on the basis of sale deed, a report dated 17.01.1968, relating to column-9 entry of Hanuman, was submitted by Naib Tahsildar. After hearing the parties, Tahsildar found Ghirau was in possession and allowed the mutation application as while deciding mutation application, he was required to decide possession according to provisions of Section 40 of U.P. Land Revenue, Act, 1901. Hanuman lost mutation case up to Board of Revenue, U.P. finally in 1973. In compliance of mutation order, column-9 entry of khatauni was expunged. Even if revenue record up to 1383 F was burnt, entries of column-9 prior to it, are not relevant as it has corrected by judicial order by Revenue Court in mutation proceeding. In basic consolidation record, i.e. 1388 F, name of Ghirau was recorded in revenue record and there was no entry of the names of the petitioners in column-9. The petitioners filed objection, claiming their right on the basis of possession as such burden of proof was upon them to prove that they had perfected their right over the land in dispute. They failed to prove their possession over the land in dispute. So far judgment of District Judge dated 12.12.1978 is concerned, it has not become final and First Appeal filed by Ghirau was dismissed in default in which restoration application has been filed, which is pending. He relied upon judgment of Board of Revenue, U.P. in Mangal Vs. Prem Lal, 2002 (93) RD 29 and this Court in Balchan Vs. DDC and others, 2015 (128) RD 320, in which it has been held that issue/service of PA-10 on the land holder and Chairman, Land Management Committee before recording possession of any person in column-9 is mandatory and in the absence

of service of PA-10, entry has no evidenciary value. Adverse possession has been deprecated by Supreme Court in Hemaji Waghaji Jat BhikhabaiKhengarbhai Harijan, AIR 2009 SC 103 and State of Haryana Vs. Mukesh Kumar, (2011) 10 SCC 404. Judgment of this Court in Shambhoo Vs. DDC and others, 2015 (126) RD 784, in which it was held that it is obligatory on part of the person to plead and prove his adverse possession."

(v) In the case of **Ram Naresh Misra vs. Sita Ram and Ors.; 2021 SCC OnLine All 425**, this Court held as under:-

"16. Reading of the aforesaid provisions makes it clear that if any entry is made in PA- 10, the same shall be communicated to the person or persons concerned recorded in columns 3 and 4 or their heirs and obtain their signatures. Records on being submitted to the Revenue Inspector, he shall ensure at the time of Padtal i.e. verification of the village that it has been issued in all the cases and the signatures obtained by the recipients. Therefore, in case, any entry made on the basis of adverse possession the same was to be communicated to the person concerned and the person claiming is required to prove that it was in accordance with the manual and as to what was nature of possession and when it started in the knowledge of the tenant and the possession was continuous and how long it continued.

17. This Court considered this issue in the case of Mohd. Raza Vs. Deputy Director of Consolidation and Another; R.D. 1997 (R.D.) 276 and held that the entries in the revenue papers not prepared by following the procedure prescribed under the Uttar Pradesh Land Records Manual and PA-10 notice was not served on the main tenant, such entries are of no evidentiary value and would not confer any right.

18. This court, in the case of Gurumukh Singh and Others Vs. Deputy Director of Nainital and Others; MANU/UP/1544/1996: 1997 (80) RD 276, has alsc held that the entries will have no evidentiary value if they are not in accordance with the provisions of Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession. Relevant paragraphs 6 and 7 are extracted below:-

"6. It is clear from Para A-102C of the Land Records Manual that the entries will have no evidentiary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is claiming adverse possession against the recorded tenure-holder and he denies that he had not received any P.A. 10 or he had no knowledge of the entries made in the revenue the burden of proof is further upon the person claiming adverse possession to prove that the tenure-holder was duly given notice in prescribed Form P.A. 10. Para A-81 itself provides that the notice will be given by the Lekhpal and he will obtain the signature of the Chairman, Land Management Committee as well as from the recorded tenure-holder. It is also otherwise necessary to be provided by the person claiming adverse possession. The law of adverse possession contemplates that there is not only continuity of possession as against the true owner but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a

person comes in possession of the land of another person, he cannot establish his title by adverse possession unless it is further proved by him that the tenure holder had knowledge of such adverse possession."

20. This Court, in the cases of Babu Lal Vs. Deputy Director of Consolidation (Supra), Balchan and two Others Vs. Deputy Director of Consolidation and Others (Supra), Chandi Prasad (Dead) Through L.Rs. Vs. Deputy Director of Consolidation and Others (Supra), Shiv Mangal Lal Vs. Deputy Director of Consolidation and Other (Supra) and Shri Nath Vs. Deputy Director of Consolidation (Supra), has consistently held that if an entry has been made in column-9 of the Khatauni without issuing and service of PA-10 on the recorded tenure holder then such an entry was illegal and has no evidentiary value. It has further been held that the burden to prove that PA-10 was issued and served on the tenure holder is lying upon the person relying on the column-9."

(vi) In the case of **Indrapal Singh vs. The Deputy Director of Consolidation, Kheri and Ors.; 2019 SCC OnLine All 4553**, this Court observed as under:-

"29. A party laying his claim on the basis of adverse possession in some property has to prove as to the date, time and manner in which possession is converted into open, hostile and adverse. In the case of Marwari Kumhar and others vs. Bhagwanpuri Guru Ganeshpuri and another, reported in [MANU/SC/0501/2000: (2000) 6 SCC 735], Hon'ble Supreme Court has held that in absence of any proof as to the date, time and the manner in which possession gets converted into open, hostile and adverse, the claim for adverse possession can not be upheld.

30. Thus, Court in its latest judgment in the case of Ishwarchand vs. Board of Revenue U.P. at Allahabad and others, reported in [MANU/UP/0938/2019: 2019 (142) RD 676] has, in paragraph 17 observed as under:"17. In my considered opinion, this argument cannot be accepted because possession can also be permissive. Till such time, it is proved that the Lekhpal had made the entry under Class 9 strictly in accordance with the provisions of the Land Records Manual and thereafter, a notice was sent to the recorded tenure holder in PA-10, no claim for adverse possession, could have been decreed."

(vii) In the case of **Sattan and Ors. vs. D.D.C. and Ors.; 2017 SCC OnLine All 1829**, this Court held as under:-

"10. Now, the claim of the petitioners based on adverse possession has to be examined. The petitioners have filed khasra 1369 F, 1377 F, 1380 F, 1385 F, khatauni 1365 F, 1385 F, 1396 F, revenue receipts, irrigation pass- book and examined Sattan, Chhotu, Chandrika, Deocharan and Bholanath as the witnesses. On its basis, they tried to prove that they were in possession of disputed land of two villages from 1365 F and 1369 F according to their share and 1/6 share each. This Court in Jamuna Prasad v. DDC, 1981 RD 112, Gaya Ram v. DDC, 1982 RD 1, Ram Shakal v. DDC, 1987 (2) AWC 878, Gurumukh Singh v. DDC, 1997 RD 276 and Hasan Raza v. DDC, 2006 (101) RD 10, held that in order to rely upon khasra or khatauni entry in column-9, for possession burden is upon the person relying upon it to prove that entry was made after following the procedure of U.P. Land Record Manual. Paragraph-102-C, whereof requires issue/service of PA-10 to the recorded tenure holder and chairman of

Land Management Committee and order of Supervisor Kanoongo. Deputy Director of Consolidation has recorded findings that entries were not made by the order of competent authority in the khasra and khatauni. Further there is no evidence to prove that before making entry PA-10 was issued/serviced upon recorded tenure holder and chairman of Land Management Committee. There is no evidence that these entries were continuous entries for statutory period to acquire right under Section 210 of U.P. Act No. 1 of 1951. So far as oral evidence is con- cerned, Sattan and Chhotu could not give plot numbers and other details of the land in their possession. Deputy Director of Consolidation found that Chhotu in his statement had claimed disputed land on the basis of adverse possession from a period of 22 years as such their claim that in family partition, they got share each in the disputed land was contradicted from his oral statement."

(viii) In the case of **Shambhoo and Others vs. Deputy Director of Consolidation, Faizabad and Another; 2014 SCC OnLine All 15517**, this Court observed as under:-

"76. In order to defeat title of a plaintiff on the ground of adverse possession it is obligatory on the part of the respondent to specifically plead and prove as to since when their possession came adverse. If it was permissive or obtained pursuant to some sort of arrangement, the plea of adverse possession would fail. In Md. Moham- mad Ali v. Jagadish Kalita, with reference to a case dealing with such an issue amongst co-sharers it was ob- served that long and continuos possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription."

30. Considered the aforesaid and perused the record as also the judgments referred above.

31. From the aforesaid, this Court finds that the case of the petitioners is based upon the plea of adverse possession and accordingly, the petitioners were required to prove the adverse possession, which can be deduced from the judgments referred above.

32. The plea that Dukhi and Khelawan were not sons of Ghurai, (original tenure holder) if be decided in favour of petitioners, even then in that eventuality the petitioners would not get the rights over the land in issue as for the rights over the land in issue, they have to prove the plea of adverse possession as such this Court is not inclined to delve into this aspect of the case. Moreover, the finding recorded by the Assistant Settlement Officer of Consolidation that Dukhi and Khelawan are sons of Ghurai was not assailed by the petitioners before the Deputy Director of Consolidation and now they are estopped from raising this plea directly before this Court.

33. Reverting to the plea of adverse possession, this Court finds from various pronouncements, referred above, that the burden of proof is upon the person claiming rights over the land on the basis of plea of adverse possession.

34. In the instant case, the claim of the petitioners is based upon the entries related to PA-10 in the Khasra and Khatauni.

35. With regard to entries in Khasra or Khatauni the settled view is that:-

(i) In order to rely upon khasra or khatauni entry in column-9, for possession burden is upon the person relying upon it to prove that entry was made after following the procedure of U.P. Land Records Manual. Paragraph-102-C, whereof requires issue/service of PA-10 to the recorded tenure holder and chairman of Land Management Committee.

(ii) If an entry has been made in column-9 of the Khatauni without issuing and service of PA-10 on the recorded tenure holder then such an entry was illegal and has no evidentiary value. The burden to prove that PA-10 was issued and served on the tenure holder is lying upon the person relying on the column-9.

(iii) The entries in the revenue papers not prepared by following the procedure prescribed under the U.P. Land Records Manual and PA-10 notice was not served on the main tenant, such entries are of no evidentiary value and would not confer any right.

(iv) The entries will have no evidentiary value if they are not in accordance with the provisions of U.P. Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession.

(v) Unless it is proved that the Lekhpal had made the entry under Column 9 strictly in accordance with the provisions of the U.P. Land Records Manual and thereafter, a notice was sent to the recorded tenure holder in P.A.-10, no claim for adverse possession, could have been decreed.

36. The statements recorded before the Consolidation Officer have not been brought on record, as such, this Court is unable to record any finding based upon said the statements that as to whether the petitioners had proved their case based upon the plea of adverse possession or not. Accordingly, this Court is only considering the orders passed by the authorities under the Act of 1953 namely Consolidation Officer, Assistant Settlement Officer of Consolidation and Deputy Director of Consolidation i.e. order(s) dated 29.11.1977, 25.09.1978 and 27.03.1982, respectively, for coming to the conclusion.

37. The Assistant Settlement Officer of Consolidation and Deputy Director of Consolidation based upon the material available on record including the evidence adduced by the parties declined to accept the plea of petitioners based upon the copies of Khasra and Khatauni after observing that these entries in the revenue record are not in accordance with provisions envisaged under U.P. Land Records Manual and also that the petitioners have not brought on record any peace of evidence to show that P.A.-10 was served on the tenant.

38. From the judgments referred above, it is apparent that the petitioners were under obligation to prove that the entries in the revenue record was made after following the mode and manner prescribed in U.P. Land Records Manual.

39. No document or evidence has been brought to the notice of this Court to show that the entries in the aforesaid Khasra and Khatauni were made after following mode and manner prescribed under U.P. Land Records Manual. Thus, this Court is of the view that petitioners have failed to prove the plea of adverse possession.

40. In regard to contention of learned counsel for the petitioners that proper

issues were not framed, this Court is of the view that the same is unsustainable in the light of Issue Nos.1 and 2 framed by the Consolidation Officer, indicated in Para 13 of this judgment.

41. In regard to plea that un-rebutted averments made in the petition regarding possession should be considered and the impugned orders be set aside, this Court is of the view that in the instant petition the findings recorded by the authorities under the Act of 1953 are to be considered on the basis of material available on record and the facts and evidence adduced by the parties before the authorities under the Act of 1953 and as such, the contention so raised is completely misconceived.

42. The contention of the learned counsel for the petitioners based upon Section 180(2) of the Act of 1939 is completely misconceived as in the instant petition the same has not been pleaded and also for the reason that the case of the petitioners is based upon the plea of adverse possession.

43. The decision of Board of Revenue in the case of **Hazari vs. Mathura (B.R.), 1991 SCC OnLine BoR (UP) 27; 1992 RD 79;** is not an authority on the question that where the person is claiming rights over the land on the basis of plea of adverse possession and relies upon the recorded entries, he is not to establish that the entries were made in accordance with the mode and manner prescribed under law. In the instant case, the claim of the petitioners based upon the plea of adverse possession was based upon the entries in Khasra and Khatauni, as such, they were required to prove the said entries and they failed to prove the same by adducing proper evidence.

44. Thus, for the reasons aforesaid, the findings recorded by the Assistant Settlement Officer of Consolidation and Deputy Director of Consolidation, according to which, the entries in Khasra and Khatauni produced by the petitioners were not made in the revenue record in terms of mode and manner prescribed in U.P. Land Records Manual and that no evidence was produced by the petitioners to prove that before making entries PA-10 was issued and served upon the recorded tenure holder and Land Management Committee, are justified.

45. Accordingly, this Court does not find any merit in this petition. It is accordingly **dismissed**. No order as to costs.

(2024) 1 ILRA 744
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.01.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-B No. 2306 of 1978

Ram Asrey & Ors. ...Petitioners
Versus
D.D.C. & Ors. ...Respondents

Counsel for the Petitioners:
U.S. Sahai, Uma Shankar Sahai

Counsel for the Respondent:
C.S.C., L.P. Misra, Surendra Sharma

Civil Law - U.P. Consolidation of Holdings Act, 1953 - Sections 19-A(2) - According to family settlement, descendants of Bandhau allotted land of Village Khandasara and descendants of Gopi allotted land of Village Chaupuria - Partition suit filed by Bandhau's descendants concerning Village Chaupuria,

decreed & anr. partition suit filed by petitioners concerning Village Khandasara, decreed - Khata No. 88 of Village Khandsara recorded in name of Bandhau, whose descendants are opposite parties - Petitioners, descendants of Gopi, asserted Khata No. 88 belonged to Bhairon - In objections, claimants claimed Khata No. 88 as joint family property, asserted entitlement to 1/4 share - Claimants belong to sixth generation, required to establish Bhairon's property never partitioned, for this purpose, required to prove from acquisition of property till filing of claim in consolidation proceedings, family of cousins and uncle remained joined, after death of original recorded tenure holder, eldest member's name recorded in revenue records, or that Bandhau was karta of family, failed to prove - As per settlement of Abhai Narain, considered by DDC while recording finding on partition, land of Bhairon partitioned - To controvert this, neither Abhai Narain's St.ment produced nor submissions advanced - St.ment of Patiram confirms partition - Further, claimants' suit for partition concerning land in Village Khandsara, excluding Khata No. 88, demonstrates land, including Khata No. 88 allotted to Bandhau's descendants, belonging to Bhairon partitioned, claimants accepted same, except regarding land in suit. (Para 30)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Rangammal Vs Kuppuswami, (2011) 12 SCC 220

2. Jai Narain Vs D.D.C., 1979 RD 198

3. Sheo Nath Vs D.D.C., 1983 RD 107

4. Jagdamba Singh Vs Dy. Director of Consolidation, 1984 SCC OnLine All 689 : 1985 All LJ 671, (Paras 14 to 29)

5. Sanehi & anr. Vs Deputy Director (Cons.) Faizabad & ors. 1985 All CJ 2306, (Paras 6, 7)

6. Bodh Raj Vs Joint Director of Consolidation, Faizabad, 1995 SCC OnLine All 614 : (1996) 27 ALR 98, (Para 12)

7. Bajrangi Vs Joint Director Cons. Raebareli reported in 2020 SCC OnLine All 2066 : (2020) 147 RD 683, (Paras 22 to 33)

8. Dropadi Devi Vs Shiv Chandra Dixit, 2020 SCC OnLine All 104, (Paras 51 to 55)

9. Bhagwat Sharan Vs Purushottam, (2020) 6 SCC 387 : 2020 SCC OnLine SC 348, (Paras 10 to 12)

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Case called out. No one appeared on behalf of private respondents to oppose this petition. The present petition is listed under the heading 'THESE CASES SHALL NOT BE ADJOURNED'. As such, this Court proceeded to hear the case finally.

2. Heard learned counsel for the petitioners and Sri Hemant Kumar Pandey, learned State counsel.

3. By means of this petition, the petitioners have challenged the order dated 21.05.1973 passed by Assistant Settlement Officer of Consolidation, District Sultanpur (hereinafter referred to as "ASOC") in Appeal Nos. 992 and 1974, which were filed under Section 11(1) of U.P. Consolidation of Holdings Act, 1953 (in short "Act of 1953"). The petitioners have also challenged the order dated 18.07.1978 passed by Deputy Director of Consolidation, District Sultanpur (hereinafter referred to as "DDC") in Revision Nos. 2645 and 2638, which were filed under Section 48 of the Act of 1953.

4. Before proceeding further, it would be apt to indicate here that earlier this petition was allowed vide order dated 20.10.2008. Thereafter, an application (C.M. Application No. 127124 of 2014) seeking recall of the order dated 20.10.2008 was filed alongwith an application (C.M. Application No. 127123 of 2014) for condonation of delay and this Court after taking note of the averments made in the

application(s), recalled the final order dated 20.10.2008 vide order dated 31.08.2017, which on reproduction reads as under:-

"C.M.Application No.127123 of 2014

Considering the statement of affidavit filed in support of the application, the application is allowed and the delay in filing the application for recall of order dated 20.10.2008 is condoned.

C.M.Application No.127124 of 2014

This is an application for recall of order dated 20.10.2008.

The learned counsel for the applicants/respondents has submitted that the opposite parties 3, 4, 5, 6 and 7 had already died and the applications for substitution of their legal heirs were pending, but it appears that those were escaped from mentioning to the court and this court proceeded to decide the matter finally against the dead persons vide order dated 20.10.2008.

Despite time provided to the petitioners, no objection has been filed. I have considered the aforesaid submissions and found it appropriate to recall the order dated 20.10.2008 and restore the writ petition to its original number.

Let a fresh notice be issued to the petitioners to decide the case afresh on merit."

5. Now reverting to the matter, the dispute in the present case relates to Khata No. 88 situated at Village Khandsara, Tehsil Kadipur, District Sultanpur. In regard to Khata No. 88, the original petitioner No. 1 namely Ram Asrey and Abhai Narain (father of original petitioner Nos. 2 & 3 namely Ram Pyarey and Radhey Shyam), both sons of Sahadeo (in short "claimants/objectors"), filed the objection under Section 9-A(2) of the Act of 1953. In this objection, the relief was also sought with regard to Deep Narain son of Sahadeo. It appears from the copy of order dated 21.06.1971 (Annexure No. 4 to this petition) passed by Consolidation Officer, Kadipur, Sultanpur (hereinafter referred to as "CO') in Case No. 848 that CO declared that Ram Asrey, Abhai Narain and Deep Narain are entitled to 1/4 share of Khata No. 88. The claim of claimants/objectors before the CO was to get share in land indicated in Khata No. 88. The claimants/objectors before the CO stated that it is a joint property and accordingly they are entitled to 1/4 share of the same, as is apparent from para 4 and 5 of the objections (Annexure No. 1 to this petition), which are extracted hereunder:-

"धारा 4- यह कि बाद भूमि में आपत्ति कर्ता का 1/4 भाग है व इस हद तक आपत्ति कर्ता तथा दि० प०नं० 7बाद भूमि पर अधिकृत है।

धारा 5- यह कि दीप नरायन आपत्ति कर्ता के रूप में नही सम्मिलित हो सके हैं अतः उन्हें दि०प०नं० 7 बनाया जाता है। आपत्ति पत्र उनके भी हित में प्रस्तुत किया जा रहा है। अतः प्रार्थना है कि बाद भूमि के 1/4 भाग को मालियत आपत्ति कर्ता तथा दि०प०नं० 7 को दी जाये।"

6. The claim of above named claimants/objectors was opposed by Ram Abhilakh and others. In the reply to the objections under Section 9-A(2) of the Act of 1953, Ram Abhilakh and others stated that Gopi and Bandhau, sons of Bhairon, were living separately. Gopi was the elder brother and hence the entry with regard to Bandhau cannot be looked into in representative capacity. The branch of Gopi

has been out of possession and hence their claims have been extinguished.

7. The CO decided the objection on 21.06.1971 in favour of above named claimants/objectors holding that partition never took place and provided 1/4 share in Khata No. 88 to the objectors.

8. Being aggrieved, theAppeal Nos. 992 and 1974 were filed broadly on the fact that partition took place earlier, as such, the claimants/objectors were not having right over the land indicated in Khata No. 88. The appellate authority/ASOC allowed the appeals vide order dated 21.05.1973 and interfered in the order passed by CO dated 21.06.1971. The relevant portion of the order passed by ASOC dated 21.05.1973 on reproduction reads as under:-

"विवादित खाता के नम्बरान पर अपीलकर्ता गण के पूर्वजों का नाम अंकित है। यदि खाते के दो चार नम्बरान पर सह पूर्वज का नाम दर्ज सिद्ध हो तो जायदाद सह पूर्वज के समय की नहीं समझी जा सकती है। क्योंकि उस समय से व नम्बरान उसी दशा में दर्ज नहीं चले आ रहे हैं विपक्षीगण द्वारा प्रदिष्ट की गयी 1868 की रूलिंग इस मुकदमे में लागू नहीं होगी। क्योंकि विपक्षी द्वारा यह साबित नहीं किया गया है कि विवादित भूमि जब ली गई उस समय यह लोग एक साथ रहते थे तथा संयुक्त परिवार के जायदाद से ली गयी थी। अपीलकर्तागण द्वारा प्रदिष्ट की गयी आर०डी० 1969 की पृष्ठ 175 पर की रूलिंग इस मुकदमे में लागू होती है जिसमें विपक्षीगण स्वयं के नजदीकी खानदान में सहखातेदारी का हक स्वीकृत नहीं किया गया है। विपक्षीगण का हिस्से के अनुसार मालगुजारी अदा करने या कब्जे का प्रमाण भी नहीं मिलता। खाते में केवल कुछ नम्बरान पर कब्जा अंकित होने से सहखातेदारी का हक नहीं माना जा सकता। इन सब तथ्यों के आधार पर चकबंदी अधिकारी के निर्णय से जिसमें विपक्षी अभय नरायन आदि को सहखातेदार माना गया है। मै सहमत नहीं हूँ विपक्षीगण इस खाते में अपने को सहखातेदार नहीं सिद्ध कर सके।

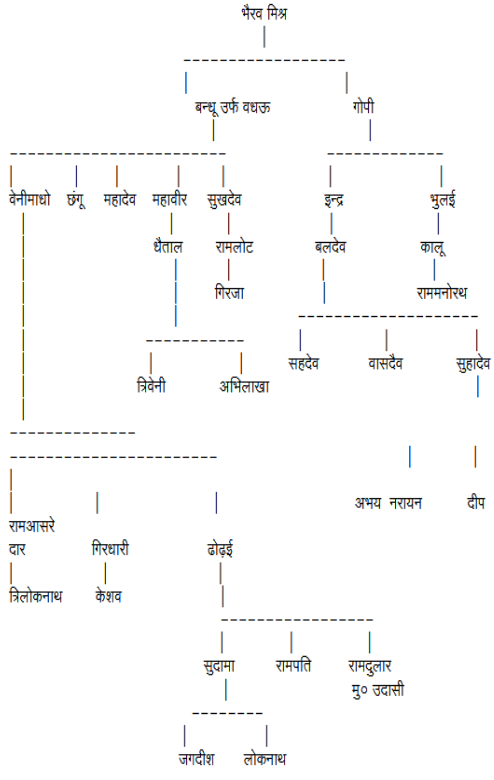
अपील नम्बर 992 पूर्ण रूप से तथा अपील नम्बर 1674अंशतः केवल अभय नरायन आदि के सम्बन्ध में स्वीकृत की जाती है तथा राम अमिलाख आदि के सम्बन्ध में खारिज की गयी। निर्णय चकबन्दी अधिकारी दिनांक 21.6.71 रद्द किया गया। खाता नम्बर 88 का बटवारा निम्न प्रकार से किया गया। तथा अभय नरायन आदि की आपत्ति खारिज की गयी। वाद अमल दरामद मिसिल दाखिल दफतर हो।"

9. Challenging the order dated 21.05.1973 passed by ASOC, theRevision Nos. 2645 and 2638 were filed under Section 48 of the Act of 1953. The revisional authority/DDC dismissed the revisions vide order dated 18.07.1978, which on reproduction reads as under:-

"यह दो निगरानियां सबअच० के आदेश दिनांक 21-5-73 के विरुद्ध प्रस्तुत की गई है जो उन्होंने अपील सं० 992 आदि मे पारित किया है। चूँकि ये दोनों निगरानियां एक दूसरे से सम्बन्धित है तथा एक ही प्राकृति की है अतः मै उनका निस्तारण एक ही साथ करना उचित समझता हूँ।

मैने पक्षों को सुना तथा कागजात का अवलोकन किया।

निगरानीकर्तागण विवादित खाते की भूमि को सहपूर्वज भैरव मिश्र के समय की भूमि कहते हुए सहखातेदारी की माँग करते है। च०अ० के द्वारा उनकी सहखातेदारी की माँग स्वीकार की गई किन्तु स०ब०अ०च० ने उनकी सहखातेदारी की माँग को निरस्त कर दिया तथा आधारवर्ष के इन्द्राज को निगरानीकर्ता के विरुद्ध कायम रखा। पक्षों के मध्य निम्न वंशावली प्रस्तुत की गई जोकि पक्षों को स्वीकार है।



निगरानीकर्तागण अपने को गोपी की साखा का बताते हुए तथा विवादित भूमि को भैरव की बनाई हुई बताते हुए सहखातेदारी की माँग करते हैं जबकि विपक्षीगण इस भूमि को बन्धु के द्वारा गोपी से अलग रहते हुए अर्जित की हुई बताते है। तथा उनकी ओर से यह कहा गया कि पक्षों के मध्य 40-50 वर्ष से अधिक अलगा विलगी है व पक्षों के मध्य पारिवारिक विभाजन हो चुका है। इस तथ्य को निगरानीकर्तागण भी स्वीकार करते है। यह भूमि ग्राम खाडसरा में स्थित है। विभाजन में विपक्षीगण की ओर से कहा गया है कि इस ग्राम की भूमि विपक्षीगण को प्राप्त हुई तथा विपक्षीगण ही इस ग्राम के रहने वाले हैं जबकि निगरानी कर्ता ग्राम चौपरिया के रहने वाले हैं तथा वहां की भूमि पारिवारिक विभाजन के अनुसार निगरानीकर्तागण को प्राप्त हुई है। निगरानीकर्ता के अधिवक्ता द्वारा मेरा ध्यान इस ओर आकर्षित कराया गया कि स०ब०अ०च० ने अपने आदेश में यह गलत लिखा दिया है कि विवादित भूमि बन्दोवस्त ओवल, दोयम तथा सोयम व उसके वाद केवल विपक्षीगण के नाम या उनके पूर्वजों के नाम दर्ज है जबकि इस भूमि के अनेक गाटे दोनो पक्षों के सहपूर्वज बन्धू के नाम भी दर्ज है। तथा इन्द्र के नाम भी दर्ज है। निगरानीकर्ता के अधिवक्ता की यह बात अभिलेख के अवलोकन से सत्य पाई गई कि विपक्षीगण के अधिवक्ता द्वारा यह कहा गया कि निगरानीकर्ता अपने ही साखा के राम मनोरथ को सहखातेदार के अधिकार स्वीकार नहीं करते हैं अतः वह उससे कैसे सहखातेदार के अधिकार माँग सकते हैं। उसके विरुद्ध निगरानीकर्ता के अधिवक्ता द्वारा यह कहा गया कि राममनोरथ की ओर से माननीय उच्च न्यायालय में अभी वाद का फैसला नहीं हुआ इसके समर्थन में उन्होंने माननीय उच्च न्यायालय के रिमान्ड आदेश की नकल प्रस्तुत की जिससे यह सिद्ध होता है कि अभी राममनोरथ व उनके मध्य भी मुकदमेबाजी चल रही है। इस प्रकार से इस तर्क के आधार पर विपक्षीगण को कोई लाभ नहीं प्रदान किया जा सकता है। विपक्षीगण के अधिवक्ता ने मेरा ध्यान अभय नरायन के बयान की ओर आकर्षित किया जिसमें अभय नरायन ने यह स्वयं बयान दिया है कि विवाद भैरव के समय की भूमि से सम्बन्धित है तथा ग्राम खडसरा के भूमि के बटवारे के बारे में उन्होंने दावा किया था जो दावा भैरव के समय की भूमि के बारे में स्वीकार किया जा चुका है इस प्रकार से स्वयं अभय नरायन के बयान के अनुसार जो भूमि विवादित थी उसके बारे में बटवारे के दावे के अनुसार उन्हें हक पहले से ही प्राप्त हो चुकी है। यह बात समझ में नही आती है कि अब शेष भूमि के बारे में भी निगरानीकर्ता को कोई अधिकार प्राप्त था तो उन्होंने उस भूमि के बारे में भी क्यों नहीं उसी समय बटवारे के लिए दावा प्रस्तुत किया। पक्षों के मध्य बटवारा बहुत अर्से पूर्व से स्वीकार है जिससे यही सिद्ध होता है कि पक्षों के मध्य काफी लम्बे अर्से से पारिवारिक विभाजन हो

चुका है। तथा इस विभाजन के अनुसार ग्राम खाडसरा की भूमि विपक्षीगण को प्राप्त हुई थी तथा ग्राम चौपरिया की भूमि निगरानीकर्तागण को प्राप्त हुई थी। वे इस विभाजन से सन्तुष्ट भी थे। तथा जिस भूमि से निगरानीकर्तागण संतुष्ट नहीं थे उसके बारे में पहले भी विभाजन का दावा कर चुके है। इससे यही सिद्ध होता है कि ग्राम खाडसरा की शेष भूमि के बारे में यह विपक्षीगण के अधिकार को स्वीकार कर चुके हैं। यद्यपि निगरानीकर्ता के अधिवक्ता ने यह तर्क प्रस्तुत किया कि पारिवारिक विभाजन से पक्षों के मध्य अंतिम बटवारा नहीं माना जाना चाहिए किन्तु इतने लम्बे अर्से पूर्व किए गए पारिवारिक विभाजन का भी उतना ही महत्व है। तथा यह विभाजन पक्षों के मध्य पत्रावली पर उपलब्ध साक्ष्य से बटवारा के रूप से स्वीकार कर लिया जाना प्रतीत होता है। इसके अतिरिक्त भैरव व बन्धऊ आदि के समय से जो भूमि चली आ रही व उसकी समरूपता मे भी पर्याप्त अंतर हो चुका है चूँकि पक्षगण स्वयं काफी अर्से पूर्व से पारिवारिक विभाजन स्वीकार करते है। इसलिए यह वाद में सफल होने हेतु निगरानीकर्ता द्वारा यह आवश्यक था कि वे सिद्ध करते कि पक्षों के सहपूर्वज भैरव के वाद जो भूमि बन्धऊ अथवा गोपी के द्वारा अर्जित की गई वह संयुक्त परिवार में रहते हुए तथा संयुक्त सम्पत्ति से अर्जित की गई थी। इस सम्बन्ध में निगरानीकर्ता ने बन्धऊ को अगुआ परिवार भी होना सिद्ध नहीं किया है तथा चूँकि बन्धऊ तथा इन्द्र के ही नाम अतिरिक्त रूप से अलग-अलग भूमि दर्ज की गई इसलिए भी विपक्षी के अधिवक्ता के इस तर्क में बल प्रतीत होता है कि गोपी तथा बन्धऊ के समय से ही दोनो पक्षों के मध्य विभाजन हो चुका है तथा दोनों पक्ष में अलग अलग रहकर सम्पत्ति अर्जित की।

उपरोक्त विवेचन के आधार पर निगरानीकर्तागण अपने वाद को सिद्ध करने में सफल नहीं रहे थे तथा सबअच० का निर्णय सही व न्यायसंगत प्रतीत होता है।

दोनों निगरानियां निराधार हैं और खारिज की जाती है।"

10. In the aforesaid background of the case, the present petition has been filed.

11. Assailing the impugned orders dated 21.05.1973 and 18.07.1978, learned counsel for the petitioners submitted that the family property, which was originally recorded in the name of Bhairon, was never partitioned, as such, the petitioners and their predecessors were entitled to share in the property including the property indicated in Khata No. 88, as such, the findings recorded by the ASOC and DDC in the impugned orders dated 21.05.1973 and 18.07.1978, respectively, are liable to be interfered with by this Court.

12. To substantiate the aforesaid, learned counsel for the petitioners only placed reliance on the order passed by the trial court dated 18.05.1961 in Suit/Case No. 32 of 1960, which was filed under Section 176 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short "Act of 1950") byAbhai Narain, Deep Narain and Ram Asrey.

13. Based upon the order dated 18.05.1961, it has been stated that the aforesaid suit was filed with regard to property situated at Village Khandsara, in which, the plea of partition was taken, however, the same was not accepted and considering the pleadings on record, the suit was decided in favour of plaintiffs holding that they are having 1/2 share over the property in suit.

14. At this stage, on being asked that which was the property in issue in suit, learned counsel for the petitioners, based

upon the copy of order dated 18.05.1961 as also the pleadings on record, failed to indicate the property in issue in suit.

15. It is appropriate to mention here that the order passed in partition suit No. 32 of 1960 dated 18.05.1961 indicates that the case of above named plaintiffs in the suit was to the effect that the land in suit was in co-tenancy of the plaintiffs & defendant Nos. 3 to 9 and the same was situated at Village Khandsara and the allegation that the land in suit was partitioned, was not accepted by the regular/trial court.

16. The case of the side opposite, as appears from counter and supplementary counter affidavit, is to the effect that family partition took placemore than 50 years ago and as per the same, the land situated at Village Khandsara went towards the share of Bandhau's branch and land situated at Village Chauparia went towards the share of Gopi's branch. To support the fact related to partition, side opposite has brought on record the statement of one Patiram (defence witness), which on reproduction reads as under:-

"मैं पतीराम सुत ढोढई उमर 55 साल सा० खडासरा पो० अल्देमऊ तहसील कादीपुर वहल्फ बयान किया कि आराजी निजाई जानता हूँ। बधऊ व गोपी को जानता हूँ ये दोनो अलग अलग रहते थे इनकी खेती बारी रहन सहन सब अलग हो गयो था गोपी चौपटिया रहते थे वभऊ खडसरा रहते गोपी बधऊ में गोपी बड़े थे दोनों सगे भाई थी आराजी विजई मेरा जिजा के जमाने की नहीं है। यह हमारे आजा वेनी माधो को बनाई है ये लोग चौखटिया में मुधत से रहते है। इनकी कोई खेती बारी इस गाँव में नहीं है और न इनका कोई कब्जा व दखल ही है और न ये लोग कभी कब्जा व दखल करने जाते है हमारी कुछ जमीन मातहती थी जो मेरी जमाने की थी जिसके बारे में दावा दायर करके अपना हिस्सा ले चुके है आजा से मालूम हुआ कि यह आराजी वेनी माधव को बनाई है और गोपी व वजऊ अलग अलग रहते थे।"

17. Considered the aforesaid and perused the record.

18. Undisputedly, the case setup by the original petitioner No. 1, predecessors in interest of the original petitioner Nos. 2 & 3, before the CO was based upon the fact that the land recorded in Khata No. 88 is a joint property, as such, they are entitled to the share. To prove the jointness, petitioners' counsel has placed reliance on the order passed by regular/trial court dated 18.05.1961.

19. The CO while allowing the claim of the petitioners specifically observed that the onus of proving partition in the family was on the defendants but they failed to produce cogent evidence.

20. However, as per the established principles, the claimant has to prove his case and he can succeed on the strength of his own legs and not on the weakness of side opposite. In the case of ***Rangammal v. Kuppuswami, (2011) 12 SCC 220***, the Hob'ble Apex Court observed that *"Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."*

21. In the case of***Jai Narainv.D.D.C.,[1979 RD 198]*** it was held that the presumption is only in respect of jointness and not that any property acquired by members of the family is a joint family property. It may be thrown in the common stock or the members may intend it to be treated as joint family property or it may be acquired by joint family nucleus. But this is a matter of evidence and not of presumption.

22. In the case of ***Sheo Nathv.D.D.C.,[1983 RD 107]*** it was held that a member of the joint family or even a Karta of the family can acquire property for himself and in his own name and that the other members of the family would have no interest or share in it if he had acquired it from his own funds. But if the tenancy holding was acquired with the aid and assistance of the joint family funds while the family was joint, then other members of the joint family would also have a share in it although it may be recorded in the name of an individual member of the joint family. It was also held in this case that it is well settled that the claim of co-tenancy rights cannot be upheld merely on the strength of recorded possession over certain plots of the disputed holding and receipt for rent and canal dues made by the claimant. If a holding is entered in the name of one or more members of the family and another member claims a share in the holding, the burden of proving that the holding was joint family property and the name of recorded person or persons was in the representative capacity lies heavily on the claimant.

23. In the judgment passed in the case of ***Jagdamba Singh v. Dy. Director of Consolidation,*** **1984 SCC OnLine All 689 : 1985 All LJ 671**, this Court observed as under:-

"14.It is fairly well settled that in order to entitle a party to claim co-tenancy rights in the holding on the ground of its being ancestral the unbroken identity of the holding has got to be established throughout the period. If the identity has changed of the holding the claim cannot succeed. This view has been expressed in several decisions of Board of Revenue and also of this Court in the cases noted below:—

(1) 1943 Rev Dec 567 (BR)*Jodhiav.Bhikwa.*

(2) 1942 Rev Dec 379 (BR)*Hamid Aliv.Benares Bank.*

(3) 1942 Rev Dee 401 (BR)*Mohd. Yasinv.Mohd. Shafi.*

(4) 1945 Rev Dec 122 (BR)*Rajaramv.Narain Singh.*

(5) 1969 Rev Dec 175 (BR)*Abhai Narainv.Ram Manorath.*

(6) 1973 Rev Dec 242 (BR)*Aminuddinv.Kamuruddin.*

(7) 1975 Rev Dec 195 (BR)*Ram Narainv.Buddhu.*

(8) 1963 Rev Dec 37 (BR)*Mahadeo Singhv.Sunder Kewat.*

(9) 1979 Rev Dec 125 : (1979 All LJ NOC 47) (BR)*Balwantiv.Bhaiya Ram.*

(10) 1983 (1) Lucknow Civil Decision, 40 (HC)*Jhagroov.The Deputy Director of Consolidation.*

15.In all the aforesaid decisions it has been consistently held that in order to uphold the claim of co-tenancy rights on the ground of land being ancestral it is essential that the entire land of the holding of the common ancestor must have come down in the identical form an it must have remained unchanged and intact. It would, however, be correct to say that where as a

result of survey made during settlements, the area of some plots might have decreased or increased or that some plot or plots are eliminated for some explained reason from the holding in question viz. having fallen in the bed of river due to the alluvial and deluvial action of the river or by the construction of the canal etc., then in such event it cannot be said that there is break in the identity of the holding in dispute. The slight change like elimination of certain plot or the increase or decrease in the area of certain plots for the aforesaid reasons shown would not operate to destroy the identity of the holding coming down in identical form in the family from the time of common ancestor. But in order to uphold the claim of co-tenancy rights on the ground of land being ancestral it must be established by the claimant that the holding has come down intact and in identical form that it has not been sub-divided or resettled with one or some of the heirs or with the strangers. Thus, where the disputed holding has not come intact in the identical form and only some of the plots of the holding belonging to common ancestor are found included as in the present disputed holding it would not make it ancestral holding so as to give a share in it to the claimants on that ground nor it would be permissible to pick up those plots from the holding and declare them to be ancestral property and give a share in those plots to the claimant.

16.Learned counsel for the opposite parties had urged that in the present case there is no evidence regarding resettlement of the land with Mata Dihal Singh, and, as such, the opposite parties 1 to 3 have committed no error in giving co-tenancy rights to opposite parties 5 to 8 in those plots of the holding which initially belonged to Devi Singh. I am unable to agree with this contention. In second settlement of 1301F, the present holding in dispute was recorded in the name of Mata Dihal Singh. Although it contained 19 plots which initially belonged to Devi Singh, but this holding consisted of 43 plots with an area of 43 bighas, 19 biswas and 16 biswansis on an annual rent of Rs. 117-6-3. It is thus evident that 24 plots which did not belong to Devi Singh were also included in the holding which was settled with Mata Dihal Singh on aforesaid annual rent by the then landlord. Similarly, in 1301 F., a separate holding is recorded in the name of Ram Baran Singh consisting of 19 plots out of which 5 plots belonged to Devi Singh. These two holdings were thus apparently settled by the landlord separately with these persons, Mata Dihal Singh and Ram Baran Sngh. This entry is 90 years old and it is practically impossible to produce direct evidence on the question regarding settlement of land by the landlord with these persons. The entry itself affords the evidence regarding settlement with these persons — especially when all those plots which belonged to Devi Singh had not come down in identical form in none of these holdings which came to be recorded separately in the name of Mata Dihal Singh and Ram Baran Singh. In this view of the matter I do not find any substance in the aforesaid arguments of the learned counsel for the opposite parties. It is not disputed before me that the suits for ejectment and arrears of rent were filed by the landlord against Mata Dihal Singh and also against Ram Baran Singh in respect of the land-holding which were recorded in their names. Admittedly, Ram Baran Singh was ejected in the suit filed by the landlord for arrears of rent and ejectment as he could not pay the arrears of rent outstanding against him. The grandfather of the petitioners Mata Dihal Singh was not ejected as rent was paid by him. Landlord had also filed suits for ejectment in respect

of the holding in dispute against the petitioners. It is thus evident that the petitioners and their predecessors were always treated separate tenure-holders of the land in dispute by the landlord.

17.Thus, in this view of the matter I find that neither the disputed holding nor any portion thereof could be held to be ancestral holding coming down from the time of common ancestor Devi Singh as it has not come down in the identical form, and, as such, the opposite parties could not be declared to be co-tenure-holders by picking uncertain plots from the holding in dispute and treating them to be ancestral on the ground that those initially belonged to Devi Singh.

18.Learned counsel for the opposite parties had contended that the opposite parties 1 to 3 cannot be said to have fallen in error in giving share in those plots of the disputed holding which belonged to Devi Singh. I am unable to agree with this contention as well. Where the holding of the common ancestor, as already observed above, has not come down intact in identical form the claimant cannot be granted co-tenancy rights only in some of the plots of the disputed holding merely on the ground that those initially belonged to the common ancestor. This question cropped up for consideration before Board of Revenue inMohd. Yasinv.Mohd. Shaft, 1942 Rev Dec 401 (BR) wherein Sathe, J. observed:—

"The mere fact that land comprised in several holding belonged to a common ancestor is not enough to hold that it belongs to all the descendants of the common ancestor. One essential thing which is necessary for this is that the identity of the holding must have continued unbroken. If the land was divided between two branches of the family by a family arrangement and some holdings are entered in the name of one branch or the other and some jointly, if will be inequitable to pick out some of the resultant holdings and say that they belong to both the branches as they belonged to one ancestor."

19.In (sic)Udal Singhv.Hardayal, 1973 Rev Dec 242 (BR) it has been observed:—

"It was more than clear that the holding had not come in the identical form from the ancestor. The holding may have been acquired by the plaintiffs' ancestor in 1872 or thereabouts and it appears to have continued in that form until 1924 or thereabouts, but then it changed hands and while part of the old plots were retained some additions and alterations were made and instead of occupancy a new hereditary tenure was created in favour of the new lessees. It is obviously, therefore, not possible to hop back to the year 1900, and then assume in spite of the lack of continuity that since the ancestors were co-tenure-holders in the year 1900, they should be regarded as co-tenure-holders in any new settlement made with some of the members of the family."

20.Similar view was expressed by Board of Revenue inRam Narainv.Buddhu, 1975 Rev Dec 195 (BR), wherein it was held:

"Where the original holding of the common ancestor has not come down in an intact form the plaintiffs cannot claim co-tenancy in respect of only one part of common ancestor's holding".

21.I have carefully gone through these decisions and in my opinion, the Board of Revenue has taken a correct view on the point that in order to uphold the claim of co-tenancy rights on the ground that the holding in dispute is ancestral property, it is necessary that the holding should have come down intact in the identical form without any break and it would not be open to pick up few plots of the holding which

initially belonged to common ancestor and declare them to be ancestral property giving a share to the claimant on that ground. The claim of co-tenancy rights cannot be upheld in respect of certain plots of the holding but the claim is to be considered and is to be accepted or rejected in toto in respect of the holding and not in respect of any portion thereof. In this view of the matter I find that the opposite parties 1 to 3 committed error in granting co-tenancy rights to the opposite parties 5 to 8 in 36 plots of the disputed holding merely on the ground that these plot's initially belonged to Devi Singh, and, are therefore, ancestral property. This view is absolutely erroneous and in view of what has been said above, the said plots in question cannot be held to be ancestral holding so as to give co-tenancy rights to the opposite parties 5 to 8 in those plots. In my opinion no co-tenancy rights could be legally granted in respect of a part of the holding and, as such, the impugned orders passed by opposite parties 1 to 3 granting opposite parties 5 to 8 co-tenancy rights in respect of the part of the holding (36 plots), cannot be legally sustained.

22.Learned counsel for the opposite parties Sri Hargun Charan, however, urged that even if the claim of the opposite parties 5 to 8 cannot be sustained on the ground that the disputed holding is ancestral, yet their claim is sustainable on the ground that the entire land of the disputed Khata No. 36 is joint family property and the name of Mata Dihal Singh was recorded in the representative capacity as he was head and Karta of the joint family. His further contention was that even if it be held that the holding in dispute consisting of 84 plots with an area of 44 bighas, 9 biswas, 14 biswansis was settled afresh by the landlord with Mata Dihal Singh, the same would be deemed to be joint family property as at the time of acquisition he was head and Karta of the family being elder brother. Learned counsel pointed out that the opposite parties 1 to 3 have recorded a finding to the effect that at the time of second settlement in the year 1301 F., both these brothers Mata Dihal Singh and Ram Baran Singh formed joint family and on the basis of this finding learned counsel urged that even if land of the disputed holding was acquired by Mata Dihal Singh, but the same would be treated to be joint family property and the opposite parties 5 to 8 would get half share in all the plots of the disputed holding-Khata No. 36.1 am unable to agree with this contention as well.

23.It is well settled that the creation of tenancy in respect of agricultural land is a matter of contract between the landlord and the tenant. Even in the joint Hindu family a member of the joint family could acquire land for himself and unless it is proved that the land was acquired by him in the representative capacity and for the benefit of the family, it cannot be held to be joint family land merely because it was acquired by him when he formed joint family with other members. Even a Karta of joint Hindu family can acquire land in his name for his own benefit and it cannot be treated to be joint family property merely because he happens to be Karta of the family at the time of the alleged acquisition of the property. It has to be positively proved that when the land was acquired by the Karta of the joint family he had acquired it in the representative capacity for the entire body of coparceners and it is treated as such by the members of the family.

24.It appears to be fairly well settled that when joint family is possessed of sufficient nucleus and the Head or Karta of the family had, as a matter of fact, in his possession joint family funds, while acquiring certain property in his own name,

the onus would lie on him to prove that it was his self-acquired property and that it was not acquired with the aid or assistance of the joint family funds. But even this rule cannot be always pressed in service in the matter relating to acquisition of agricultural tenancy lands because no premium (Najrana) can be legally charged by the landlord while letting the land to the tenant. It therefore, cannot be assumed that in every case while obtaining lease of agricultural land the tenant must have paid some premium (Najrana) to the landlord and that too from the joint family funds. InBhagirath Devi Kumar Rani Sahabav.Agricultural Income Tax Revision Board, 1970 Rev Dec 365 : (1971 Tax LR 81), while considering this question, the Division Bench of this Court held:—

"No doubt a presumption arises in Hindu law that property standing in the name of a member of Hindu undivided family must be presumed to have been acquired from Hindu undivided family funds, and, therefore, to be Hindu undivided family property, where the member of the family does not possess sufficient funds of his own for the purposes of acquiring the property. But in a case where acquisition of the property does not require any expenditure of funds, the presumption cannot be raised.

In the instant case, no funds were required because payment of Nazrana for the acquisition of tenancy lands had been declared illegal by law."

25.Thus in this view of the matter and also in the absence of any positive evidence, I find it difficult to assume that Mata Dihal Singh while he acquired land of the disputed holding had paid some premium to the landlord and that too from the joint family funds. In the present case it was neither asserted nor proved that the land in dispute was acquired by Mata Dihal Singh with the aid or assistance of the joint family funds, and, as such, simply because the and in dispute was recorded in the name of Mata Dihal Singh it cannot be assumed to be joint family property because even in a joint family any member or even a Karta of the joint family can acquire land in his name for his own benefit. It has to be shown positively that it was neither acquired in the representative capacity by the Karta of the joint family or that it was blended as joint family property and was treated as such and that all the members of the joint family were in possession over it. But where no such case was set up nor established, the claimants cannot get co-tenancy rights merely because the disputed holding is recorded in the name of the Karta of the joint family or in the name of any member of the joint family. The claim of co-tenancy rights in such land by unrecorded member of the joint family can only be accepted if it is established that the land in dispute was acquired in the representative capacity and was blended as joint family property and was treated as such. The burden of proof that the land was acquired by the recorded tenure-holder in the representative capacity, lies heavily on the person who asserts that it was acquired as such.

26.In the present case it is very well evident that both Mata Dihal Singh and his brother Ram Baran Singh had separately acquired land and their names are recorded as separate tenure-holders on different holding in second settlement of 1301F. So even if they formed joint family at that time, the land recorded in their names could not be treated to be joint family property because it is well settled that any member of the joint family or even a Karta can acquire land in his own name for his own benefit and it will not become a joint family property merely because he happens

to be a member of the joint family at the time of acquisition of that Ind. (SeeSattoov.Dy. Director of ConsolidationW.P. 2417 of 1979, decided by me on 15-10-1981). Similar view was expressed in 1977 All WC 418 : (AIR 1976 All 502),Dildar Husainv.Ali Husain, wherein it was observed that there could be no bar to the acquisition of land by an individual even though he might be joint in estate with his other brothers but by virtue of this fact they could not automatically become co-tenants with that individual who had obtained acquisition in individual name.

27.In view of the above I am unable to accept the contention of the learned counsel for the opposite parties that the land which was recorded in the name of Mata Dihal Singh was acquired in the representative capacity or that it was a joint family property. Ram Baran Singh had also separately acquired the land which was recorded in his name in the second settlement of 1301 F. In these circumstances it cannot be said that Ram Dihal Singh acted in representative, capacity when he acquired land which was recorded in his name in the second settlement of 1301 F. If he was acting as Karta of the joint family there was no occasion for separate acquisition of land by Ram Baran Singh and recording of his name on a separate holding in the second settlement. Thus even if it be held that both these brothers formed joint family at the time of the second settlement that holding in dispute cannot be held to be joint family property so as to give a share to the opposite parties 5 to 8 on that ground. It is well settled that where a member of the joint family has been recorded as a sole tenant even during the last settlement and there is nothing to show that the holding was leased out to him or to his predecessor-in-interest in the representative capacity, there would be a presumption, though rebuttable, that the settlement entry is correct and the other members of the family cannot claim to be co-tenants merely on the ground that they were members of the joint family.

28.The acquisition of land in the representative capacity either by the Karta or a member of joint family can be established by the evidence led directly to establish the fact that the landlord had settled the land with him in the representative capacity for all the other members of the family as well and that all the members of the joint family came into possession over the land which was blended and treated as joint family property. The evidence establishing the fact about joint possession of all the members of the joint family on the land of holding till it remained undivided or over specific plots of the holding by members of the family to the extent of their respective shares, by way of mutual partition in the event of separation in the family and the payment, of land revenue by them either directly to landlord or through the recorded person, would no doubt be very material circumstance and a piece of admissible corroborative evidence to establish the fact regarding acquisition of land in the representative capacity by the recorded person. It may, however, be expressed to clarify that merely by being in possession over certain plots would alone be not enough to establish that the land was acquired by the recorded tenant in the representative capacity because no amount of common living and the use and enjoyment of the land jointly or severally would make the claimant a co-sharer in the holding or for treating it to be joint family property acquired in representative capacity. It has to be established by cogent

evidence that the land was in fact acquired by the recorded person as Karta in the representative capacity for the benefit of all the members of the joint family and it was blended and always treated as joint family property by the recorded person without any objection by the landlord to it and that the claimants have remained in possession over the land of the holding to the extent of their share in it and paid its rent. It be also shown that the possession of claimants over the land of the disputed holding was in their own right and not by way of any arrangement as licensee on behalf of the recorded tenant or for any other consideration on his behalf.

29.In the present case I find that the opposite parties 5 to 8 have not been able to prove their possession and their claim regarding co-tenancy has been upheld on the basis of constructive possession which, in my opinion, is altogether erroneous view. The doctrine of possession of one co-tenant is that of all co-tenants can only be invoked where co-tenancy is either admitted or established. In the present case the petitioners have seriously refuted the claim regarding co-tenancy rights asserted by opposite parties 5 to 8 and have also failed to establish it on merits as already observed above. Thus the impugned orders passed by opposite parties 1 to 3 cannot be sustained and deserve to be quashed."

24. In the judgment passed in the case of ***Sanehi and Another vs. Deputy Director (Cons.) Faizabad and Others, 1985 All CJ 2306***, this Court, with regard to claim based upon the co-tenancy, observed as under:-

"6. The foremost crucial question for consideration in the writ petition is as to whether the land of the disputed holding is ancestral and is coming down in the identical form or not. In order to claim co-tenancy rights by an unrecorded tenant it has to be proved that the land in dispute is either ancestral holding or it was acquired in the representative capacity by the recorded tenure holder or that it was acquired with the aid and assistance of the joint family funds or that it was their joint acquisition and unfortunately their names were not recorded.

7. In order to establish whether the land in dispute is ancestral holding coming down from the time of the common ancestor, it is very necessary to establish that the land has come down in the identical form and with unbroken period, and as such, mere recording of the name of common ancestor earlier on some of the plots of the holding would not be enough for holding that the land of the disputed holding is ancestral property. It may, however, be clarified that the increase or decrease in the area of certain plots of the holding as a result of resurvey made during the settlements or elimination of one or two plots from the holding recorded in the name of common ancestor for certain good reasons shown would not affect or alter the identity of the holding which has otherwise retained its character having come down in the identical form without any break in the continuity of tenancy from the time of common ancestor. If the identity of the holding has changed and it has not come down in identical form, it can then very well be assumed to have been settled with the recorded tenure holder and it cannot be treated to be ancestral holding so as to give a share to the unrecorded claimant claiming a share in it merely on that ground."

25. In the case of ***Bodh Raj v. Joint Director of Consolidation, Faizabad, 1995 SCC OnLine All 614 : (1996) 27 ALR 98***, this Court observed as under:

"12.Therefore, in view of the case law, cited above, it is clear that there is a presumption with respect to jointness of family and if it is shown or proved to the satisfaction of the court that the family was joint then the property inherited from a common ancestor will be deemed to be joint property of all. It is also clear that the joint family funds must be used for purchase of the property in order to make it joint. Individual member of the joint family can also acquire property in his own name from the separate fund and that property will not be treated to be joint family property and if the property is entered in the name of one person then it has to be proved by other party, who claims to be joint property that it was acquired by the joint family funds."

26. This Court in the case of ***Bajrangi vs. Joint Director Cons. Raebareli*** reported in ***2020 SCC OnLine All 2066 : (2020) 147 RD 683,*** after considering the judgment passed in the case of *(Smt.) Dharmawati Tiwariv.Prem Shanker Tiwari,* 1999 (17) LCD 81;*Sheo Nathv.Deputy Direction of Consolidation*,1983 RD 107; *Sonu and Rahulv.Board of Revenue*,(2010) 109 RD 679;*Shiva Nathv.Deputy Director of Consolidation, Varanasi,* (2014) 123 RD 323;*Ruchhav.Deputy Director of Consolidation, Gorakhpur,* 2007 (25) LCD 1420; *Shrinivas Krishnarao Kangov.Narayan Devji Kango*,AIR 1954 SC 379; *Appasaheb Peerappa Chamdgadev.Devendra Peerappa Chamdgade*,(2007) 1 SCC 521: (AIR 2007 SC 218;AIR 2006 SCW 5562; (2007) 1 AIR Kant R 17); *K.V. Narayanaswami Iyerv.K.V. Ramakrishna Iyer*,AIR 1965 SC 289; *Rukhmabaiv.Lala Laxminarayn,*AIR 1960 SC 335; *Achuthan Nairv.Chinnamu Amma*;AIR 1966 SC 411;*Surendra Kumarv.Phoolchand (Dead) Through L.Rs.*,(1996) 2 SCC 491: (AIR 1996 SC 1148: AIR 1996 SCW 695); *D.S. Lakshmaiahv.L. Balasubramanyam*,AIR 2003 SC 3800 and *Makhan Singh (D) By L.Rs.v.Kulwant Singh;*(2007) 10 SCC 602 observed as under:-

"22.This court in the case ofSheo Nathv.Deputy Director Consolidation(supra) has held that if a holding is entered in the name of one or more members of the family and another member claims a share in the holding the burden of proving that the holding was joint family property and the name of recorded person or persons was in the representative capacity lies heavily on the claimant. It has further been held that the law is fairly settled that the member of the joint family or even a Karta of the joint family can acquire property himself and own his name and the other members of the family would have no interest or share in it if he has acquired it from his own fund.

23.This Court in the case of Sonu and Rahulv.Board of Revenue(supra) has held that rights of a Bhumidhar are transferable and this power of transfer is only subject to the provisions of theUttar Pradesh Zamindari Abolition and Land Reforms Act, 1950and under the said act the principles of coparcenary property are not applicable to Bhumidhari rights. It has also been held that in absence of any material it could not be shown that the family had any nucleus or Joint Hindu Family fund. The relevant paragraphs 3, 4, 5 are reproduced as under:—

"(3) The only point urged by the learned counsel for the petitioners is that the land in dispute was purchased by Chandra Shekhar out of Joint Hindu Family fund and as such the petitioners were not even born on the date of the sale deed. There is no material on record to show that

the said family had any nucleus or Joint Hindu Family fund. The sale deed stands in the name of Sri Chandra Shekhar alone.

(4) A Division Bench of this Court in the case ofMahendra Singhv.Attar Singh, has held that the Bhumidhari rights are special rights created by Act I of 1951 and these new rights are solely to be governed by the provisions of the Act. The notions ofHindu LaworMohammedan Lawwhich would be applicable to other property not governed by any special law can not be imported into the rights created by this Act.

(5) By Section 152 of the U.P. Zamindari Abolition and Land Reforms Act, rights of a Bhumidhar are transferable and this power of transfer is only subject to the provisions of this Act, Under the Act the principles coparcenary property are not applicable to Bhumidhari rights."

24.This Court in the case of ofShiva Nathv.Deputy Director of Consolidation, Varanasi(supra) after considering the judgments of the Hon'ble Apex Court has held that the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden it shifts to the party who claims that the property has been acquitted by him through his own source without the aid of the joint family property and there can be no presumption in law that a property purchased in the name of a member of a family had ipso facto the character of Joint Hindu Family property unless it could be shown that the family possessed a nucleus for the purchase of the same.

25.The Hon'ble Apex Court in the case ofShrinivas Krishnarao Kangov.Narayan Devji Kango,AIR 1954 SC 379has held that so far as the proposition of law is concerned, the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden, it shifts to the party who claims that the property has been purchased by him through his own source and not from the joint family nucleus.

26.The Hon'ble Apex Court in the case ofAppasaheb Peerappa Chamdgadev.Devendra Peerappa Chamdgade,(2007) 1 SCC 521: (AIR 2007 SC 218;AIR 2006 SCW 5562; (2007) 1 AIR Kant R 17) after considering other decisions has held that on survey of the aforesaid decisions what emerges is that there is no presumption of a Joint Hindu Family but on me evidence if it is established that the property was Joint Hindu Family property and the other properties were acquired out of that nucleus and if the initial burden is discharged by the person who claims Joint Hindu Family, tiien 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 by cogent and necessary evidence.

27.The Hon'ble Apex Court in the case ofK.V. Narayanaswami Iyerv.K.V. Ramakrishna Iyer,AIR 1965 SC 289has held that it is well settled that in case on the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any family member of the joint family should be presumed to be acquired from out of family funds and so form part of the joint family property.

28.The Hon'ble Apex Court in the case ofRukhmabaiv.Lala Laxminarayn,AIR 1960 SC 335has held that mere is a presumption inHindu lawof jointness of family but mere is no presumption that any property whether movable or immovable held by a member of a Joint Hindu Family is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact and if he proves that

there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family who is claiming to have acquired without any assistance of the joint family property. The same view has been taken by the Hon'ble Apex Court in the case ofAchuthan Nairv.Chinnamu Amma;AIR 1966 SC 411andSurendra Kumarv.Phoolchand (Dead) Through L.Rs.,(1996) 2 SCC 491: (AIR 1996 SC 1148: AIR 1996 SCW 695).

29.The Hon'ble Apex Court in the case ofD.S. Lakshmaiahv.L. Balasubramanyam,AIR 2003 SC 3800has observed that a property could not be presumed to be Joint Hindu Family merely because of the existence of a Joint Hindu Family and raised an ancillary question in para graph-7 and answered the same in paragraph- 18. The same are extracted below:—

"7. The question to be determined in the present case is as to who is required to prove the nature of property whether it is joint Hindu family property or self-acquired property of the first appellant.

18. The legal principle, therefore, is that mere 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 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."

30.The same has also been followed by the Hon'ble Apex Court in the case of Makhan Singh (D) By L.Rs.v.Kulwant Singh;(2007) 10 SCC 602.

31.This Court in the case ofRuchhav.Deputy Director of Consolidation, Gorakhpur(supra) has held that it is well settled proposition that even in the Joint Hindu Family a member of said family can acquire land for himself and unless it is proved that the land was acquired by him in the representative capacity out of joint family funds for the benefit of the family it can not be held to be joint family land merely because it was acquired by him when he formed joint family with other members.

32.In the present case since the petitioners were claiming that land in dispute was acquired by the Joint Hindu Family, therefore initial bur den was upon the petitioners to prove that it was acquired from the joint nucleus of the Joint Hindu Family. But the burden could not be discharged by the petitioners and they could not prove that it was purchased from the joint nucleus for the welfare of the family.

33.The judgment relied by the learned counsel for the petitioners in the case of(Smt.) Dharmawati Tiwariv.Prem Shanker Tiwari(supra) is not of any assistance to the case of the petitioners because in that case also the trial court after considering all relevant aspect of the controversy viz. continuity of jointness till the house in dispute is acquired, availability of nucleus of the joint family for purchase of the house in dispute, treatment and conduct of the parties with respect to the property in dispute while raising a presumption of jointness of the family had placed the burden upon the shoulder of the contesting respondents to prove that jointness of the family came to an end from the property in dispute as it was alleged to have been self acquired. But in the present

case the petitioners have failed to discharge their initial burden, therefore, the plea of the petitioners that the opposite party Nos. 4 and 5 were required to prove that the jointness of the family has come to an end is misconceived and not sustainable in the eyes of law. In view the aforesaid discussions this Court is of the considered opinion that the judgment and order dated 22.06.1987 passed by the Consolidation Officer and dated 11.03.1999 passed by the Joint Director Consolidation have rightly been passed in accordance with law after considering the material and evidence on record. This Court does not find any illegality or error in the orders. The writ petition has been filed on misconceived grounds having no substance which is devoid of any merit and is liable to be dismissed."

27. In the judgment passed in the case of ***Dropadi Devi v. Shiv Chandra Dixit, 2020 SCC OnLine All 104***, this Court observed as under:-

"51.Now coming to the question regarding the evidence to indicate that the property was a Joint Hindu Family Property, it was for the plaintiffs to have led the evidence in that regard which they have failed. In absence of any evidence to the aforesaid effect the plaintiff could not have been granted the benefit of getting the property treated as Joint Hindu Family Property whereas on the other hand prima-facie the evidence which was available on record clearly indicated that the property in question was purchased by Sri. Shiv Shanker Dubey in the year 1934.

52.It was not disputed by the plaintiff-witness that Sri. Shiv Shanker Dubey was not employee/enlisted in the Army during the First World War. It was also not disputed by the plaintiff and his witnesses that Sri. Shiv Shanker Dubey was employed in the Loco Work Shop at Lucknow. It was also not disputed that Sri. Shiv Shanker Dubey had earlier purchased a property in the year 1931 which he later sold and thereafter he purchased the disputed house in the year 1934.

53.At this stage it will be worthwhile to notice the law regarding the Joint Hindu Family Property is now fairly well settled that in order to successfully stake a claim regarding a Joint Hindu Family Property, the burden is on the party to indicate that there existed a joint family which had the requisite funds and nucleus out of which the property in question has been purchased.

54.There is a difference between a joint family and a joint family property merely because a joint family exists does not give rise to a presumption that the property also belongs to the joint family. In this regard, this Court draws strength from the decision of the Apex Court in the case ofD.S. Lakshmaiahv.L. Balasubramanyamreported in(2003) 10 SCC 310, the relevant portion reads as under:—

18. The legal principle, therefore, is 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 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.

55.Similary, the Coordinate Bench of this Court in the case ofKunj Bihariv.Ganga

Sahai Pandereported in2013 SCC OnLine Alld. 13489:(2013) (99) ALR 826wherein tracing the history and considering the earlier decision on the point of Joint Hindu Family and property, the burden of proof etc. This Court has held as under:—

24. The "patriarchal family" may be defined as a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grand-father, great-grandfather. Whatever be a formal prescription of law, the head of such a group is always in practice, despotic; and he is the object of respect, if not always of affection, which is probably seated deeper than any positive institution. Manu says, "three persons, a wife, a son and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong." Narada says, "he is of age and independent, in case his parents be dead; during their lifetime he is dependent, even though he be grown old."

25. The "joint family" is normally a transition form from "patriarchal family". At the death of common ancestors or head of house, if the family chooses to continue united, the eldest son would be the natural head. The former one was head of family by natural authority, the later other can only be so by a delegated authority. He is primus but inter pares. An undivided Hindu family thus is ordinarily joint, not only in estate but in food and worship. The presumption, therefore, is that members of a Hindu family are living in a state of union unless contrary is established. This presumption however varies inasmuch as it is stronger in case of real brother than in case of cousin and farther one go, from the founder of family, the presumption becomes weaker and weaker. However, there is no presumption that a family, because it is joint, possesses joint property. Under Mitakshara Law, possession of property is not necessary requisite for constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever, such as, at least, ordinary household articles which they would enjoy in common.

32. The joint undivided family is the normal condition of Hindu society as observed inRaghunadhav.Brozo Kishroe,(1876) 3 IA 154andNeelkisto Debv.Beerchunder,(1989) 12 MIA 523. An HUF is ordinarily joint not only in estate but in food and worship. Unless contrary is established, the presumption is that the members of a Hindu family are living in a state of union (see:Govind Dassv.Kuldip Singh,AIR 1971 Delhi 151andBhagwan Dayalv.Mst. Reoti Devi,AIR 1962 SC 287). If, however, one of the coparceners is admittedly living separately from other members of the family, neither it can be said that other members do not constitute a Hindu joint family nor the member living separately, who has stripped his relation with the joint family, can be said to be still a coparcener or member of joint family. Simultaneously, merely if some members are working and living at different places, though own a joint family in common, it cannot be said that they do not form a joint Hindu family. Since it is only a presumption, the strength thereof necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins and farther one goes from the founder of the family, the presumption becomes weaker and weaker.

33. Brothers may be presumed to be joint but conclusion of jointness with collaterals must be affirmatively proved. The presumption lies strongly in favour of

father and son that they are living jointly unless proved otherwise.

34. This presumption, however, does not apply in respect of property. There is no presumption that a family, because it is joint, possess joint property. As per Mitakshara law, the possession of property is not a necessary requisite for the constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive that they are possessing no property whatever, such as ordinary household articles which they would enjoy in common.

35. InSher Singhv.Gamdoor Singh, 1997 (2) HLR 81 (SC), the Court said that once existence of a joint family is not in dispute, necessarily the property held by family assumed the character of a coparcenary property and every member of family would be entitled, by birth, to a share in coparcenary property, unless any one of the coparcener pleads, by separate pleadings and proves, that some of the properties or all the properties are his self-acquired properties and cannot be blended in coparcenary property. Merely because the family is joint, there is no presumption of joint property. A Hindu, even if he be joint may possess separate property. Such property belongs exclusively to him. Neither member of the coparcenary, nor his male issue, acquires any interest in it by birth. On his death (intestate), it passes by succession to his heirs and not by survivorship to the surviving coparcener. The existence of joint family does not raise presumption that it owns properties jointly. But once joint family nucleus is either proved or admitted so as to draw inference that such property could have been acquired out of joint family funds, the burden shifts to the party alleging self acquisition, to establish affirmatively, that such property was acquired without aid of joint family. Initial burden always lies upon the party asserting that any item of property is joint family property.

38. In Appalaswamiv. Suryanarayana murti, AIR 1947 PC 189, it was held that Hindu law is very clear. Proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon one who asserts that an item of property is joint, to establish that 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 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 joint family property/fund.

39. Again inSrinivas Krishnarao Kangov.Narayan Devji Kango,AIR 1954 SC 379, it was held that proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which form its nature and relative value, may have formed the nucleus, from which 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 joint family property.

40. The legal proposition which emerges therefrom is that initial burden is on the person who claims that it is joint family property but after initial burden is discharged, the burden shifts to the party claiming that the property was self acquired

and without the aid of joint family property/fund.

41. InRukhmabaiv.Lala Laxminarayan,AIR 1960 SC 335, the Court said:

"There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need. not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis-a-vis the family property, A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of, a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property. to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property…" (emphasis added)"

28. In the case of **Bhagwat Sharan v. Purushottam, (2020) 6 SCC 387 : 2020 SCC OnLine SC 348**, the Hon'ble Apex Court observed as under:-

"10.At the outset we may note that a lot of arguments were addressed and judgments were cited on the attributes of HUF and the manner in which it can be constituted. In view of the facts narrated above, in our view, a large number of these arguments and citations need not be considered. The law is well settled that the burden is on the person who alleges that the property is a joint property of an HUF to prove the same. Reference in this behalf may be made to the judgments of this Court inBhagwan Dayalv.Reoti Devi[Bhagwan Dayalv.Reoti Devi, AIR 1962 SC 287] . Both the parties have placed reliance on this judgment. In this case, this Court held that the general principle is that a Hindu family is presumed to be joint unless the contrary is proved. It was further held that where one of the coparceners separated himself from other members of the joint family there was no presumption that the rest of coparceners continued to constitute a joint family. However, it was also held that at the same time there is no presumption that because one member of the family has separated, the rest of the family is no longer a joint family. However, it is important to note that this Court inBhagwati Prasad Sahv.Dulhin Rameshwari Kuer[Bhagwati Prasad Sahv.Dulhin Rameshwari Kuer, 1951 SCC 486 : 1951 SCR 603] , it held as follows : (SCC p. 491, para 10)

"10. … Except in the case of reunion, the mere fact that separated coparceners chose to live together or act jointly for purposes of business or trade or in their dealings with properties, would not give

them the status of coparceners under the Mitakshara law."

11.The Privy Council inRandhi Appalaswamiv.Randhi Suryanarayanamurti[Randhi Appalaswamiv.Randhi Suryanarayanamurti, 1947 SCC OnLine PC 42 : ILR 1948 Mad 440] held as follows : (SCC OnLine PC)

"… The Hindu law upon this aspect of the case is well settled. Proof of the 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."

The aforesaid view was accepted by this Court inShrinivas Krishnarao Kangov.Narayan Devji Kango[Shrinivas Krishnarao Kangov.Narayan Devji Kango, (1955) 1 SCR 1 : AIR 1954 SC 379] .

12.InD.S. Lakshmaiahv. L. Balasubra manyam [D.S. Lakshmaiahv. L. Balasubra manyam, (2003) 10 SCC 310] this Court held as follows : (D.S. Lakshmaiah case [D.S. Lakshmaiahv. L. Balasubramanyam, (2003) 10 SCC 310] , SCC p. 317, para 18)

"18. The legal principle, therefore, is 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 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."

Similar view was taken in Rukhmabaiv. Lala Laxminarayan [Rukhmabaiv. Lala Laxminarayan, (1960) 2 SCR 253 : AIR 1960 SC 335] andAppasaheb Peerappa Chamdgadev. Devendra Peerappa Chamdgade [Appasaheb Peerappa Chamdgadev. Devendra Peerappa Chamdgade, (2007) 1 SCC 521] . The law is thus well settled that the burden lies upon the person who alleges the existence of the Hindu Undivided Family to prove the same."

29. The ASOC and DDC while rejecting the claim of the claimants/objectors vide impugned order(s) dated 21.05.1973 and 18.07.1978, respectively, have recorded specific finding(s). According to which, family property was partitioned and as per terms of partition, the parties were in possession of the land situated in Village-Khandsara and Chaupuria. Finding(s) related to partition was recorded after observing that the partition is admitted between the parties and both the parties were satisfied by the partition and regarding the property, for which the claimants/objectors were dissatisfied, a suit for partition was instituted by them, which was allowed. It is evident from the impugned order dated 18.07.1978 passed by DDC that for holding that the property was partitioned, the DDC considered the statement of Abhai Narain (one of the claimants/objectors). Finding in regard to possession over Khata No. 88 is also against the claimants/objectors.

30. The finding(s) aforesaid and rejecting the claim of the claimants/objectors, to the view of this Court, is just and proper. It is for the following reasons:-

(i) From para 4 to 7 of this petition, it appears that the family settlement/partition in respect of land/property which was existing in the name of Bhairon, except Khata No. 88, is admitted.

(ii) As per above indicated paras, according to family settlement, the descendants of Bandhau got land/property of Village- Khandasara and descendants of Gopi got land/property of Village- Chaupuria and with regard to land existing at Village- Chaupuria, a suit for partition filed by the descendants of Bandhau was decreed and another suit for partition filed from the side of the petitioners with regard to land existing at Village- Khandsara was decreed.

(iii) The Khata No. 88 situated in Village- Khandsara was recorded in the name of Bandhau and the opposite parties are the descendants of Bandhau.

(iv) The petitioners are the descendants of Gopi.

(v) As per the case of the petitioners, the land of Khata No. 88 was of Bhairon. Thus, the claimants/objectors before the CO namely Ram Asrey, Abhai Narain and Deep Narain were of sixth generation, as appears from the undisputed pedigree indicated in the impugned order dated 18.07.1978.

(vi) In the instant case, in the objection under Section 9-A(2) of the Act of 1953, the claimants/objectors have pleaded that the Khata No. 88 is joint family property and as such they are entitled to 1/4 share in this Khata. Thus, in view of the law on issue, the burden to prove the same was on the claimants/objectors.

(vii) The claim of co-tenancy rights cannot be upheld in respect of certain plots of holding but the claim is to be considered and is to be accepted and rejected in toto in respect of holding and not in respect of any portion thereof, as observed in the case of **Jagdamaba Singh** (supra), and to oppose this aspect of the case, nothing has been brought to the notice of this Court.

(viii) In the aforesaid background of the case including in view of the fact that the claimants/objectors were of sixth generation, the claimants/objectors were required to prove that the land/property of Bhairon was never partitioned and for this purpose, they were required to prove that since the time of acquisition of the property till the filing of the claim in consolidation proceeding the family of cousins (first, second, third, fourth.....) and uncles remained joint as also that after the death of the original recorded tenure holder the name of eldest member of the joint family was entered in the revenue records and the same procedure followed till the claim was raised for the first time in consolidation proceedings and/or Bandhau was karta of family, which they failed to prove as appears from the material available on record.

(ix) On the other hand, as per settlement of Abhai Narain (one of the claimants/objectors), considered by DDC while recording the finding regarding partition, it appears that the land/property of Bhairon was partitioned and to impeach/controvert the same, neither the statement of Abhai Narain has been brought on record nor on this aspect of the case, submissions have been made.

(x) Statement of Patiram, quoted above, also indicates that the land/property of Bhairon was partitioned.

(xi) Filing a suit for partition of a land situated in Village- Khandsara, excluding

Khata No. 88 situated in Village-Khandsara, filed by the claimants/objectors also proves that the land/property including Khata No. 88, which was provided to descendants of Bandhau, belonging to Bhairon was partitioned and claimants/objectors were satisfied with the partition expect with regard to land/property in suit.

31. For the reasons aforesaid, this Court finds that there is no requirement of interference in the impugned order(s) dated 21.05.1973 and 18.07.1978. The petition is accordingly **dismissed**. Cost made easy.

(2024) 1 ILRA 767
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.01.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 12 of 2024

Saurabha Srivastava & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ravindra Kumar Yadava, Ram Suphal

Counsel for the Respondents:
C.S.C.

A. Stamp Law – Indian Stamp Act, 1899 – Section 47-A – U.P. Stamp (Valuation of Property) Rules, 1997 – Market Value Assessment – Petitioners challenged orders dated 20.07.2022 and 06.07.2023 imposing additional stamp duty and penalty for undervaluation of land purchased via sale deed dated 04.02.2021 – Inspection on 15.03.2021 revealed land used for residential plotting with road and electricity poles – Held, Collector's assessment of market value at Rs.3900 per square meter valid, based on inspection report conducted proximate to sale deed, showing land's potential for non-agricultural use – *Smt. Pushpa Sareen Vs St. of U.P.* (Full Bench) followed, allowing consideration of land's potential use at or near execution date – Circle rate irrelevant as market value determined under Rules, 1997 – *Gyan Prakash Vs St. of U.P.* relied upon – Ex-parte order justified due to petitioners' non-appearance – *Smt. Omwati Vs Commissioner, Meerut* distinguished as subordinate to Full Bench ruling – No interference warranted. (Para 16-24)

Writ petition dismissed.

List of Cases cited:

1. Smt. Pushpa Sareen Vs St. of U.P.; 2015 (3) ADJ 136 (FB)

2. Gyan Prakash Vs St. of U.P.; Misc. Single No. 17858 of 2016, decided on 07.02.2019

3. Smt. Omwati Vs Commissioner, Meerut; 2008 (3) ADJ 182

4. Duncans Industries Ltd. Vs St. of U.P.; 1997 SCC OnLine All 423

5. Ganga Saran and Sons Vs Income Tax Officer; (1981) 3 SCC 143

6. St. of Punjab Vs Mahavir Singh; (1996) 1 SCC 609

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioners and Sri Vikram Soni, learned Standing Counsel appearing on behalf of the respondents.

2. Instant petition has been filed praying for the following main reliefs:-

"i) Issue a writ, order or direction in the nature of CERTIORARI to quash the impugned order dated 20-07-2022 passed by Learned Collector Gonda and order dated 6-7-2023 passed by the Additional Commissioner (Administrative-II)

Devipatan Mandal Gonda, annexed as Annexure No-1 and 2 respectably with this writ petition.

ii) Issue a writ, order or direction in the nature of MANDAMUS directing the concerning authorities to stay the execution and implementation of the order dated 20-07-2022 passed by Learned Collector Gonda and order dated 6-7-2023 passed by the Additional Commissioner (Administrative-II) Devipatan Mandal Gonda during the pendency of the writ petition."

3. The case set forth by the petitioners is that they had purchased the land Gata No.1842 area 0.7280 hectares situated in village Durgaganj, Pargana Nawabganj, Tehsil Tarabganj, District Gonda on 04.02.2021 through registered sale deed. Although the land was agricultural yet as more consideration was being paid beyond the value of land as per circle rate, which was Rs.18.20 lakhs but as per the market value of the land sale consideration was paid as Rs.90 lakhs. It is contended that an inspection was conducted by the Sub-Registrar, Tarabganj, Gonda and a report was submittted on 15.03.2021 from which it emerged that plotting was being carried out over the land in dispute and a road was also constructed and the electricity poles had also been installed on the 25 feet wide road. On the basis of the said report, the proceedings were initiated under the provisions of Section 47-A of the Indian Stamp Act, 1899 (hereinafter referred to as the 'Act, 1899').

4. Despite notice to the petitioners, they failed to put in appearance with the result the competent authority passed an ex-parte order dated 20.07.2022, a copy of which is Annexure-1 to the writ petition. The competent authority after assessing the market value of the land in terms of U.P. Stamp (Valuation of Property) Rules, 1997 (hereinafter referred to as the 'Rules, 1997') was of the view that the land was to be valued at Rs.3900 per square meter and after arriving at fair market value, imposed stamp duty of Rs.969600 and penalty along with registration fee upon the petitioners.

5. The petitioners being aggrieved, filed an appeal before the appellate authority under the provisions of Section 56(1-A) of the Act, 1899, which appeal has also been rejected vide impugned order dated 06.07.2023, a copy of which is Annexure-2 to the writ petition.

6. Still being aggrieved, instant writ petition has been filed.

7. The grounds as raised by the learned counsel for the petitioners while seeking to challenge the impugned orders are that (a) already an excess amount was paid while purchasing the land inasmuch as although the agricultural rate was less yet more amount was paid as sale consideration and consequently, towards stamp duty (b) the respondents have calculated the market value on the basis of prospective utilization of the land which is legally misconceived, (c) the value of residential rate is Rs.2500 per square meter but the competent authority has assessed the value as Rs.3900 per square meter, and (d) inspection having been made at a later date.

8. Placing reliance on the judgment of this Court in the case of **Smt. Omwati vs. Commissioner, Meerut and others - 2008(3) ADJ 182,** the contention is that future market value of the land could not have been taken into consideration by the competent authority while arriving at the fair market value of the said land.

9. On the other hand Sri Vikram Soni, learned Standing Counsel appearing on behalf of the respondents, has placed reliance on the Full Bench judgment of this Court in the case of **Smt. Pushpa Sareen vs. State of U.P. and others - 2015 (3) ADJ 136**, to contend that one of the questions which were considered by the Full Bench of this Court was:-

"Whether the Collector Stamps has power to fix the valuation of a plot on the assumption that the same is likely to be used for commercial purposes, and whether the presumed future prospective use of the land can be a criterian for valuation by the Collector".

10. He contends that the question has been answered by the Full Bench of this Court by holding that though the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date yet the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto.

11. Placing reliance on the aforesaid Full Bench judgment of this Court the argument of Sri Soni is that the land was purchased by the petitioners on 04.02.2021 and the inspection was conducted on 15.03.2021 on the basis of which proceedings were initiated against the petitioners. Thus once the inspection was conducted in close proximity to the execution of the sale deed which inspection was done within a period of one and half month of the execution of the sale deed and from the inspection it emerged that the cutting of plots had been done, 25 feet wide road was existing and the electricity poles had been installed consequently the same would fall within the ambit of question which has been answered by the Full Bench i.e. the potential of the land as emerged in the inspection report dated 15.03.2021 and the inspection having been conducted within a reasonable time of the execution of the sale deed from which it emerged that the land was being put for the use of plotting of plots/carving of the plots consequently considering Rules, 1997 the fair market value of the land has been arrived at.

12. So far as the valuation of the land as per the circle rate which is indicated as Rs.2500 per square meter vis-a-vis the rate indicated by the competent authority at Rs.3900 per square meter, reliance has been placed on the judgment of this Court in the case of **Gyan Prakash vs. State of U.P. and others** passed in Misc. Single No.17858 of 2016 decided on 07.02.2019, to contend that this Court has held that the 'market value' of the land is to be assessed under the Rules, 1997 and thus there is no illegality or infirmity in the orders impugned more particularly when the market value has been arrived at in terms of Rules, 1997.

13. Heard learned counsels for the parties and perused the records.

14. From perusal of the records, it emerges that the petitioners claim to have purchased a piece of land as described above through registered sale deed on 04.02.2021. Admittedly, the stamp duty was affixed at agricultural rates but as a higher market value was paid consequently the stamp duty was paid at the sale consideration. An inspection was conducted on 15.03.2021 from which it emerged that

plots were being carved out over the land, 25 feet wide road was existing and electricity poles were also installed over the land. On the basis of the said report, proceedings were initiated against the petitioners under the provisions of the Act, 1899. Despite service of notice, the petitioners failed to put in appearance and an ex-parte order dated 20.07.2022 was passed by the competent authority whereby the market value of the land was assessed at Rs.3900 per square meter and the petitioners have been required to deposit more stamp duty, registration charges as well as penalty. The petitioners being aggrieved filed an appeal which has also been rejected vide the order impugned dated 06.07.2023. Being aggrieved, instant petition has been filed.

15. The grounds raised in the petition are that (a) already an excess amount was paid while purchasing the land inasmuch as although the agricultural rate was lesser yet more amount was paid as sale consideration and consequently towards stamp duty, (b) the respondents have calculated the market value on the basis of prospective utilization of the land which is legally misconceived, and (c) the value of residential rate is Rs.2500 per square meter but the competent authority has assessed the value as Rs.3900 per square meter and (d) inspection having been made at a later date.

16. So far as the inspection having been conducted subsequent to the sale deed having been executed on 04.02.2021 and the inspection being conducted on 15.03.2021, the Court may refer to the answer of the Full Bench on this point in the case of **Smt. Pushpa Sareen (supra)** where the Hon'ble Full Bench has held as under:-

"Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. ***The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future.*** *The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land.* ***This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto****. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land."*

(emphasis by the Court)

17. From perusal of the question as was considered by the Full Bench, it emerges that the Hon'ble Full Bench has categorically held that the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a **period reasonably proximate thereto.**

18. From perusal of the records, it clearly emerges that the land was purchased on 04.02.2021 and the inspection was conducted on 15.03.2021 i.e. within a

period reasonably proximate to the purchase of the land. From a perusal of the inspection report, it clearly emerges that the plots have been carved out, 25 feet wide road was existing and the electricity poles had also been installed on the said piece of land. Thus, it cannot be said that the Collector concerned/competent authority has considered future value of the land inasmuch as it is from the inspection report from which it emerged that the land was being put to residential use by carving out plots and as such by considering the provisions of Rules, 1997 the Collector/competent authority has arrived at a fair market value.

19. The arrival of a fair market value would also not be circumscribed by the circle rates as held by this Court in the case of **Gyan Prakash (supra)** wherein this Court after considering the provisions of the Rules, 1997 has held as under:-

"30. The next question that arises is as to how the authority concerned would adjudicate the matter pertaining to the 'market value' and the stamp duty which in fact has been paid on the sale deed. This question may also not detain this Court inasmuch as Section 47-A (3) of the 1899 Act clearly gives the said power to the Collector to call for an examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property and if he has reason to believe that the market value of such property has not been truly set forth in the instrument he may determine the ***'market value'*** *of the said property and the duty payable thereon. Thus,* ***reason to believe*** *is vested with the Collector and upon which the determination of the market value is to follow. The term "reason to believe" used in Section 47-A (3) of the 1899 Act clearly spells out that the authority must have some material, with a direct, circumstantial or even intrinsic evidence on the basis of which he may come to a reasonable belief that the market value of the property has not been correctly indicated in the instrument/sale deed. Thus, there has to be some material before the authority in order to arrive at the said conclusion. This aspect of the matter is also no longer res-integra keeping in view the judgment of this Court in the case of* ***Duncans Industries Limited vs. State of U.P. 1997 SCC On line All 423,*** *wherein this Court after placing reliance on the judgment of Hon'ble the Supreme Court in the case of* ***Ganga Saran and sons vs. Income Tax Officer (1981) 3 SCC 143 and State of Punjab vs. Mahavir Singh (1996) 1 SCC 609*** *has held as under:-*

"Section 47A (2) of the Act postulates that if the Registering Authority while registering the instrument on which duty is chargeable on the market-value of the property, has "reason to believe" that the market-value of the property which is the subject-matter of such instrument has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the market value, of such property and proper duty payable thereon. The term 'reason to believe' occurring in Sub-section (2) of Section 47A spells out that Registering Officer, must have some material-direct, circumstantial or even intrinsic evidence on the basis of which, he may come to a reasonable belief that the market value of the property has not been truly set forth in the instrument. In other words, the belief must be that of the honest and reasonable person based upon reasonable grounds. In Ganga Saran and Sons v. Income Tax Officer (1981) 3 SCC 143: AIR 1981 SC 1363, the Supreme Court while dwelling on the expression 'reason to

believe' occurring in Section 147(a) of the Income Tax Act, 1961 was pleased to hold as under:

"The important words under Section 147(a) are 'has reason to believe' and these words are stronger than the words 'is satisfied'. The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147(a). If there is no rational or intelligible nexus between the reasons and the belief so that on such reasons no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the Assessee, had escaped assessment and such escapement was by reason of the omission or failure on the part of the Assessee to disclose fully and properly all material facts and the notice issued by him would be liable to be struck down as invalid."

Formulation of the requisite belief under Section 47A of the Stamp Act is not a matter of purely subjective satisfaction. In State of Punjab v. Mahavir Singh (1996) 1 SCC 609 : (1996) 1 SCC 609, the Supreme Court while considering identical Section 47A as inserted in the Act by Punjab Stamp (Amendment) Act, 1992 held that the Registering Authority has to satisfy himself that the value of the property or the consideration of it has not been truly set forth in the instrument and further that it will be "only an objective satisfaction" that the authority has to reach a reasonable belief that the value or consideration of the property conveyed has not been truly set forth in the instrument relating to the transfer of property. It is thus patent that it would be matter of objective satisfaction of the Registering Authority to reach a reasonable belief that the value or consideration of the property which is the subject-matter of transfer, has not been truly set forth."

20. From perusal of the judgment of this Court in the case of **Gyan Prakash (supra)**, it is thus apparent that the market value of the land would have got nothing to do with the circle rates inasmuch as it is the determination of the Collector which would determine the market value of the land along with some material which may have a direct, circumstantial or even intrinsic value on the basis of which he can come to a reasonable belief that the market value of the property has not been correctly indicated in the instrument/sale deed.

21. As already indicated above, from a perusal of the inspection report it emerged that the land was not being put to agriculture use rather plots had been carved out, road was existing over the said piece of land and electricity poles had also been installed and thus the fair market value as has been arrived at by the Collector needs no interference by this Court and would not be circumscribed by the circle rate.

22. So far as the ground of more value having been paid while purchasing the land vis-avis the agricultural circle rate, the said ground is also patently misconceived inasmuch as the amount paid by the petitioners has been found to be less than the

fair market value as assessed by the Collector. Thus, the said ground is also rejected.

23. So far as the judgment of this Court in the case of **Smt. Omwati (supra)** is concerned, obviously the same would give way to the Full Bench judgment of this Court in the case of **Smt. Pushpa Sareen (supra).**

24. Keeping in view the aforesaid discussion, no case for interference is made out. Accordingly, the writ petition is dismissed.

(2024) 1 ILRA 773
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, A.C.J.
THE HON'BLE DONADI RAMESH, J.

Writ-C No. 11417 of 2023
with
Writ-C Nos. 18478 of 2023 & 18521 of 2023

Balwan Singh & Anr. ...Petitioners
Versus
N.H.A.I. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Harsh Vardhan Gupta

Counsel for the Respondents:
Sri Pranjal Mehrotra

The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act of 2013) to National Highways Act, 1956 (NH Act) – Section 80 -The petitioners sought interest under Section 80 of the Act of 2013 for delayed payment of compensation for land acquired under the NH Act – Held, Section 80, providing for interest at 9% per annum (and 15% after one year of delay) on unpaid or undeposited compensation, applies to NH Act acquisitions, as it is a beneficial provision, following *Union of India Vs Tarsem Singh* (2019), which struck down Section 3-J of the NH Act as violative of Article 14 for denying solatium and interest. (Paras 13, 15, 16, 17)

Constitutional Validity and Article 14 – The exclusion of solatium and interest under Section 3-J of the NH Act was declared unconstitutional in *Tarsem Singh* for creating discriminatory treatment between landowners under different statutes – Held, denying interest under Section 80 of the Act of 2013 to NH Act acquisitions would violate Article 14, as it discriminates against similarly situated landowners, and the Central Government's notification dated 28.08.2015 under Section 105(3) extends beneficial provisions of the Act of 2013 to NH Act acquisitions. (Paras 13, 14, 15)

Statutory Framework – Interest on Compensation – Section 3-H(5) of the NH Act provides interest at 9% per annum only on excess compensation determined by the Arbitrator, but is silent on interest for delays in initial compensation payment – Held, Section 80 of the Act of 2013, mandating interest from the date of possession until payment, is more beneficial and applies to NH Act acquisitions to ensure fair compensation, as per the mandate of Section 105(3) of the Act of 2013. (Paras 5, 6, 10, 16, 17)

Central Government's Notification and Legislative Intent – The Central Government's notification dated 28.08.2015, issued under Sections 105 and 113 of the Act of 2013, extended provisions for compensation, rehabilitation, and resettlement to NH Act acquisitions – Held, this reflects the intent to provide uniform benefits to landowners, ensuring that interest under Section 80 applies to prevent dilution of compensation rights, aligning with *Nagpur Improvement Trust* principles. (Paras 12, 14, 16)

Application to Specific Cases – In Writ-C No. 11417 of 2023, petitioners claimed interest for 18 months from the award date (22.09.2020) to payment date (03.03.2022); in Writ-C Nos. 18478 and 18521 of 2023, petitioners sought interest from the award date (07.12.2019) to payment date (30.01.2023) – Held, petitioners

are entitled to interest under Section 80 of the Act of 2013 for the delayed periods, and respondents are directed to calculate and pay within four weeks. (Paras 2, 18)

Writ Petitions Allowed.

List of Cases cited:

1. Union of India Vs Tarsem Singh, (2019) SCC OnLine SC 1557

2. Nagpur Improvement Trust Vs Vithal Rao, (1973) 1 SCC 500

(Delivered by Manoj Kumar Gupta, A.C.J.)

1. The main issue for consideration in these writ petitions is whether Section 80 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 'the Act, 2013') relating to payment of interest on delayed payment of compensation amount would apply to the acquisitions made under the provisions of the National Highways Act, 1956 (for short 'NH Act') as amended by the National Highways Laws (Amendment) Act, 1997.

2. Before we advert to the above issue, we may note in brief the facts of each individual case:-

Writ-C No.11417 of 2023

1.	Date of notification under Section 3-A (In Gazette)	-18.06.2012
	(In Newspaper)	-18.07.2012
2.	Date of notification under Section 3-D (In Gazette)	-17.06.2013
	(In Newspaper)	-20.08.2013
3.	Date of award	- 22.09.2020
4(a)	Rs.59,20,163/- deposited as compensation in the account of the petitioner no.1.	- 03.03.2022
(b)	Rs.63,47,648/- deposited as compensation in the account of petitioner no.2.	- 03.03.2022

Note:- The compensation amount deposited in the account of the petitioners included interest upto 22.09.2020 i.e. upto the date of award – petitioners claimed interest for eighteen months from the date of award dated 22.09.2022 till date of actual payment i.e. 03.03.2022 at the rate of 12% per annum (Rs.10,79,100), but which was not granted.

Writ-C No.18478 of 2023

1.	Date of notification under Section 3-A (In Gazette)	- 21.06.2019
	(In Newspaper)	- 03.07.2019
2.	Date of notification under Section 3-D (In Gazette)	- 18.09.2019
	(In Newspaper)	- 28.09.2019
3.	Date of award	- 07.12.2019
	Project Director, NHAI addressed a communication to Competent Authority mentioning that financial approval has been granted to the compensation amount as per award, except in case of the petitioners, where the award was to be challenged before the Arbitrator.	- 28.02.2020
	Award challenged before the Arbitrator under Section 3-G (5)	
	Arbitrator rejected the challenge	- 03.01.2021
	In Writ-C No.22284 of 2021 filed by the petitioners, direction was issued to the respondents to transfer compensation amount in	- 01.11.2021

the account of the petitioners within one month provided the requisite formalities are completed by the petitioners – the petitioners claim to have completed all the formalities.

Contempt Application (Civil) No.1966 of 2021 filed by the petitioners was disposed of by granting one more opportunity to the opposite parties to comply with the order of the Writ Court. - 05.04.2022

The Competent Authority refused to pay compensation on the ground that objection under Section 34 was pending before the court. - 01.06.2022

In Contempt Application (Civil) No.4125 of 2022 filed by the petitioner, notice was issued to the opposite parties. - 03.12.2022

Competent Authority addressed a communication to NHAI that payment was made to the petitioners by RTGS on 30.01.2023, but the amount has not been received from NHAI. - 02.02.2023

The petitioners filed application for payment of interest from the date of award i.e. 7.12.2019 upto the date of actual payment, but which request has not been accepted. - 18.03.2023

Writ-C No.18521 of 2023

1. Date of notification under Section 3-A (In Gazette) 21.06.2019

   (In Newspaper) 03.07.2019

2. Date of notification under Section 3-D (In Gazette) - 18.09.2019

   (In Newspaper) 28.09.2019

3. Date of award - 07.12.2019

   Date of possession under Section 3-E

Project Director, NHAI addressed a communication to Competent Authority mentioning that approval has been granted to the compensation amount as per award with the exception in the case of petitioners, where the award is to be challenged before the Arbitrator - 19.05.2020

Award challenged before the Arbitrator under Section 3-G (5)

Arbitrator rejected the challenge - 03.01.2021

In Writ-C No.22406 of 2021 filed by the petitioners, direction was issued to the respondents to transfer compensation amount in the account of the petitioners within one month provided the requisite formalities are completed by the petitioners – the petitioners claimed to have completed all the formalities. -01.11.2021

Contempt Application (Civil) No.1965 of 2022 filed by the petitioners was disposed of by granting one more opportunity to the opposite parties to comply with the order of the Writ Court. - 05.04.2022

The Competent Authority refused to pay compensation on the ground that objection under Section 34 was pending before the court. - 02.06.2022

Second Contempt Application (Civil) No. 4124 of 2022 filed by the petitioners. Notice issued to opposite parties. - 03.12.2022

Competent Authority addressed a communication to NHAI that payment was made to the petitioners by RTGS on 30.01.2023, but the amount has not been received from NHAI.	-02.02.2023
The petitioners filed application for payment of interest from the date of award i.e. 7.12.2019 upto the date of actual payment, but which request has not been accepted.	18.03.2023

Submission of Counsel for the Parties

3. Learned counsel for the petitioners made the following submissions: -

(a) The Supreme Court in **Union of India and others Vs. Tarsem Singh and others**[1] has declared Section 3-J of NH Act as unconstitutional, being violative of Article 14 of the Constitution. It has also been held that the State cannot be permitted to discriminate between land owners on account of difference in Statutes under which their lands are acquired, as it would be violative of Article 14 of the Constitution.

(b) The solatium and interest is payable to the land owners whose property is compulsorily acquired as part of compensation. Any discrimination in this regard would render the provision relating to acquisition under the National Highways Act unconstitutional. The petitioners would therefore be entitled to interest in case of delay not only on the compensation amount enhanced by the Arbitrator [Section 3-H(5) of the NH Act], but also on the amount initially determined by the Competent Authority, by virtue of Section 80 of the Act, 2013.

4. On the other hand, Sri Pranjal Mehrotral, learned counsel appearing on behalf of NHAI submitted as follows:

By virtue of Section 105 (1) of the Act, 2013, the provisions of the Act have been made inapplicable to the enactments relating to land acquisition specified in the Fourth Schedule. The NH Act is enlisted at Serial No.7 in the Fourth Schedule. Therefore, the provisions of the Act, 2013 would not be applicable nor the petitioners can claim any interest under Section 80 of the Act, 2013.

Statutory Regime -

5. A bird's eye view of the relevant old and new statutory regime would help us in deciding the controversy. The NH Act initially did not contain any provision for acquisition of land even when required for construction of Highway. The acquisitions used to be made under the Land Acquisition Act, 1894 (for short 'the Old Act'). It was resulting in considerable delay. In order to expedite the process of land acquisition where land is required for construction of National Highways, the National Highways Laws (Amendment) Act, 1997 was enacted. By inserting Sections 3-A to 3-J of NH Act, a parallel machinery to the existing provisions under the Old Act was provided for acquisition of lands for National Highways. Under it, preliminary notification is made under Section 3-A declaring intention of the Central Government to acquire land followed by final declaration under Section 3-D. The important feature is that on publication of declaration under Section 3-D, the land vests absolutely in the Central

Government free from all encumbrances and consequently, the Central Government is clothed with power to take possession. Section 3-G is the machinery provision for determination of compensation and 3-H stipulates that the Central Government shall deposit the compensation amount in such manner as may be laid down by Rules made in this behalf with the Competent Authority before taking possession of the land. The National Highways (Manner of Depositing the Amount by the Central Government; Making Requisite Funds Available to the Competent Authority for Acquisition of Land) Rules, 2019 lays down the mechanism in which the compensation amount would be made available to the Competent Authority. It mandates that the Executive Agency would make available the amount determined under Section 3-G of the Act within fifteen days of the raising of demand by the Competent Authority and where the amount determined by the Arbitrator under sub-section (7) of Section 3-G of the Act is in excess of the amount determined by the Competent Authority, the excess amount, together with interest, if any, awarded by the Arbitrator would be deposited within thirty days of the communication of the Arbitrator's award unless such award has been further challenged by either of the aggrieved parties. Rule 4 enlists the circumstances in which the Competent Authority can deposit unclaimed or disputed amounts with the principal court of civil jurisdiction and in which event, it would be deemed as payment made to the entitled persons under sub-section (2) of Section 3-H of the Act. Section 3-H stipulates that as soon as may be after the amount has been deposited under sub-section (1), the Competent Authority shall on behalf of Central Government pay the amount to the person or persons entitled thereto. Sub-section (5) stipulates that where the amount determined under Section 3-G by the Arbitrator is in excess of the amount determined by the Competent Authority, the Arbitrator may award interest at 9% per annum on such excess amount from the date of taking possession under Section 3-D till the date of the actual deposit thereof.

6. Section 80 of the 2013 Act contemplates that where compensation amount is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of 9% per annum from the time of so taking possession until it shall have been so paid or deposited. The rate of interest is upto 15% per annum where there is delay beyond one year in making payment. Section 80 of the Act is extracted below for ready reference:-

"**80. Payment of interest**.–When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of nine per cent. per annum from the time of so taking possession until it shall have been so paid or deposited:

Provided that if such compensation or any part thereof is not paid or deposited within a period of one year from the date on which possession is taken, interest at the rate of fifteen per cent. per annum shall be payable from the date or expiry of the said period of one year on the amount of compensation or part thereof which has not been paid or deposited before the date of such expiry."

7. Chapter X of the Act, 2013 and Section 80 whereof is part, relates to payment of the compensation amount. Section 77 relates to payment or deposit of

same in the account of the Land Acquisition Rehabilitation and Resettlement Authority. It reads as follows:-

"77. Payment of compensation or deposit of same in Authority.–(1) On making an award under Section 30, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award and shall pay it to them by depositing the amount in their bank accounts unless prevented by someone or more of the contingencies mentioned in Sub-section (2).

(2) If the person entitled to compensation shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Authority to which a reference under Section 64 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:

Provided further that no person who has received the amount otherwise than under protest shall be entitled to make any application under Sub-section (1) of Section 64:

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto."

8. Sections 78 and 79 relate to investment of money deposited with the Authority. The said provisions read as follows:-

"78. Investment of money deposited in respect of lands belonging to person incompetent to alienate.–(1) If any money is deposited in the Authority concerned under Sub-section (2) of Section 77 and it appears that the land in respect whereof the same was awarded belonged to any person who had no power to alienate the same, the Authority concerned shall—

(a) order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held; or

(b) if such purchase cannot be effected forthwith, then in such Government of other approved securities as the Authority concerned shall think fit,

and shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who would for the time being have been entitled to the possession of the said land, and such moneys shall remain so deposited and invested until the same be applied—

(i) in the purchase of such other lands as aforesaid; or

(ii) in payment to any person or persons becoming absolutely entitled thereto.

(2) In all cases of money deposited to which this Section applies the Authority concerned shall order the costs of the following matters, including therein all reasonable charge and expenses incident thereon, to be paid by the Collector, namely:—

(a) the costs of such investments as aforesaid;

(b) the costs of the orders for the payment of the interest or other proceeds of

the securities upon which such moneys are for the time being invested, and for the payment out of the Authority concerned of the principal of such moneys, and of all proceedings relating thereto, except such as may be occasioned by litigation between adverse claimants."

"79. Investment of money deposited in other cases.–When any money shall have been deposited in the Authority concerned under this Act for any cause other than the causes mentioned in Section 78, the Authority may, on the application of any party interested or claiming an interest in such money, order the same to be invested in such Government or other approved securities as it may think proper, and paid in such manner as it may consider will give the parties interested therein the same benefit from it as they might have had from the land in respect whereof such money shall have been deposited or as near thereto as may be."

9. A conjoint reading of Sections 77, 78, 79 and 80 reveals that as soon as award is made, the Collector is under mandate to tender payment of the compensation awarded by him to the persons entitled thereto by depositing the amount in their accounts unless prevented by some one or more of the contingencies mentioned in sub-section (2). Sub-section (2) permits the Collector to deposit the amount with the Authority to which a reference under Section 64 would be submitted, where the person entitled to compensation has not consented to receive it or if there be any person competent to alienate the land or if there be any dispute as to title to receive compensation or as to the apportionment of it.

10. When we compare the provisions relating to payment of interest under NHAI Act, 1956 with the provisions under the 2013 Act, it transpires that the provisions under the Act, 2013 are more beneficial to the land owners. As already noted, the only provision for payment of interest under the NH Act is Section 3-H (5), whereunder interest at the rate of 9% per annum is payable only on excess amount determined by the Arbitrator. The Act is silent in respect of payment of interest in cases where compensation amount is not paid or deposited on or before taking possession of the land in respect of which the interest is allowable in terms of Section 80 of the Act, 2013.

Analysis

11. In the above backdrop, we now proceed to examine the main issue regarding applicability of Section 80 of the Act of 2013 to the acquisitions made under the NH Act.

12. There's no gainsaying that by virtue of sub-section (1) of Section 105 of the Act of 2013, the provisions of the Act do not automatically apply to the acquisitions made under the NH Act. However, it is noteworthy that under sub-section (3), the Central Government is invested with the power to issue notification for making applicable any of the provisions of the Act of 2013 relating to determination of compensation in accordance with the First Schedule and rehabilitation and resettlement specified in the Second and Third Schedules with such exceptions or modifications as would not reduce the compensation or dilute the provisions of the Act of 2013 to the Act specified in the First Schedule. Section 105 of the Act 2013 reads as follows: -

Section 105. Provisions of this Act not to apply in certain cases or to apply

with certain modifications. - (1) Subject to sub-section (3), the provisions of this Act shall not apply to the enactments relating to land acquisition specified in the Fourth Schedule.

(2) Subject to sub-section (2) of Section 106 the Central Government may, by notification, omit or add to any of the enactments specified in the Fourth Schedule.

(3) The Central Government shall, by notification, within one year from the date of commencement of this Act, direct that any of the provisions of this Act relating to the determination of compensation in accordance with the First Schedule and rehabilitation and resettlement specified in the Second and Third Schedules, being beneficial to the affected families, shall apply to the cases of land acquisition under the enactments specified in the Fourth Schedule or shall apply with such exceptions or modifications that do not reduce the compensation or dilute the provisions of this Act relating to compensation or rehabilitation and resettlement as may be specified in the notification, as the case may be.

(4) A copy of every notification proposed to be issued under sub-section (3), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses of Parliament."

13. In **Tarsem Singh** (supra), the main issue was whether the provisions relating to non grant of solatium and interest to lands acquired under the NH Act would render the said Act violative of Article 14 of the Constitution. While examining the said issue, the Supreme Court noticed the differences between the two Acts. One of the important difference noted by the Supreme Court between the provisions of the two Acts is regarding absence of provision under the NH Act relating to grant of interest except in cases where there is enhancement of compensation amount by the Arbitrator and that too, only on the amount enhanced. The Supreme Court also noticed the notification issued by the Central Government dated 28.08.2015 under Section 105 read with Section 113 of the 2013 Act which makes the compensation provisions under the said Act applicable to the acquisitions under the NH Act. It was also noticed that there was specific provision in shape of proviso to Section 28 under the Old Act whereunder interest was awardable at the rate of 15% per annum if such payment was made beyond one year. It was noticed that before the 1997 Amendment Act and after coming into force 2013 Act, solatium and interest were payable to the land owners in case of acquisition for purposes of National Highways. Bearing in mind the aforesaid important aspect, it was observed that denial of solatium and interest was not the object of the Amendment Act, 1997 and therefore, the provisions of the NH Act providing for grant of compensation without solatium and interest would not fall within the protective umbrella of Article 31(C) of the Constitution. Accordingly, in case of infraction of Article 14, the provision would be rendered illegal. Resultantly, Section 3-J of the NH Act which excludes the applicability of the Act

2013 was struck down as violative of Article 14 of the Constitution. The relevant extracts from the said judgment laying down the above proposition are as follows:

"12. The First Schedule to the said Act provides that solatium equivalent to 100% of the market value multiplied by various factors, depending on whether the land is situated in a rural or urban area, constitutes minimum compensation package to be given to those whose land is acquired. The Fourth Schedule to this Act, to be read along with Section 105, expressly includes under Item 7, the National Highways Act, 1956. In Item 9, this Schedule also includes The Requisitioning and Acquisition of Immovable Property Act, 1952. By a notification dated 28 th August, 2015 issued under Section 105 read with Section 113 of the 2013 Act, it is provided that the 2013 Act compensation provisions will apply to acquisitions that take place under the National Highways Act. The result is that both before the 1997 Amendment Act and after the coming into force of the 2013 Act, solatium and interest is payable to landowners whose property is compulsorily acquired for purposes of National Highways. This is one other very important circumstance to be borne in mind when judging the constitutional validity of the 1997 Amendment Act for the interregnum period from 1997 to 2015.

…..

…..

Even if the Amendment Act, 1997 be regarded as an Act to carry out the purposes of Article 39(b), the object of the Amendment Act is not served by removing solatium and interest from compensation to be awarded. It is obvious, therefore, that the grant of compensation without solatium and interest is not basically and essentially necessary to carry out the object of the Amendment Act, 1997, even if it is to be considered as an acquisition Act pure and simple, for the object of the said Amendment Act as we have seen is to obviate delays in the acquisition process of acquiring land for National Highways. On application of this test as well, it is clear that the grant of compensation without solatium and interest, not being basically and essentially necessary to carry out the object of the Amendment Act, would not receive the protective umbrella of Article 31-C and, therefore, any infraction of Article 14 can be inquired into by the Court."

14. The Supreme Court also took into consideration the Ordinance of 2014 making applicable the provisions relating to compensation, rehabilitation and resettlement under the Act 2013 to the acquisitions made under the NH Act and a subsequent notification to the same effect dated 28.08.2015. Para 38 of the Law Report which takes notice of the aforesaid notifications, is extracted below:

"38. It is worthy of note that even in acquisitions that take place under the National Highways Act and the 1952 Act, the notification of 2015 under the new Acquisition Act of 2013 makes solatium and interest payable in cases covered by both Acts. In fact, with effect from 1st January, 2015, an Amendment Ordinance No.9 of 2014 was promulgated amending the 2013 Act. Section 10 of the said amendment Ordinance states as follows:

"10. In the principal Act, in Section 105,-

(i) for Sub-section (3), the following Sub-section shall be substituted, namely:-

"(3) The provisions of this Act relating to the determination of

compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule shall apply to the enactments relating to land acquisition specified in the Fourth Schedule with effect from 1st January, 2015.";

(ii) Sub-section (4) shall be omitted." It is only when this Ordinance lapsed that the notification dated 28 th August, 2015 was then made under Section 113 of the 2013 Act. This notification is important and states as follows:

"MINISTRY OF RURAL DEVELOPMENT

ORDER

New Delhi, the 28th August, 2015

S.O. 2368(E).— Whereas, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013) (hereinafter referred to as the RFCTLARR Act) came into effect from 1st January, 2014;

And whereas, Sub-section (3) of Section 105 of the RFCLTARR Act provided for issuing of notification to make the provisions of the Act relating to the determination of the compensation, rehabilitation and resettlement applicable to cases of land acquisition under the enactments specified in the Fourth Schedule to the RFCTLARR Act;

And whereas, the notification envisaged under Sub- Section (3) of Section 105 of RFCTLARR Act was not issued, and the RFCTLARR (Amendment) Ordinance, 2014 (9 of 2014) was promulgated on 31st December, 2014, thereby, inter-alia, amending Section 105 of the RFCTLARR Act to extend the provisions of the Act relating to the determination of the compensation and rehabilitation and resettlement to cases of land acquisition under the enactments specified in the Fourth Schedule to the RFCTLARR Act;

And whereas, the RFCTLARR (Amendment) Ordinance, 2015 (4 of 2015) was promulgated on 3rd April, 2015 to give continuity to the provisions of the RFCTLARR (Amendment) Ordinance, 2014;

And whereas, the RFCTLARR (Amendment) Second Ordinance, 2015 (5 of 2015) was promulgated on 30th May, 2015 to give continuity to the provisions of the RFCTLARR (Amendment) Ordinance, 2015 (4 of 2015); And whereas, the replacement Bill relating to the RFCTLARR (Amendment) Ordinance, 2015 (4 of 2015) was referred to the Joint Committee of the Houses for examination and report and the same is pending with the Joint Committee;

As whereas, as per the provisions of article 123 of the Constitution, the RFCTLARR (Amendment) Second Ordinance, 2015 (5 of 2015) shall lapse on the 31st day of August, 2015 and thereby placing the land owners at the disadvantageous position, resulting in denial of benefits of enhanced compensation and rehabilitation and resettlement to the cases of land acquisition under the 13 Acts specified in the Fourth Schedule to the RFCTLARR Act as extended to the land owners under the said Ordinance;

And whereas, the Central Government considers it necessary to extend the benefits available to the land owners under the RFCTLARR Act to similarly placed land owners whose lands are acquired under the 13 enactments specified in the Fourth Schedule; and accordingly the Central Government keeping in view the aforesaid

difficulties has decided to extend the beneficial advantage to the land owners and uniformly apply the beneficial provisions of the RFCTLARR Act, relating to the determination of compensation and rehabilitation and resettlement as were made applicable to cases of land acquisition under the said enactments in the interest of the land owners;

Now, therefore, in exercise of the powers conferred by Sub-section (1) of Section 113 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (30 of 2013), the Central Government hereby makes the following Order to remove the aforesaid difficulties, namely;-

1. (1) This Order may be called the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Removal of Difficulties) Order, 2015.

(2) It shall come into force with effect from the 1st day of September, 2015.

2. The provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, relating to the determination of compensation in accordance with the First Schedule, rehabilitation and resettlement in accordance with the Second Schedule and infrastructure amenities in accordance with the Third Schedule shall apply to all cases of land acquisition under the enactments specified in the Fourth Schedule to the said Act.

[F.No. 13011/01/2014-LRD]
K. P. KRISHNAN, Addl. Secy."

It is thus clear that the Ordinance as well as the notification have applied the principle contained in Nagpur Improvement Trust (supra), as the Central Government has considered it necessary to extend the benefits available to landowners generally under the 2013 Act to similarly placed landowners whose lands are acquired under the 13 enactments specified in the Fourth Schedule, the National Highways Act being one of the aforesaid enactments. This being the case, it is clear that the Government has itself accepted that the principle of Nagpur Improvement Trust (supra) would apply to acquisitions which take place under the National Highways Act, and that solatium and interest would be payable under the 2013 Act to persons whose lands are acquired for the purpose of National Highways as they are similarly placed to those landowners whose lands have been acquired for other public purposes under the 2013 Act. This being the case, it is clear that even the Government is of the view that it is not possible to discriminate between landowners covered by the 2013 Act and landowners covered by the National Highways Act, when it comes to compensation to be paid for lands acquired under either of the enactments. The judgments delivered under the 1952 Act as well as the Defence of India Act, 1971, may, therefore, require a re-look in the light of this development. 1 In any case, as has been pointed out hereinabove, the case of Chajju Ram (supra), has been referred to a larger Bench. In this view of the matter, we are of the view that the view of the Punjab and Haryana High Court is correct, whereas the view of the Rajasthan High Court is not correct."

15. In para 41 of the judgment, the Supreme Court held that the provision relating to solatium and interest would also be applicable to cases that arise between 1997-2015. Accordingly, Section 23(1-A) and (2) and interest payable in terms of

proviso to Section 28 of the Old Act has been held to be applicable to acquisitions made under the NH Act. Para 41 is extracted below:

"41. There is no doubt that the learned Solicitor General, in the aforesaid two orders, has conceded the issue raised in these cases. This assumes importance in view of the plea of Shri Divan that the impugned judgments should be set aside on the ground that when the arbitral awards did not provide for solatium or interest, no Section 34 petition having been filed by the landowners on this score, the Division Bench judgments that are impugned before us ought not to have allowed solatium and/or interest. Ordinarily, we would have acceded to this plea, but given the fact that the Government itself is of the view that solatium and interest should be granted even in cases that arise between 1997 and 2015, in the interest of justice we decline to interfere with such orders, given our discretionary jurisdiction under Article 136 of the Constitution of India. We therefore declare that the provisions of the Land Acquisition Act relating to solatium and interest contained in Section 23(1A) and (2) and interest payable in terms of Section 28 proviso will apply to acquisitions made under the National Highways Act. Consequently, the provision of Section 3J is, to this extent, violative of Article 14 of the Constitution of India and, therefore, declared to be unconstitutional. Accordingly, Appeal @ SLP (C) No. 9599/2019 is dismissed."

16. Applying the principles enunciated in **Tarsem Singh** (supra), we are of considered opinion that provision relating to interest i.e. Section 80 of the Act 2013 being a more beneficial provision would apply to acquisitions made under the NH Act. This also expressly flows from the mandate of sub-section (3) of Section 105 which stipulates that while making applicable the provisions relating to compensation, rehabilitation and resettlement under the Act of 2013 to acquisitions made under various Acts specified in Schedule-1, the only exception or modification permissible would be such as would not reduce the compensation or dilute the provisions of the Act, 2013.

17. As already noted, the interest being part of compensation, the more beneficial provision of 2013, Act relating to interest i.e. Section 80 on the amount determined in the first instance (by Competent Authority under NH Act) would undoubtedly apply to the acquisitions made under the NH Act.

18. In the result, all the petitions succeed and are allowed. The respondents are directed to calculate the interest as per the provisions of Section 80 of the Act 2013 and pay the same to the petitioners within four weeks from the date of the communication of the instant order.

19. No order as to costs.

(2024) 1 ILRA 784
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2023 & 09.01.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-C No. 25025 of 2023

Smt. Haseena & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Pundir

Counsel for the Respondents:
Sri Abhishek Shukla (Addl. C.S.C.), Sri B.K. Singh Raghuvansi, Sri Kaushal Kishore Mani

Civil Law - U.P. Revenue Code, 2006 - Sections 64 & 67-A - U.P. Revenue Code Rules, 2016 - Rule 68 - Petitioners, claim to be landless agricultural labourers living below poverty line. Asserted that possession of 180 sq.m. of Banjar land, where they constructed pucca house about 25–30 years ago. Pursuant to USOF scheme, BSNL sought 200 sq.m land for Tower installation. On Lekhpal's report, authorities allotted 200 sq.m. of said plot for BSNL tower under USOF scheme, trees were auctioned and cut. Petitioners' house demolished to facilitate tower installation. Petitioners contend that their possession is deemed settled, conferring perpetual rights. Seek mandamus restraining eviction and prohibiting installation of BSNL tower over their house site - Petitioners invoke Section 67-A, Code, 2006 by writ of mandamus, but respondents deny possession of petitioners in any manner and no record supports their claim, nor proceedings under Section 67 been initiated against petitioners, as they were not found in possession - Section 67 of Code, 2006 permits settlement of house sites in favour of occupant provided occupant built house which exists on 29.11.2012 subject to occupant's category and land type within prescribed area, but mandatory conditions stand unfulfilled. (Para 2, 12, 13)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Manorey alias Manohar Vs Board of Revenue (U.P.) & ors. AIR 2003 Supreme Court 4102

2. Baij Nath Vs Commissioner Varanasi & ors. 2020 (147) RD 360

3. Raju Vs St. of U.P. & ors. 2020 (149) RD 434, (Paras 11 to 17)

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Sanjay Kumar Pundir, learned counsel for the petitioners, Mr. Abhishek Shukla, learned Addl. C.S.C. for the state-respondents and Mr. B.K. Singh Raghuvanshi, learned counsel for respondent no.6.

2. Brief facts of the case are that Khata No.151 Plot No.163 area 0-4-0 Biswa situated in Village- Bhuribans, Tehsil- Nakur, District- Saharanpur was recorded as banjar in the basic year khatauni of 1359 fasli. In the first consolidation operation commenced in the year 1967-68 New Plot No. 123 area 0-6-0 Biswa of Khata No. 115 was carved out from old Plot No. 163/2 of Khata No.151. According to petitioner, he belongs to OBC category caste 'teli' Muslim by religion and permanent resident of Village- Bhuribans being landless agricultural labourer living below poverty line. According to petitioners they have constructed pucca house with bricks and khaprail to its appurtenant land in area of 180 square meters and are in possession over the same for last more than 25-30 years however respondents are denying the petitioner's possession in any manner. Department of Telecommunications Government of India under the Universal Service Obligation Fund (USOF) has planned to provide connectivity in India's rural and remote area wherein BSNL has required co-operation from the Government of U.P. to provide land measuring in area 200 square meter free of cost in each village. On the basis of report dated 22.10.2022 submitted by Lekhpal, a letter dated 14.4.2023 has been issued to BSNL for installation of BSNL tower over Plot No.123 area 0.0300 hectare out of its total 0.0620 hectare. Tehsildar vide letter dated 30.6.2023 issued auction notice for cutting down the trees on Plot No.123 accordingly trees were cut

down on 17.7.2023 in presence of revenue authorities. According to petitioners their house was demolished by the authorities on 22.7.2023 and started digging the ground to facilitate the installation of BSNL Tower. Hence this writ petition on behalf of petitioners for mandamus commanding the respondent authorities, Collector/District Magistrate Saharanpur to prevent the eviction of the petitioners' Pucca house built with bricks and 'khaprail' to its appurtenant land measuring in area about 180 sq.m. over Banjar land of Plot No.123 out of its total 0.0620 hectare ,existing since before 29.11.2012,more than 25-30 years back, as by operation of law under enactment of Section 67-A of U.P. Revenue Code, 2006, r/w Rule 68 of the U.P. Revenue Code Rules,2016 the site of said house shall be presumed to be held by owner and deemed to be settled with the occupant thereof, and thereby, the petitioners shall be treated to have been already perfected their perpetual rights and title over the same, and further the BSNL authorities maybe directed not be install the proposed tower over/within the premises of petitioners existing house on the proposed Plot No.123,situated in Village- Bhuribans, Tehsil-Nakur, District- Saharanpur, so that their constitutional rights guaranteed under Article 300A of the Constitution of India may be safeguarded, otherwise the petitioners' shall suffer irreparable loss and injury.

3. This court on 7.8.2023 passed the following order:-

"1. Heard Sri Sanjay Kumar Pundir, learned counsel for petitioner and Sri B.K. Singh Raghuvanshi, learned counsel for respondent no. 6 and Sri Dhananjai Singh, learned Standing counsel appearing on behalf of respondent no. 1, 2, 3, 4 and 7 and Sri Ramesh Prasad holding brief of Sri Kaushal Kishore Mani, learned counsel for respondent no. 5.

2. It is the case of the petitioner that he was having a house fortified with a boundary and the same has been demolished on the behest of the portion of land over which the construction has been raised by the petitioner has already been entered as Banjar in the revenue records. There is a proposal for installation of tower by the respondent no. 6 for smooth connectivity of the telephone/mobile connections.

3. It is the admitted case on behalf of the petitioner that the plot in question does not belongs to the petitioner but at the same time the occupation over the same is covered under Section 67(a) of the U.P. Revenue Code, 2006 and the benefit of the same may be extended in favour of him and without conducting any proceeding under Section 67 of the Code of 2006 the revenue authorities proceeded illegally against the petitioner.

4. Sri Dhananjai Singh, learned Standing counsel is hereby granted 10 days time to seek instructions specifically over the issue whether any demolition proceeding has been initiated? Whether any co nstruction is raised by the petitioner over plot no. 123 situated at Village Bhuribans, Tehsil Nakur, District Saharanpur.

5. Learned counsel for the respondents prays for and are granted two weeks time for filing counter-affidavit.

6. One week time thereafter is granted for filing rejoinder affidavit, if any.

7. Put up this case on 28.08.2023 as fresh."

4. In pursuance of the order dated 7.7.2023 passed by this court counter affidavit as been filed by state as well as short counter affidavit has been filed by respondent no.6/BSNL. Petitioners have filed their rejoinder affidavit also.

5. Counsel for the petitioners submitted that petitioners belongs to OBC category (teli) Muslim by religion and permanent resident of village in question being landless agricultural labourer is entitled to benefit of Section 67-A of U.P. Revenue Code, 2006 but respondent authorities have illegally demolished the petitioner's residential construction without initiating proper proceeding in accordance with law. He further submitted that land in dispute was initially recorded as banjar in revenue record and at present is abadi as such petitioners are entitled to benefit of Section 67-A of U.P. Revenue Code, 2006. He further submitted that villagers of the village in question have submitted affidavit before the authorities that petitioners are in possession of the plot for the last more than 5 years and their residential construction without following procedure of law. He further submitted that petitioners belong to Muslim Community as such authorities have proceeded with malice intention against the petitioners. He further submitted that title and entitlement of the petitioners being infringed which is guaranteed under Article 300A of the Constitution of India as such petitioners are entitled to the relief claimed in the writ petition. He further placed the provisions contained under Sections 64, 67 and 67-A of U.P. Revenue Code, 2006 as well as Rule 68 of U.P. Revenue Code Rules 2016 in support of his argument. He further placed reliance upon the judgment of Hon'ble Apex Court reported in ***AIR 2003 Supreme Court 4102 Manorey alias Manohar Versus Board of Revenue (U.P.) and Others*** in order to demonstrate that petitioners are entitled to benefit of Section 67-A of U.P. Revenue Code, 2006.

6. On the other hand Mr. Abhishek Shukla learned Additional Chief Standing Counsel for the state respondents submitted that Plot No.123 area 0.06620 hectare is recorded as category 5(3)- Bajar in the revenue record. He further submitted that there was no construction of the petitioners over plot in dispute and the averments made to this effect in the writ petition are wholly false. He further submitted that in order to provide proper mobile connectivity to the villagers, the land in dispute was proposed for installation of BSNL Tower but the ownership of the land shall remained with Gaon Sabha. He further submitted that construction/installation of BSNL Tower of BSNL Tower has been completed. He further submitted that after inspection/demarcation of the land in dispute illegal construction of Mohar Singh,Ratan and Bhullan were found accordingly three cases under Section 67(1) of U.P. Revenue Code, 2006 have been registered being Case No. T202309600306164, T202309600306165 and T202309600306166 which are pending before Tehsildar. He further submitted that petitioners have taken contradictory stand in their defense by stating at one hand that their residential construction is situated over disputed land and on the other hand stating that trees are situated over the land in dispute after demolition of the house. He further submitted that in view of the entry of the plot in dispute as well as the other facts relating to possession of the plot in dispute petitioner is not entitled to the protection of Section 67-A of U.P. Revenue Code, 2006 and writ petition is liable to be dismissed.

7. Mr. B.K.Singh Raghuvanshi, learned counsel for the respondent no.6 submitted that state has given plot to respondent no.6 for construction/installation of BSNL Tower to provide mobile connectivity to the villagers and the work has already been completed as such no interference is required in the matter. He further submitted that petitioner is neither owner nor in possession of the land in dispute as such petitioners are entitled to claim any relief in the matter.

8. Mr. Kaushal Kishore Mani, learned Counsel for the respondent no.5/Gram Panchayat submitted that petitioners have not found in possession of the land in dispute as such petitioners cannot claim benefit of Section 67-A of U.P. Revenue Code, 2006. He further submitted writ petition filed on behalf of petitioners for mandamus claiming benefit of Section 67-A U.P. Revenue Code, 2006 in respect to the plot in dispute is not maintainable before this court.

9. I have considered the argument advanced by learned counsel for the parties and perused the records.

10. There is no dispute about the fact that Plot No. 123 area 0.0620 hectare is recorded as banjar class 5(3) in the latest Khatauni of 1429-1434 fasli (1.7.2021 to 30.6.2027) as well as in C.H. Form 45 which have been annexed as Annexure No.2 to the writ petition.

11. Petitioners are claiming benefit of Section 67-A U.P. Revenue Code, 2006 read with Rule 68 of U.P. Revenue Code Rules, 2016 as such perusal of Sections 64,67-A and Rule 68 of U.P. Revenue Code Rules, 2016 will be relevant which is as under:-

"U.P. Revenue Code, 2006

64. Allotment of abadi sites—(1) The following order of preference shall be observed in making allotment of land referred to in Section 63—

(a) an agricultural labourer or a village artisan residing in the Gram Sabha and belonging to a Scheduled Caste or Scheduled Tribe or Other Backward Classes or a person of general category living below poverty line as determined by the State Government.

(b) any other agricultural labourer or a village artisan residing in the Gram Sabha. (c) any other person residing in the Gram Sabha and belonging to a scheduled caste or scheduled tribe or other Backward Classes or a person of general category living below poverty line as determined by the State Government:

Provided that preference will be given to widow and physically handicapped person within same category.

Explanation.—For the purposes of this sub-section—

(1) "other backward class" means the backward classes of citizens specified in Schedule I of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 (U.P. Act No. 4 of 1994);

(2) "person of general category living below poverty line" means such persons as may be determined from time to time by the State Government.

(3) In making an allotment under this section, preference shall be given to a person who either holds no house or has insufficient accommodation considering the requirements of his family.

(4) Every land allotted under this section shall be held by the allottee on such terms and conditions as may be prescribed[:]

[Provided that if the allottee is a married man and his wife is alive, she shall be co-allottee of equal share in the land so allotted.]

Section 67-A. Certain house sites tobe settled with existing owners thereof.—(1) If any person referred to in sub-section (1) of Section 64 has built a house on any land referred to in Section 63 of this Code, not being land reserved for any public purpose, and such house exists on the November 29, 2012, the site of such house shall be held by the owner of the house on such terms and conditions as may be prescribed.

(2) Where any person referred to in sub-section (1) of Section 64, has built a house on any land held by a tenure holder (not being a government lessee) and such house exists on November 29, 2000, the site of such house, notwithstanding anything contained in this Code, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed.

Explanation.—For the purpose of sub-section (2), a house existing on November 29, 2000, on any land held by a tenure holder, shall, unless the contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family.]

U.P. Revenue Code Rules,2016

68. Settlement of house sites with existing owners thereof (Section 67-A).—(1) Where any person referred to in sub-section (1) of Section 64 has built a house on any land referred to in Section 63 of the Code, not being land reserved for any public purpose and such house exists on twenty-ninth day of November 2012, the site of such house shall be held by the owner of the house on terms and conditions prescribed in Rule 64.

Note.—For the removal of doubt it is hereby declared that the maximum area of the site settled under Section 67-A(1) of the Code or the rules famed thereunder shall not exceed two hundred square metres.

(2) Where any person referred to in sub-section (1) of Section 64 has built a house on any land held by a tenure holder (not being a government lessee) and such house exists on twenty-ninth day of November 2000, the site of such house shall be deemed to be held by the owner of the house on the following terms and conditions—

(a) the maximum area of the site settled under Section 67-A(2) of the Code or the rules framed thereunder shall not exceed two hundred square meters.

(b) the owner of the house as well as his heirs shall have a heritable interest in the site and shall also have unrestricted right to use the trees and wells existing on the site subject to existing rights of easements.

(c) he shall have a right to use the site for construction of a residential house, subject to existing rights of easement.

(d) the owner of the house shall not be liable to pay to the tenure holder or the State Government any future rent in respect of the site.

(e) the succession over the site shall be governed by personal law which the house owner was subject to.

(f) the owner of the house and his heirs shall not be liable to ejectment on any ground whatsoever.

(g) if the building is abandoned or if the owner thereof dies without any heir entitled to succeed, the land or site shall escheat to the State.

(h) the tenure holder shall be allowed remission of the proportionate land revenue for the portion of his holding settled under this rule with house owners. The land shall also be classified as abadi in the Khatauni maintained under the Code."

12. In the instant matter petitioners are claiming benefit of Section 67-A U.P. Revenue Code, 2006 in exercise of jurisdiction under Article 226 of Constitution of India by way of writ of mandamus although respondent authorities are denying the possession of the petitioners in any manner nor any document on record demonstrate that petitioners are in possession over the plot in dispute for the last 25 years. Respondents have not initiated proceeding against the petitioners under Section 67 of U.P. Revenue Code, 2006 as petitioners have not found in possession over the plot in dispute.

13. The scheme has been provided under Section 67 of U.P. Revenue Code, 2006 for settlement of the house site in favour of occupant provided occupant built a house which exists on 29.11.2012 and occupant belong to particular category as well as land should also be of particular category upto certain area but all the mandatory condition as mentioned above are not fulfilled in the instant matter.

14. This court in the case reported in ***2020 (147) RD 360 Baij Nath Versus Commissioner Varanasi and Others*** as well as ***2020 (149) RD 434 Raju Versus State of U.P. and Others*** has adjudicated the same controversy. Paragraph Nos. 11 to 17 of the judgment rendered in ***Raju(Supra)*** will be relevant for perusal which are as under:-

"11. It is not disputed that land from where the petitioners have been ordered to be evicted, is recorded as 'Banjar'. It has not been earmarked as an abadi site till date and is therefore, not land referred to under Section 63 of the Code.

12. Section 64 extracted above, shows the order of preference to be followed up while making allotment of an abadi site. Highest in this order of preference are agricultural labourers or village artisans belonging to the scheduled caste or scheduled tribes followed by other backward classes and, thereafter, by persons of general category living below the poverty line.

13. None of the petitioners belongs to the scheduled caste or scheduled tribe as already noted herein above. Two of them claim to belong to the backward class while two appear to be from the general category.

14. Careful perusal of the applications under Section 67A, which are stated to have been filed by the petitioners, reveals that nowhere in these applications have the applicants stated that no agricultural labourers or village artisan belonging to the scheduled caste or scheduled tribe are residing in village Pachrukhiya. This was necessarily required to be pleaded by them.

15. Merely because a person lower in order of preference has encroached upon Gaon Sabha land, he cannot and should not be granted the benefit of Section 67A unless and until he is in a position to

establish categorically that a person higher in preference is not available in the village. Any other interpretation of Section 67A would result in great injustice as an unauthorized occupant would be liable to be granted its benefit only on account of him or her having illegally encroached upon Gaon Sabha property, despite other needier and persons higher in preference being available in the village.

16. Therefore, and for the reasons given above, this Court is constrained to hold that not only is the land in issue in this writ petitions not land governed by Section 63 of the Code, as it has not been reserved for allotment as abadi site, the petitioners are also, prima facie, not eligible to the benefit of Section 67A as their applications are bereft of necessary pleadings. Therefore on both counts the benefit of Section 67A cannot be extended to the petitioners. Although, reference has also been made in the writ petition as also the applications under Section 67A to provisions of the U.P. Zamindari Abolition and Land Reforms Act, such reference or reliance, in my considered opinion, is not tenable because on date, as also on the date the applications under Section 67A have been filed by the petitioners, the said Act, namely U.P. Zamindari Abolition and Land Reforms Act stood repealed.

17. In view of the foregoing, these writ petitions lack force and are accordingly dismissed."

15. In view of the ratio of law laid down by this court in **Raju (supra)** and **Bajnath (supra)** petitioners are not entitled to any type of declaration or settlement as provided under Section 67A of U.P. Revenue Code, 2006 in exercise of jurisdiction under Article 226 of Constitution of India by way of writ of mandamus.

16. So far as case law of Hon'ble Apex Court in **Manorey alias Manohar (supra)** is concern, the ratio of **Manorey alias Manohar (supra)** is not available to petitioners as petitioners have failed to demonstrate from any evidence on record that petitioners were in possession over the plot in dispute which is the mandatory condition for settlement under Section 67-A of U.P. Revenue Code, 2006.

17. Considering the entire facts and circumstances of the case no interference is required in exercise of jurisdiction under Article 226 of Constitution of India by way of writ of mandamus.

18. Writ petition is dismissed accordingly.

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. The Bench Secretary of the Court has placed the record of this case in the chamber regarding some ambiguity in respect to the judgment dated 28.11.2023 passed in the aforesaid petition.

2. The Court has perused the judgment dated 28.11.2023 available on the record as well as the uploaded judgment on the official website of the Court. It reflects that on account of some inadvertence, the following particulars of some other case, starting from the fourth line of sub-para no.4 of paragraph no.3 (page no.4), has been wrongly/ inadvertently uploaded on the official website of the Court:

"Hon'ble Chandra Kumar Rai, J.

1. Mr. Rakesh Pathak, learned counsel for the petitioners, Mr. Sanjay Srivastava, State Law Officer and Mr. Sher Bahadur Singh, learned counsel for the respondent-Land Management Committee.

2. Learned counsel for the petitioners submitted that the lease granted in favour of petitioners has been cancelled in arbitrary manner. He further submitted that the revision has been also dismissed without summoning the record of the proceedings.

3. Matter requires consideration.

4. Issue notice to respondent nos. 5 to 11 returnable at an early date.

5. Steps be taken within two weeks.

6. Respondent nos.12 to 15 are stated to be proforma respondents, as such, notices to respondent nos.12 to 15 are dispensed with.

7. All the respondents including State & Gaon Sabha shall file counter affidavit within six weeks.

8. Petitioner will file rejoinder affidavit within two weeks thereafter.

9. List this case in the additional cause list on 5.2.2024.

10. The application for interim relief shall be considered on the next date fixed in the matter."

Order Date :- 30.11.2023

3. In view of above, the aforesaid wrong particulars appearing in the fourth line of sub-para no.4 of paragraph no.3 (page no.4) of the judgment dated 28.11.2023 **stand deleted.**

4. This order shall form part of the earlier judgment dated 28.11.2023.

5. Office to do the needful.

(2024) 1 ILRA 792

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 08.12.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 25856 of 2023

C/m, Lala Babu Baijal Memorial Inter College, Hapur & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Gautam Baghel, SriBabboo Ram

Counsel for the Respondents:
C.S.C., Sri Navin Kumar Srivastava, Sri Ritesh Upadhyay, Sri Sukrampal

A. Educational Institutions – Jurisdiction of District Inspector of Schools Under U.P. Educational Institutions (Prevention of Dissipation of Assets) Act, 1974 – Petitioners challenged a notice dated 31.07.2023 issued by the District Inspector of Schools, Hapur, alleging it was beyond his jurisdiction under the Act – Held, the notice seeking details of immovable properties and compensation from land acquisition was within the scope of "assets" and "property" as defined under Sections 2(d) and 8 of the Act, 1974, and the District Inspector of Schools was competent to issue it under the notification dated 07.05.1975, which delegates authority to obtain asset details, and the Government Order dated 06.06.2023. (Paras 5, 6, 7, 10, 11, 12, 13, 21, 22, 23)

B. Statutory Interpretation – Purposive Approach to "Assets" and "Property" – Petitioners argued that the notice exceeded the scope of "assets" as defined in the table under Section 8 of the Act, 1974 – Held, applying purposive interpretation, the term "assets" must be read with the definition of "property" under Section 2(d), which includes rights and interests arising from immovable properties, such as compensation from land acquisition – The notice's demand for such details was covered under "special details" in the Section 8 table, aligning with the Act's objective to prevent

dissipation of institutional assets, as supported by *Central India Spinning Vs Municipal Committee*, *Girdhari Lal Vs Balbir Nath Mathur*, and other Supreme Court precedents. (Paras 13, 14, 15, 16, 17, 18, 19, 20, 21)

C. Writ Jurisdiction – Maintainability Against a Show-Cause Notice – Petitioners contended that the notice was ultra vires and warranted interference under Article 226 – Held, a writ petition against a notice seeking information is generally not maintainable unless it is issued without jurisdiction or violates statutory provisions – The notice was within the District Inspector's delegated authority under the 1975 notification and 2023 Government Order, and no substantive action under Section 4 of the Act, 1974 had been initiated, rendering the challenge premature. (Paras 9, 12, 22, 23, 24)

D. Delegation of Powers – Scope Under Notification and Government Order – Petitioners argued that the District Inspector's authority was limited to obtaining asset details as per the 1975 notification and did not extend to seeking compensation details – Held, the notification dated 07.05.1975 authorizes the District Inspector to obtain "details of assets," which, read with Section 2(d), includes compensation from land acquisition – The Government Order dated 06.06.2023 further supports the District Inspector's role, even as part of a six-member committee, and no adjudication by the committee was involved at this stage. (Paras 4, 5, 7, 12, 22)

E. Precedent and Administrative Authority – Petitioners relied on *C/M Rashtriya Kanya Inter College Vs St. of U.P.* and Supreme Court decisions in *Commissioner of Income Tax Vs Anjum M.H. Ghaswala* and *M/s Cannon India Vs Commissioner of Customs* to argue lack of jurisdiction – Held, the prior case was distinguishable as it involved a notice by the Joint Director, not the District Inspector, and predated the 2023 Government Order – The Supreme Court precedents emphasize that powers must be exercised as per statute, but the District Inspector's notice complied with delegated authority, and an officer's affidavit in another case does not divest statutory competence. (Paras 7, 8, 23)

Writ Petition Dismissed.

List of Cases cited:

1. Central India Spinning and Weaving Manufacturing Comp. Vs Municipal Committee, AIR 1958 SC 341

2. Girdhari Lal & Sons Vs Balbir Nath Mathur, (1986) 2 SCC 237

3. K.P. Varghese Vs ITO, (1981) 4 SCC 173

4. State Bank of Travancore Vs Mohd. M. Khan, (1981) 4 SCC 82

5. Som Prakash Rekhi Vs U.O.I., (1981) 1 SCC 449

6. Ravula Subba Rao Vs CIT, AIR 1956 SC 604

7. Govindlal Vs Agricultural Produce Market Committee, (1975) 2 SCC 482

8. Babaji Kondaji Vs Nasik Merchants Co-op Bank Ltd., (1984) 2 SCC 50

9. Utkal Contractors & Joinery Pvt. Ltd. Vs St. of Orissa, (1987) 3 SCC 279

10. Eera (through Dr. Manjula Krippendorf) Vs St. (NCT of Delhi), (2017) 15 SCC 133

11. Swedish Match AB Vs Securities & Exchange Board, India, (2004) 11 SCC 641

12. Reserve Bank of India Vs Peerless General Finance and Investment Co. Ltd., (1987) 1 SCC 424

13. S. Gopal Reddy Vs St. of Andhra Pradesh, (1996) 4 SCC 596

14. Prakash Kumar Vs St. of Guj., (2005) 2 SCC 409

15. Anwar Hasan Khan Vs Mohd. Shafi, (2001) 8 SCC 540

16. U.O.I. Vs Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277

17. N. K. Jain Vs C. K. Shah, (1991) 2 SCC 495

18. Commissioner of Income Tax, Mumbai Vs Anjum M.H. Ghaswala, (2002) 1 SCC 633

19. M/s Cannon India Private Limited Vs Commissioner of Customs, 2021 AIR (SC) 1699

20. C/M Rashtriya Kanya Inter College Vs St. of U.P., Writ-C No. 3867 of 2023

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

1. Heard Shri Gautam Baghel, learned counsel for the petitioners, Shri Jitendra Singh, learned Additional Chief Standing Counsel for respondent nos.1, 2 and 3, Shri Ritesh Upadhyay, learned counsel for respondent no.4 and perused the record.

THE CHALLENGE

2. This writ petition has been filed challenging a notice dated 31.07.2023, whereby the District Inspector of Schools, Hapur has called upon the petitioners' Management to produce evidence in relation to seven points.

PREVIOUS ORDER IN THIS PETITION

3. This Court, raising prima facie doubts upon maintainability of the writ petition in view of objections raised by Shri Ritesh Upadhyay based upon notifications dated 07.05.1975 and 06.06.2023 (wrongly typed as 09.06.2023 in the order) passed following order on 22.11.2023:-

"1. This petition has been filed challenging notice dated 31.7.2023, whereby the District Inspector of Schools, Hapur has called upon the petitioners' Management to produce evidence in relation to seven points.

2. Sri Gautam Baghel, learned counsel for the petitioners submits that the show-cause notice is without jurisdiction and it has been issued in purported exercise of powers under The Uttar Pradesh Educational Institutions (Prevention of Dissipation of Assets) Act, 1974, whereas the power to undertake such an exercise is vested in Director of Education alone.

3. Sri Ritesh Upadhyay, learned counsel for the contesting respondent has, however, placed before this Court the notifications dated 7.5.1975 and 9.6.2023 and he submits that by virtue of these notifications, the power to issue such notice has been conferred and delegated upon the District Inspector of Schools also and, therefore, the petition has no merit and same be dismissed.

4. At this stage, learned counsel for the petitioner seeks time to go through the said notifications.

5. Sri Ritesh Upadhyay is directed to serve a copy of aforesaid notifications upon Sri Gautam Baghel, learned counsel for the petitioner during course of the day.

6. Put up this case on 8.12.2023 as fresh so as to enable the learned counsel for the petitioners to satisfy the Court on maintainability of the writ petition against a show-cause notice. "

THE NOTIFICATION OF DELEGATION OF POWER

4. The notification dated 07.05.1975, being germane to the controversy involved, is reproduced as below:-

"शिक्षा निदेशालय (माध्यमिक) उत्तर प्रदेश

आदेश संख्या शि० मु०/ 4200-466,
लखनऊः दिनांकः 7 मई, 1975

अधिसूचना

उत्तर प्रदेश शैक्षिक संस्थायें (अस्तियों के अपव्यय का निवारण) अधिनियम 1974 (उत्तर प्रदेश अधिनियम संख्या 3. 1975) की धारा 2(क) के उपबन्धों के अनुसार शिक्षा निदेशक (माध्यमिक शिक्षा) निम्नलिखित अधिकारियों को उनके सम्मुख अंकित कृत्यों को सम्पादित करने के लिए प्राधिकृत करते हैः-

(क) मण्डलीय उप शिक्षा निदेशक- अपने मण्डल के समस्त बालक शिक्षा संस्थाओं द्वारा अधिनियम की धारा 4(4) तथा 5(1) के अधीन प्रस्तुत प्रत्यावेदन। आवेदन प्राप्त करना तथा उन पर आदेश देना।

(ख) मण्डलीय बालिका विद्यालय निरीक्षिका- अपने मण्डल के समस्त बालिक शिक्षा संस्थाओं से समस्त अस्तियों को विवरण प्राप्त करना तथा अधिनियम की धारा 4(4) तथा 5(1) के अधीन के उनके द्वारा प्रस्तुत प्रत्यावेदन/ आवेदनों को प्राप्त करना और उन पर आदेश देना।

(ग) जिला विद्यालय निरीक्षक- अपने जनपद की समस्त बालकों की शिक्षा संस्थाओं से अस्तियों का विवरण प्राप्त करना।

ह० श्याम नारायण मेहरोत्रा
शिक्षा निदेशक (माध्यमिक शिक्षा)
उत्तर प्रदेश।"

SUBMISSION OF PETITIONERS

5. The submission of Shri Gautam Baghel is that the said notification deals with the delegation made under Section 2(a) of the Uttar Pradesh Educational Institutions (Prevention of Dissipation of Assets) Act, 1974 (hereinafter referred to as 'the Act, 1974'), and he submits that all the powers under the Act have not been delegated upon anyone but delegation of power upon the Regional Deputy Director of Education is restricted only to power under Section 4(4) and 5(1) of the Act, 1974 and insofar as the District Inspector of Schools is concerned, the delegation is only to the extent of obtaining instructions from all Institutions in the district in relation to "DETAILS OF ASSETS". Shri Baghel has referred to Section 8 of the Act, 1974 and submits that "ASSETS" have been described in a table contained at the end of the said provision which reads as follows:-

"संस्था के समस्त आस्तियों (Assets) का विवरण

प्रपत्र (क)

संस्था का नाम…….
जिला……..

क्र० सं०	भूमि का प्रकार	बड़े कक्षों की संख्या	छोटे कक्षों की संख्या 400 वर्ग फीट से कम के क्षेत्रफल वाले	योग	स्तम्भ 5 में दिखाये गये कमरों का प्रकार		
					लिंटल छत वाले कमरों की संख्या	टिन की छत वाले कमरों की संख्या	छप्पर/ छपरैल की छत वाले कमरों की संख्या
1	2	3	4	5	6	7	8
1. विद्यालय का मुख्य भवन 2. छात्रावास 3. आवासीय भवन 4. दुकानें 5. अन्य (पशुओं का शेड, ट्यूबवेल तथा सम्बद्ध कक्ष पुर्नव्यवस्था योजना कक्ष आदि)							

भवन किराये का है अथवा निजी	भवन का वर्तमान अनुमानित मूल्य	वार्षिक आय यदि कोई हो	विशेष विवरण
9	10	11	12

प्रबन्धक के हस्ताक्षर

नोट- भवन का मानचित्र संलग्न किया जाये जिसमें कमरों व बरामदों की नाप व किस प्रयोग में आ रहा है, अंकित किया जाये।

प्रधानाचार्य के हस्ताक्षर

प्रपत्र (ख)

क्र० सं०	भूमि का प्रकार	प्लाट नं०	क्षेत्रफल (एकड़)	भूमि वर्तमान अनुमानित	भूमि किस प्रकार की है	भूमि किस प्रयोग		
					कृषि	कृषि के लिए	कृषि	बटाई
1	2	3	4	5	6	7	8	9
1. सन्दान की भूमि 2. कृषि वर्ग की भूमि 3. पुर्नव्यवस्था योजना की भूमि 4. अन्य भूमि (क) विद्यालय भवन से संलग्न (ख) बागवानी (ग) खेल का मैदान (घ) अन्य								
में आ रही		भूमि विद्यालय के नाम दाखिल खारिज हो गई है अथवा नहीं			भूमि पर कक्षों का विवरण	विशेष विवरण		
किराये पर	बिना प्रयोग की				संख्या	लागत		
10	11	12			13	14	15	

हस्ताक्षर प्रबन्धक

नोट- (1) भूमि का एक मानचित्र जिसमें चोहद्दी व प्लाट नम्बर का क्षेत्रफल दिखाया गया हो, संलग्न किया जाये।

(2) खसरा व खतौनी की प्रमाणित प्रतिलिपि भी संलग्न की जाये।

हस्ताक्षर प्रधानाचार्य"

6. It is, therefore, contended by Shri Baghel that, even if, the District Inspector of Schools proceeds to call upon any Institution to furnish information, such information cannot go beyond those aspects which are enumerated in the table, whereas, in the present case, by the impugned notice, the petitioner-Institution has been called upon to furnish details with respect to the entire immovable properties as well as amount of compensation received by the Institution arising out of land acquisition proceedings, its utilization as well as deposit in the concerned bank accounts etc. etc.

GOVERNMENT ORDER DATED 06.06.2023

7. Insofar as the second Government Order dated 06.06.2023 relied upon by Shri Upadhyay is concerned, it is contended by Shri Baghel that the role of District Inspector of Schools has been defined as one of the members of a six-member Committee described in Clause 3(8) of the said Government Order which should be read alongwith other sub-clauses and is meant only for holding proceedings in relation to utilization of income received by the Institution and, therefore, even if, the said Clause is read, the action can be taken strictly in accordance with law, by a six-members Committee and not by the District Inspector of Schools alone. Shri Baghel has also referred to 'Annexure 10' to the writ

petition which is a copy of the order dated 10.04.2023 passed by this Court in Writ C No.3867 of 2023 (C/M Rashtriya Kanya Inter College And Another v. State of U.P. And 4 Others) and submits that the said writ petition had arisen out of a notice dated 31.12.2022 issued by the Joint Director of Education, Moradabad Region, Moradabad and the Director of Education (Secondary), on his personal appearance, filed his affidavit before this Court stating that the impugned notice dated 31.12.2022 had been issued by the Joint Director in excess of the jurisdiction conferred by law. The submission is that taking note of the admission made by the Director, this Court quashed the impugned notice and allowed the writ petition giving liberty to the Director of Education to proceed in accordance with law.

8. He has also placed reliance upon a decision of Apex Court in the case of Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala And Others, (2002) 1 SCC 633 and submits that the normal rule of construction is that when a Statute vests certain power in an authority to be exercised in a particular manner, the said power has to be exercised only in the manner provided in the Statute itself. It is further argued that the Apex Court in M/s Cannon India Private Limited v. Commissioner of Customs, 2021 AIR (SC) 1699 has held that if notice is issued by the Officer who does not have any authority of law, the same is liable to be set aside.

SUBMISSION OF THE STATE

9. Shri Jitendra Singh, learned Additional Chief Standing Counsel, on the other hand, submits that the writ petition against a notice calling upon certain information and documents from the Management of a recognized Institution is not maintainable and infact the petitioner is avoiding to furnish the information sought for whereas under the Scheme of the Act, 1974, such information must come before the Authorities and, hence, no interference is warranted.

SUBMISSION OF THE CONTESTING PRIVATE RESPONDENT

10. Shri Ritesh Upadhyay, learned counsel for respondent no.4, submits that Section 2(d) of the Act, 1974 defines the "PROPERTY" in the following words:-

"2.(d)- 'property', in relation to an institution, includes all immovable properties belonging to or endowed wholly or purely for the benefit of the institution, including lands, buildings and all other rights and interests arising out of such property as may be in the ownership, possession, power or control of the Management."

11. The submission is that not only the immovable properties but also all other rights and interests arising out of such property are included in the description of "property". He further submits that the "District Inspector of Schools" is also included in the definition of Director as per Section 2(a) of the Act, 1974 and, therefore, notice issued by District Inspector of Schools is well within his competence.

DISCUSSION OF RIVAL CONTENTIONS

12. Having heard learned counsel for the parties, the Court finds that certainly

the Regional Deputy Director of Education can exercise the delegated powers under Sections 4(4) and 5(1) of the Act, 1974, however, in the present case, there is no dispute with respect to any power allegedly exercised by the Regional Deputy Director of Education. The issue involved here is as to whether, either under Clause (ग) of the notification dated 07.05.1975, or under any power conferred under the Government Order dated 06.06.2023 or under any provision of the Act, 1974, the District Inspector of Schools is competent to issue notice which has been impugned in the present writ petition.

13. The interpretation of the word "ASSETS", as made by Shri Baghel referable to the Table described at the end of Section 8 of the Act, 1974 persuades this Court to minutely examine the said table. The Court finds that, apart from the main building of the institution, hostel, residential building, shops etc. described in Format 'क', there are different clauses in the table in relation to the aspects as to whether property is rented or any private property, the current value of the building, annual income, if any and "special details" (विशेष विवरण). There is another Format (ख) just below it which also describes different nature and categories of land including agricultural land and other land and also other details including "special details" (विशेष विवरण).

OBJECT OF THE ACT, 1974

14. Before arriving at a conclusion, it is necessary to refer to the OBJECT with which the Uttar Pradesh Educational Institutions (Prevention of Dissipation of Assets) Act, 1974 was promulgated by the Legislature. The Act begins with the object "An Act to provide for measures to prevent the dissipation of assets of Educational Institutions."

JUDICIAL PRONOUNCEMENTS ON PURPOSIVE INTERPRETATION

15. Jurisprudence of statutory interpretation has moved from literal interpretation to purposive interpretation, which advances the purpose and object of a legislation. The Supreme Court in catena of judgments has dealt with the issue of literal interpretation vis-a-vis purposive interpretation. The Apex Court, in Central India Spinning and Weaving Manufacturing Comp. versus Municipal Committee, Wardha, AIR 1958 SC 341 has held that it is a recognised principle of construction that general words and phrases however wide and comprehensive they may be in their literal sense must usually be construed as being limited to the actual objects of the Act.

16. The Supreme Court, in Girdhari Lal & Sons versus Balbir Nath Mathur); 1986(2) SCC 237, has held that the primary and foremost task of a Court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment. For this purpose, where necessary the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to

give effect to the object and purpose of the enactment by supplementing the written word if necessary. It ent to observe that ascertainment of legislative intent is a basic rule of statutory construction and that a rule of construction should be preferred which advances the purpose and object of a legislation and that though a construction, according to plain language, should ordinarily be adopted, such a construction should not be adopted where it leads to anomalies, injustices, or absurdities, vide K.P. Varghese v. ITO, (1981) 4 SCC 173, State Bank of Travancore v. Mohd. M. Khan, (1981) 4 SCC 82, Som Prakash Rekhi v. Union of India (1981) 1 SCC 449, Ravula Subba Rao v. CIT, AIR 1956 SC 604, Govindlal V Agricultural Produce Market Committee, (1975) 2 SCC 482 and Babaji Kondaji v. Nasik Merchants Co-op Bank Ltd. (1984) 2 SCC 50.

17. The Supreme Court, in Utkal Contractors & Joinery Pvt. Ltd. versus State of Orissa; 1987 (3) SCC 279 has observed that a statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the Preamble, the scheme and the provisions of the Act. Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. [See-Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Anr 2017(15) SCC 133].

18. The more stringent the Law, the less is the discretion of the Court. Stringent laws are made for the purpose to achieve its objectives. This being the intendment of the legislature, the duty of the court is to see that the intention of the legislature is not frustrated. If there is any doubt or ambiguity in the statutes, the rule of purposive construction should be taken recourse to, to achieve the objectives. (See Swedish Match AB & Anr. Securities & Exchange Board, India & Anr., (2004) 11 SCC 641.

19. The Apex Court, in Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. & Ors. (1987) 1 SCC 424, held that Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read,

first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.

20. Same view has been reiterated in S. Gopal Reddy Vs. State of Andhra Pradesh, (1996) 4 SCC 596, Prakash Kumar Alias Prakash Bhutto Vs. State of Gujarat, (2005) 2 SCC 409, Anwar Hasan Khan Vs. Mohd. Shafi & Ors. (2001) 8 SCC 540, Union of India & Ors. Vs. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277, Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., (1987) 1 SCC 424: (AIR 1987 SC 1023) and N. K. Jain v. C. K. Shah (1991) 2 SCC 495: (AIR 1991 SC1289)

FINDINGS AND CONCLUSION

21. Following the cardinal rule of PURPOSIVE INTERPRETATION, as emphasized by the Supreme Court in the above-cited authorities, in the considered opinion of this Court, the word "ASSETS" mentioned in the table contained in section 8 of the Act, 1974, cannot be read in isolation, rather, it being part of the Statute, the definition of "PROPERTY" contained in Section 2(d) of the Act, 1974 has to be read simultaneously. The impugned notice seeks information with respect to the entire immovable properties of the Institution as per Point No.1 and remaining point Nos. 2 to 7 are in relation to the compensation received by the Institution arising out of land acquisition operations and its deposit as well as utilization etc. and, in the considered opinion of the Court, compensation received by the petitioner institution out of land acquisition proceedings is certainly covered into “RIGHTS AND INTERESTS ARISING OUT OF SUCH PROPERTY” and, hence, the amount of compensation is certainly included in the definition of 'PROPERTY' which is referable and relatable to the description of “ASSETS” contained in the Table, if not under Clause 1 to 5 of Format 'क', then definitely under "Special Details" (विशेष विवरण) and income and also in Format (ख). In this view of the matter, it cannot be said that the information sought by the District Inspector of Schools goes beyond the aforesaid Table.

22. Insofar as the power of the District Inspector of Schools to seek any information is concerned, the Government Order dated 06.06.2023 is quite comprehensive in nature. Various Clauses and Sub-clauses of the said Government Order are in consonance with the provisions of the Act, 1974 and the purpose which the Act seeks to achieve. Merely because the District Inspector of Schools forms part and parcel of a six-member Committee as per Clause 3(8) of the said Government Order, as of now, there is no adjudication made by the said Committee which includes even the Manager and Principal of the Institution. The present writ petition has been filed at the stage where

only a notice asking certain information has been issued by the District Inspector of Schools. Even otherwise, the U.P. Intermediate Education Act, 1921 as well as the aforesaid Act, 1974 prescribe a well structured procedure to be followed by the Director of Education in case violation of provisions of the Act is found to be committed by the concerned Management. No such proceedings have been initiated as of now and, therefore, it cannot be presumed that the Authority who is not empowered under the Act, 1974 is proceeding to take substantive action against the Management.

23. As far as the affidavit filed by the Director of Education before this Court in Writ-C No.3867 of 2023 is concerned, neither the affidavit nor notice dated 31.12.2022 impugned in the said case is before this Court. Even otherwise, the notice impugned in the present writ petition has not been issued by the Joint Director of Education nor can it be said that it is a notice under Sections 4 and 5 of the Act, 1974. The power of Director of Education under Section 4(4) of the Act, 1974 is to pass an order on representation filed by the Management against the order under Sub-Section (2) of Section 4 of the Act, 1974 or upon application for sanction being made to him under Sub-Section (3) and upon consideration of such matters and "information" as he may consider necessary. It is not a stage when any action has been taken under Sub-Section (2) of Section 4 nor has an application for sanction under Sub-Section (3) of Section 4 been considered. Therefore, this Court is of the view that no action under Section 4 has yet commenced and the information asked by the District Inspector of Schools is well within his competence. Further Writ-C No.3867 of 2023 was decided on 10.04.2023 when the Government Order dated 06.06.2023 had not even come into existence and, therefore, this Court had no occasion to deal with the competence of the District Inspector of Schools as per the said Government Order. Further, the competence of an officer issuing a notice has to be seen as per statutory provisions as well as under the sub-ordinate legislation contained in a Govt. Order etc and it cannot depend solely upon a stand taken in an affidavit, as an administrative power cannot be treated as vested or divested or conferred merely by an admission made by an Officer in an affidavit or otherwise.

24. For all the aforesaid reasons, the impugned notice is found to be within jurisdiction and, therefore, the challenge made to it does not fall within any of the exceptions under which Writ Jurisdiction under Article 226 of the Constitution of India can be exercised against a notice.

25. The writ petition fails and is, accordingly, **dismissed.**

(2024) 1 ILRA 801
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANOJ BAJAJ, J.

Writ-C No. 28355 of 2021

Smt. Kalpana Karwariya ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Suraj Singh, Sri Mukesh Prasad (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri A.K. Singh

A. Mining Law – Forfeiture of Security Under U.P. Minor Minerals (Concession) Rules, 1963 – Petitioner challenged the forfeiture of security money for non-payment of royalty, arguing it could only be recovered as arrears of land revenue under Rule 58 – Held, Rule 58 of the 1963 Rules provides that non-payment of royalty, rent, or other dues results in lease determination and recovery as arrears of land revenue, not forfeiture of security – Forfeiture of security is permissible only for contraventions under Rules 59 and 60, not for non-payment of dues, distinguishing the scope of these provisions. (Paras 4, 7, 8, 13, 14, 15)

B. Statutory Interpretation – Scope of Rules 58, 59, and 60 – Petitioner argued that Rule 58 limits recovery of unpaid dues to arrears of land revenue, while Rules 59 and 60 allow forfeiture of security for specific contraventions – Held, Rule 58 exclusively governs non-payment of royalty, rent, or dues, permitting recovery as arrears of land revenue, whereas Rules 59 and 60 address penalties for breaches of lease conditions or rules, allowing forfeiture of security only in those cases, as supported by a composite reading of the rules. (Paras 7, 8, 13, 14)

C. Lease Agreement – Interpretation of Forfeiture Clause – Respondents relied on Part-III of the lease agreement dated 22.02.2018, claiming it permitted forfeiture for non-payment – Held, despite the heading suggesting non-payment, the clause's content pertains to breaches of rules or lease conditions, not non-payment of dues – The heading does not override the clause's substance, as per *Maqbool Vs St. of U.P.*, and thus, forfeiture was not permissible for unpaid royalty. (Paras 9, 10, 13)

D. Writ Jurisdiction – Relief for Invalid Forfeiture – Petitioner challenged orders dated 25.03.2019, 16.07.2021, and 20.09.2021 forfeiting security for non-payment of the fourth instalment and other dues – Held, the orders were unsustainable as they contravened Rule 58, which mandates recovery as arrears of land revenue – The Court allowed recovery of the unpaid fourth instalment and statutory dues from the security deposit, with the remainder to be refunded, accepting the petitioner's offer. (Paras 11, 15, 16)

E. Government Order and Statutory Dues – Petitioner cited Clause 19(3) of the Government Order dated 14.08.2017, reinforcing recovery of dues as arrears of land revenue with interest – Held, the Government Order aligns with Rule 58, and additional dues like TDS and District Mineral Foundation Trust Fund contributions are recoverable as arrears, not through forfeiture, ensuring compliance with statutory mechanisms. (Paras 5, 13, 15)

Writ Petition Allowed.

List of Cases cited:

1. Maqbool Vs St. of U.P., (2019) 11 SCC 395

2. Ajay Raj Dwivedi Vs St. of U.P., Writ-C No. 13569 of 2019

(Delivered by Hon'ble Siddhartha Varma, J. & Hon'ble Manoj Bajaj, J.)

1. The question here for our determination is as to whether the security money which a miner deposits at the time of grant of lease under the Uttar Pradesh Minor Minerals (Concession) Rules, 1963 (hereinafter referred to as the "**1963 Rules**") could be forfeited when a lease is determined for the non-payment of royalty, rent or other dues. In the instant case, the petitioner had applied by means of e-tendering when it was advertised that the lease would be settled on the highest bidder for the Yamuna River Khand no. 16/2 and 16/3 measuring 20.23 acres in Village Mahewa, Tehsil Manjhanpur, District Kaushambi. The availability of mineral was given out as 4,00,000 cubic meters per year. The lease was to be given for a period of five years. The petitioner who applied by e-tendering was found to be the highest bidder and was given a lease of five years commencing on 22.02.2018 and ending on

21.02.2023. The petitioner before the grant of lease had deposited Rs. 1,74,00,000/- as security and had also deposited Rs. 1,74,00,000/- as the first instalment. As per the agreement in the first year of the mining operation, the petitioner had to deposit four instalments of Rs. 1,74,00,000/-. In the second year thereafter, he had to deposit instalments of Rs. 1,91,40,000/- in four equal instalments. After the petitioner commenced with his work, he subsequently discovered that the mineral available was not of proper standard and that the work of excavation from the mines, which he had taken on lease, was not a profitable venture. As a consequence, therefore, on 15.10.2018 the petitioner applied online to the District Magistrate, Kaushambi requesting him to get the mining area of the petitioner surveyed for assessing as to whether the quantity of mineral as was earlier given out was there or not and as to whether the minerals were mixed with mud. This application was followed by another application dated 16.10.2018 and by this application, in fact, the petitioner prayed that the lease be determined on account of the mineral not being available in the mining area. The Mines Inspector, Kaushambi on 28.11.2018 upon a query being made by the District Magistrate as to whether a re-assessment could be made, wrote to the District Magistrate that there was no provision for re-assessing as to whether minerals were available or not in the mining area which was given out to the petitioner. It is the averment in the writ petition by the petitioner that even though the petitioner had not done any mining after he had given a notice on 15.10.2018, on 04.01.2019 a notice was given to the petitioner to deposit his fourth instalment of the first year. It may be stated that after the petitioner had got the lease in his favour on 22.02.2018, he had deposited the second quarterly instalment on 19.04.2018 and the third instalment on 13.07.2018 by treasury challans. When the petitioner received the notice dated 04.01.2019, he objected to the demand made by the District Magistrate and on 30.01.2019 he objected in writing that there was no mineral available and mining was not possible and that the amounts which the petitioner had deposited earlier be also refunded to him. Even before, the petitioner's objection could be dealt with, the time to deposit the first instalment of the second year had arrived and, therefore, on 30.03.2019 the petitioner deposited Rs. 1,91,40,000/-. This the petitioner had deposited after the lease deed was determined by the order dated 25.03.2019.

2. It is the case of the petitioner that despite the fact that the petitioner had deposited the security, the two instalments of the first year and the first instalment of the second year, the District Magistrate demanded from the petitioner the fourth instalment of the first year and also the first instalment of the second year.

3. The petitioner approached the High Court against the demand but he was relegated to the filing of an appeal. The Appellate Court thereafter on 16.07.2021 rejected the appeal of the petitioner. Resultantly, the petitioner filed a Revision before the State Government under Rules 78 of 1963 Rules and when the Revisional Court dismissed the Revision on 20.09.2021, the petitioner filed the instant writ petition.

4. Learned counsel for the petitioner has assailed the three orders primarily on the ground that under Rule 58 of the 1963 Rules if any mining lease was determined

after serving a notice on the lessee to pay within 30 days of the receipt of notice any amount due or dead rent under the lease including the royalty due to the State Government and if it was not paid within the next 15 days then the State Government could realise the dues from the lessee as arrears of land revenue. Learned counsel for the petitioner since had relied upon Rule 58 of the 1963 Rules the same is being reproduced here as under :-

*"[**58. Consequences of non-payment of royalty, rent or other dues :-***

*(1) The State Government or any officer authorised by it in this behalf may **determine the mining or auction lease** after serving a notice on the lessee to pay within thirty days of the receipt of the notice any amount due or dead rent under the lease including the royalty due to the State Government if it was not paid within fifteen days next after the date of fixed for such payment. **This right shall be in addition to and without prejudice to the right of the State Government to realise such dues from the lessee as arrears of land revenue.***

(2) Without prejudice to the provisions of these rules, simple interest at the rate of 24 per cent per annum may be charged on any rent, royalty, demarcation fee and any other dues under these rules, due to the State Government after the expiry of the period of the notice under sub-rule (1).]"

(Emphasis supplied)

5. Learned counsel for the petitioner has further stated that the only instalment which the petitioner had not paid was the fourth instalment of the first year and that was to the tune of Rs. 1,74,00,000/-. This amount could, as per the Rule 58 of the 1963 Rules, be realised as arrears of land revenue from the petitioner. Learned counsel for the petitioner also referred to the Government Order dated 14.08.2017 and submitted that as per Clause 19(3) if the petitioner could not deposit any due then that amount could be recovered from him as arrears of land revenue alongwith interest. Clause 19(3) is being reproduced herein under :-

"(3) प्रथम वर्ष के लिए शेष 75 प्रतिशत पट्टा धनराशि एवं आगामी वर्षो के लिए पट्टा धनराशि नियमावली में निर्धारित चतुर्थ अनुसूची के अनुसार राज्य सरकार द्वारा समय समय पर निर्धारित प्रक्रिया के अनुसार पट्टाधारक द्वारा जमा की जायेगी। उक्त अनुसूची में नियत तिथि के अनुसार देय धनराशि जमा न करने की दशा में नियम-59 के अनुसार देय धनराशि ब्याज सहित वसूल की जायेगी।"

6. Learned counsel for the petitioner, only to clarify as to when the security could be used for adjusting the amount due, referred to Rule 59 of 1963 Rules and submitted that if there was any contravention of the conditions of the lease then the petitioner/miner could be made liable for a certain fine/penalty and that penalty could be deducted by the District Magistrate from the security money deposited against the lease in case of failure of deposit of penalty money. Learned counsel for the petitioner has also relied upon a judgment of this Court dated 19.02.2020 in ***Writ-C No. 13569 of 2019 (Ajay Raj Dwivedi vs. State of U.P. & Ors.)*** and submitted that under no circumstance, the amount which was due could be recovered other than the method as was provided under the provisions of Rule 59 of 1963 Rules and he submitted that definitely the security could not be forfeited. Learned counsel for the petitioner further pointed out to the Part-II of the agreement which

the petitioner had entered with the State Government on 22.02.2018 wherein it was provided that if any particular payment was not made then the same could be recovered as arrears of land revenue. This provision is being reproduced here as under :-

*"**स्वामित्वों का समय पर भुगतान न किया जाये तो कार्यवाही की प्रक्रिया:-** (3) यदि इस उपस्थापन-पत्र (Presents) की शर्तों और प्रतिबन्धों के अधीन राज्य सरकार को देय स्वामित्व की किसी किश्त का भुगतान पट्टाधारक/पट्टाधारकों द्वारा उपरोक्त नियत समय के भीतर न किया जाये तो उसे ऐसे अधिकारी के, जिसे राज्य सरकार सामान्य या विशिष्ट आज्ञा द्वारा निर्दिष्ट करें, प्रमाण पत्र पर उसी रीति से वसूल की जा सकती है जैसे मालगुजारी का बकाया।"*

7. Also since Rule 59 of the 1963 Rules was sought to be differentiated from Rule 58, the Rule 59 is being reproduced here as under :-

***"59. Consequences of contravention of certain conditions** -(1) The proponent who has received Letter of Intent however has not produced mining plan within the stipulated period, of one month as per the provisions mentioned in Rule 34 be liable for penalty of Rs. one lakh on failure to deposit the amount of penalty the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease.*

2) The lessee who does mining works contravening the terms and conditions mentioned in the approved mining plan and clean environment certificate issued as per the provisions provided under Rule 34, then he will be liable for penalty at the rate of Rs. 50,000/- per occasion of default that shall be recovered by the District Magistrate.

*(3) If the lease holder disobeys the provisions of Rule 35 then penalty at the rate of rupees twenty five thousand per day for each and every default shall be levied by the concerned District Magistrate. **In case of default on deposit of such levied penalty the concerned District Magistrate will deduct the said amount from the amount of security deposited against the said mining lease.***

*(4) According to the provisions provided under Rule 41-H mining work through suction machine/lifter into the water stream will be prohibited. If any lessee is found contravening the provisions of the said rule then he will be liable for penalty at the rate of of Rs. five lakh per occasion of contravening act, which will be recovered on the order of District Magistrate or Director, Geology and Mining. **On failure to deposit of the above mentioned amount of penalty the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease.***

*(5) Any lessee holding a mining lease who commits a breach of any of the conditions provided in Rule 44 shall be liable for levy/penalty of Rs. fifty thousand. **On failure to deposit the said amount of penalty the same shall be deducted by the District Magistrate from the se**curity money deposited against the concerned lease."*

(Emphasis supplied)

8. Also the Rule 60 of the 1963 Rules, to illustrate how its provision is different from Rule 58, is being reproduced here as under :-

***"60 Consequences of contravention of rules and conditions of lease generally -** (1) In case of any breach*

or contravention by a lessee of any of these rules or conditions and covenants contained or deemed to be contained in the lease except those relating to payment of royalty, rent or other sums due to the State Government, the State Government may, after giving the lessee a reasonable opportunity to state his case, determine the lease. The right shall be in addition to and without prejudice to the provisions of Rule 59.

(2) If a lease is determined under sub-rule (1), the lessee may be black listed by the District Officer for such period, not exceeding two years, as he may consider proper which shall be uploaded on the website of the department and during the said period no mineral concession under these rules shall be granted to him. An entry in this regard shall be made in the remarks column of the registers of mining lease or the auction lease, as the case may be.

(3) If any person other than the mining lease holder or entity held is convicted for the charge of illegal mining/transportation, then besides the penalty/ punishment, name of such person or entity will be listed into the black- list by the State Government and will be uploaded and displayed on the website of the department and no mining lease under this rules shall be granted within such period in favour of the said person or entity."

9. Learned counsel for the petitioner also drew the attention of the Court to the provision which was with regard to the forfeiture of the security money in the lease/agreement dated 22.02.2018. That provision in the lease deed was in Part-III of the lease deed wherein it was provided that if any rule or any condition in the lease was violated then the complete or a part of the security could be forfeited and the lease could be terminated. Learned counsel for the petitioner stated that in the Clause given in Part-III of the agreement, even though the heading was ***"स्वामित्वों का समय पर भुगतान न किया जाये तो कार्यवाही की प्रक्रिया"***, the clause actually was with regard to violation of any condition of the lease or any rule and he, therefore, submitted that even if the heading of the Clause was with regard to the procedure if payment was not made, in fact, the Clause was with regard to what had to be done if any rule or any condition of the lease was violated. Learned counsel for the petitioner in this regard submitted that the heading of the Clause was not to prevail over the content of the Clause. Since learned counsel for the petitioner pointed out to the relevant Clause in Part-III of the agreement, the same is being reproduced here as under :-

"स्वामित्वों का समय पर भुगतान न किया जाये तो कार्यवाही की प्रक्रिया:- *(1) यदि पट्टाधारक उ०प्र० उपखनिज (परिहार) नियमावली-1983 के किसी नियम या इस पट्टे की किसी प्रसंविदा और किसी शर्त को भंग करे तो राज्य सरकार पट्टा समाप्त कर सकती है और प्रतिभूति जमा को पूर्णतः या अंशतः जब्त कर सकती है, किन्तु प्रतिबन्ध यह है कि पट्टा समाप्त किये जाने के पूर्व पट्टाधारक को उक्त शर्त भंग करने का स्पष्टीकरण देने के लिये यथोचित अवसर दिया जाएगा।"*

10. Learned counsel for the petitioner, to bolster his argument that marginal note/heading had not to prevail over the actual contents of a section, relied upon the judgment of Supreme Court in **Maqbool vs. State of U.P. and another reported in (2019) 11 SCC 395** and he specifically relied upon paragraph 9 of the judgment. Paragraph 9 of the aforesaid judgment is being reproduced here as under :-

"9. The title to the provision need not invariably indicate the contents of the provision. If the provision is otherwise clear and unambiguous, the title pales into irrelevance. On the contrary, if the contents of the provision are otherwise ambiguous, an aid cant be sought from the title so as to define the provision. In the event of a conflict between the plain expressions in the provision and the indicated title, the title cannot control the contents of the provision. Title is only a broad and general indication of the nature of the subject dealt under the provision."

11. Learned counsel for the petitioner, therefore, submitted that if any amount which was payable as royalty, rent or other dues was not paid by the petitioner then in addition to the determination of the mining lease, the amount could be recovered only as arrears of land revenue. He submitted that under no circumstance, the security money could be forfeited. At this point of his argument, learned counsel for the petitioner submitted that petitioner was in fact ready to get the amount of royalty, which he had not paid, deducted from the security which he had deposited.

12. Sri Sandeep Kumar Singh, learned Additional Chief Standing Counsel, however, in reply has submitted that if the petitioner had not paid the royalty which was due from him then the authorities had no other option but to punish the petitioner and if they had to punish they could rely upon Rule 58 or also on the condition of the lease dated 22.02.2018 and relying upon the Clause under Part-III of the lease deed as had been reproduced earlier, he submitted that the Clause definitely permitted the State to forfeit the security. Also, the TDS etc. when was not paid then that had to be taken from the petitioner in addition to the forfeiture of the security.

13. Having heard Sri Mukesh Prasad, learned Senior Advocate assisted by Sri Suraj Singh, learned counsel for the petitioner and the learned Additional Chief Standing Counsel, we are of the view that when the petitioner had not paid the fourth instalment of the first year then that amount alongwith the TDS amount payable and the amount payable towards the District Mineral Foundation Trust Fund could be recovered only as arrears of land revenue. A composite reading of Rules 58, 59 and 60 of the 1963 Rules, definitely makes it clear that if a particular royalty or any other due under the lease was not paid then in addition to the determination of lease, the amount which was payable by the petitioner to the Government could be recovered only as arrears of land revenue. However, if there was any penalty for non-compliance of any of the many rules or if there was violation of any lease condition except those relating to payment of royalty, rent or other dues, the State Government could determine the lease and could also impose a penalty under Rules 59 and 60 of forfeiting the security. Definitely, the provisions of Rule 58 stand apart from the provisions of Rules 59 and 60 of the 1963 Rules.

14. Rule 58 is only with regard to the consequences of non-payment of royalty, rent or other dues. Rule 59 is with regard to the contravention of certain conditions wherein penalty could be imposed and that penalty, if not paid, could be deducted by the District Magistrate from the security money deposited by the lessee. Rule 60 was with regard to the breach or

contravention by a lessee of any of the Rules of 1963 Rules or conditions and covenant contained therein **except** those relating to payment of royalty, rent or other sums due.

15. Under such circumstances, this Court is definitely of the view that the confiscation/forfeiture of royalty by the three impugned orders namely the order dated 25.03.2019 of the Additional District Magistrate (F&R); the order dated 16.07.2021 of the Appellate Court and the order dated 20.09.2021 of the Revisional Court cannot be sustained in the eyes of law. The amount which was due from the petitioner could have been recovered only as arrears of land revenue. However, since the petitioner had given an offer that the money which was due from the petitioner i.e. the fourth instalment of the first year and other statutory dues be recovered from the security amount, it is being provided that these amounts can be recovered from the security money of Rs. 1,74,00,000/- which was deposited by the petitioner before the execution of the lease. The rest of the amount of the security be released to the petitioner forthwith.

16. With these observation, the orders dated 25.03.2019 of the Additional District Magistrate (F&R); the order dated 16.07.2021 of the Appellate Court and the order dated 20.09.2021 of the Revisional Court are set aside and the writ petition is accordingly, **allowed**.

(2024) 1 ILRA 808
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

THE HON'BLE SHIV SHANKER PRASAD, J.

Writ-C No. 30866 of 2011

Smt. Shakuntala Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri K.K. Singh, Sri C.L. Chaudhary, Sri Indra Dev, Ms. Kanchan Chaudhary, SrI V.C. Dixit

Counsel for the Respondents:
C.S.C.

Tortious Liability of the State of U.P. and its agency, the Rural Engineering Services, were held liable for the tortious act of negligence resulting in the death of Dr. Ravindra Mohan Prasa The incident occurred due to a blast in a storage facility containing molten Maxphalt/Bitumen, which seeped into the deceased's official residence, causing 70% burn injuries leading to his death on 27.07.2010. The principle of res ipsa loquitur was applied, establishing negligence as the storage of hazardous material near residential premises was inherently dangerous and not a normal or predictable event. (Paras 7, 11, 18-19)
Applicability of Fatal Accidents Act, 1855 Under Section 1A of the Fatal Accidents Act, 1855, the petitioner, as the wife of the deceased, was entitled to claim compensation for the wrongful act, neglect, or default of St. functionaries. The court clarified that such liability does not depend on whether the deceased was on active government duty at the time of the incident, rendering the St.'s policy limiting ex-gratia payments to on-duty deaths unenforceable in this context. (Paras 8, 13, 23-24)
Rejection of St.'s Defense The St.'s claim that the incident was an act of force majeure or purely accidental was rejected as evasive and unsupported, given the admitted facts of the blast and seepage of bitumen. The St.'s failure to hold its agents accountable through criminal or disciplinary proceedings did not absolve it of civil liability for the tortious act. The Committee constituted by the Chief Secretary wrongly denied compensation by misapplying the St.'s ex-gratia policy dated 08.12.2008, which was

irrelevant to tortious liability. (Paras 4, 17, 19, 21-24)
Quantification of Compensation The court awarded Rs. 50 lakhs as compensation to the petitioner, with 6% interest per annum from the date of the incident (17.07.2010) until payment, to be paid within three months. The amount was determined using a rough estimate based on the deceased's age (52 years), salary (Rs. 46,100/month), and four dependents, drawing parallels with compensation frameworks under the Motor Vehicles Act, 1988, and Employees Compensation Act, 1923, though adapted for the Fatal Accidents Act, 1855. (Paras 26-29)
Exercise of Writ Jurisdiction Despite the availability of a civil suit as a remedy under the Fatal Accidents Act, the court exercised its extraordinary jurisdiction under Article 226 of the Constitution due to the undisputed facts, the St.'s role as the tortfeasor, and the victim's status as a government employeThe court noted that relegating the petitioner to a civil suit after a 12-year delay would serve no purpose, especially given the St.'s failure to address the claim internally. (Paras 14-15, 25)
Critique of St.'s Response The St.'s response, including the Committee's findings and the evasive instructions from the Rural Engineering Department, was criticized for lacking accountability and failing to address the tortious wrong. The court emphasized that expressing grief or providing compassionate appointment and terminal dues to the deceased's family did not constitute compensation for the tortious act. (Paras 4, 16-17, 19, 24)
G. Outcome The writ petition was allowed, and the respondents were directed to pay Rs. 50 lakhs with interest to the petitioner. No costs were awarde The court underscored the need for prompt and decisive action by St. authorities to prevent such occurrences and ensure justice for victims. (Paras 29-30)

List of Cases cited:

1. Shyam Sunder Vs St. of Raj., (1974) 1 SCC 690 (Paras 9-11)

2. Guj. St. Road Transport Corpn. Vs Ramanbhai Prabhatbhai, (1987) 3 SCC 234 (Para 9)

3. Kasturilal Ralia Ram Jain Vs St. of U.P., AIR 1965 SC 1039 (Para 11)

4. Lata Wadhwa Vs St. of Bihar, (2001) 8 SCC 197 (Para 27)

5. General Manager, Kerala S.R.T.C Vs Susamma Thomas, (1994) 2 SCC 176 (Para 27)

6. M.S. Grewal & anr.Vs Deep Chand Sood & Ors, (2001) 8 SCC 151 (Para 27)

7. Sarla Verma & ors.Vs Delhi Transport Corporation & Anr., (2009) 6 SCC 121 (Para 28)

8. National Insurance Company Limited Vs Pranay Sethi and others, (2017) 16 SCC 680 (Para 28)

(Delivered byHon'ble Saumitra Dayal Singh, J. & Hon'ble Shiv Shanker Prasad, J.)

1. Heard Ms. Kanchan Chaudhary, learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State.

2. Present writ petition has been filed seeking payment of compensation of Rs. 6 crores for the accidental death of the husband of the petitioner namely, Dr. Ravindra Mohan Prasad, who died of burn injuries on 22.07.2010.

3. Pleadings have been exchanged.

4. On 31.10.2023, we passed the below quoted order:-

"1. On 20.07.2023 we have passed the below quoted order:-

"1. Learned Additional Chief Standing Counsel prays for further time to take instructions, in compliance of the earlier order dated 20th April, 2023.

2. At present, it appears that act of gross negligence was committed as had resulted in the death of Dr. Ravindra Mohan Prasad. He died of severe burn

injuries suffered from flow of molten bitumen into his official residential accommodation from a nearby pit, where such molten bitumen had been stored, without due care taken.

3. Payment of terminal dues to the heirs of the said deceased and grant of compassionate appointment may not be described as compensation for the tortious liability that otherwise arose on the State respondents.

4. Also, it is not clear, if appropriate criminal prosecution has arisen, occasioned by the gross negligent act, noted above. Here, it may be noted, the FIR was registered on the complaint made by the Secretary of the State Government.

5. Prima facie, we find, the facts of the case would commend deeper enquiry unless all remedial and consequential measures are shown to have been taken and appropriate relief by way of compensation etc. granted.

6. Shri Arimandan Singh Rajpoot, learned Additional Chief Standing Counsel prays for and is granted two weeks' time to comply with the earlier order and to obtain the written instructions in terms of the facts, noted above.

7. Accordingly, put up on 17th August, 2023 in top ten cases.

8. It is expected that the instructions would contain the stand of respondent nos. 1 and 2, in writing. They will also make full disclosure of the prosecution proceedings arising from the FIR (Annexure No. 2) as also proceedings that may have been initiated against the negligent. The instructions would also disclose existence or otherwise of the policy to grant ex-gratia and other compensation in the event of such occurrences that may be attributed to negligence on the part of State functionaries and their agents and actual compensation paid, if any."

2. Three months have passed since then. However, instructions are still awaited. At the same time, today learned Additional Chief Standing Counsel has placed on record the copy of undated instructions received by him.

3. The claim which State agency seeks to escape liability arises from a most unfortunate and shocking occurrence, wherein the government official died of serious burn injuries suffered by him as molten bitumen seeped into his government residential accommodation, from the nearby open pit dug out up government agency.

4. The written instructions issued under the signature of the Executive Engineer, Rural Engineering Department, Mirzapur are wholly evasive and irresponsible. Basic facts as to the occurrence being undisputed and the cause being man made we fail to understand how force majeure has been attributed in a cavalier manner. Also in face of disciplinary proceedings disclosed to have been initiated and warnings issued, prima facie case of negligence stands made out.

5. We do not consider it desirable to adjudicate on the dispute at this stage as it appears that the attention of highest administrative authority of the State may first examine the present facts as may lead to a just solution at the hands of the State Government itself.

6. While the Court may not dither to adjudicate the dispute, at the same time we consider it desirable that the matter may first be examined by the appropriate authority functionary of the State Government as may be nominated by the Chief Secretary of the Government of U.P. Be it a committee or a proper officer

empowered to take the appropriate decision.

7. Accordingly, let a copy of this order be communicated to the Chief Secretary, Government of U.P. for appropriate consideration and action in accordance with the existing policy of the State Government. For that purpose, let a copy of this order be supplied to Sri. Dr. D.K. Tiwari, learned Additional Chief Standing Counsel, by tomorrow.

8. Put up on 05.12.2023 in top ten cases, by which date, it is expected that the final stand of the State Government would be disclosed i.e. whether there exists any policy of the State Government to provide for ex-gratia compensation in the facts of the present case. If not, that fact may also be clearly indicated so that the adjudication process may not be delayed any further.

9. It is further expected that if policy exists, appropriate decision would be taken and communicated to the petitioner so that the issue may not remain pending any more."

5. In compliance to the above, learned Additional Chief Standing Counsel placed on record (yesterday) a copy of the written instructions received by him dated 4.12.2023. Those are marked as X.

6. Undisputedly, at the relevant time Dr. Ravindra Mohan Prasad was posted as Deputy Director, Animal Husbandry, Mirzapur Division, Mirzapur. In connection with that posting, he had been allotted official accommodation. While asleep at that official accommodation, on 17.07.2010 at about 5:40 a.m. a blast occurred at the storage facility of the Rural Engineering Services, Mirzapur in the adjoining premise. Resultantly, Maxphalt/Bitumen seeped into the residential premises of the deceased causing 70% burn injuries. He was hospitalized at the SIPS Super Speciality Hospital Burn and Trauma Center, Lucknow on 18.07.2010, where he died during treatment, on 27.07.2010. At the relevant time, the Chief Veterinary Officer, Mirzapur lodged F.I.R. in Case Crime No. 786 of 2010 at P.S. Katra, District Mirzapur under Section 337 and 338 I.P.C. against Sri J. N. Prasad, Assistant Engineer, Store and Sri R. N. Singh, Junior Engineer, Store. We are not aware of the outcome of the criminal prosecution thus lodged. However, for the purposes of relief claimed, that fact may not be relevant as such an occurrence gave rise to both civil and criminal consequences.

7. For the consideration of the claim made in the present proceeding, it is undisputed, both on the test of pleadings made in the counter affidavit as also on the strength of the written instructions (X) now placed on record that the fact narration made above is admitted to the respondent. Therefore, the cause of the blast at the storage facility of the Rural Engineering Services may remain untested in these proceedings. At the same time, the occurrence of blast is admitted. It is also admitted that as a direct result of that blast, molten Maxphalt/Bitumen flowed out and seeped into the official residence of the deceased and caused deep burn injuries to him while he was asleep. It is in such unfortunate circumstances that he suffered 70% burn injuries, to which he succumbed.

8. In the first place, such tortious act is liable to be compensated by the wrong doer under the Fatal Accidents Act, 1855 (hereinafter referred to as 'the Act'). For the purpose of the present case, the provisions of Section 1A of the said Act reads as below:-

[1A] Suit for compensation to the family of a person for loss occasioned to it by his death by actionable wrong.- Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensured) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued, shall be liable to an action or suit for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony or other crime.

Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased;

and in every such action, the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct.

9. In **Shyam Sunder v. State of Rajasthan, (1974) 1 SCC 690**, an issue arose if a claim for tortious liability could arise where death was caused to the victim as a result of injuries suffered as he jumped from a moving truck that caught fire while plying. It was answered in the affirmative. Applying the principle res ipsa loquitur the claim made was sustained by the Supreme Court and High Court decision to the contrary was reversed. The following useful discussion emerged:-

"4.The plaintiff alleged that it was on account of the negligence of the driver of the truck that a truck which was not road-worthy was put on the road and that it caught fire which led to the death of Navneetlal and that the State was liable for the negligence of its employee in the course of his employment. The plaint also alleged that the deceased had left behind him his widow, namely, the plaintiff, two minor sons, one minor daughter and his parents. The plaintiff claimed damages to the tune of Rs 20,000 and prayed for a decree for that amount.

....

9.The main point for consideration in this appeal is, whether the fact that the truck caught fire is evidence of negligence on the part of the driver in the course of his employment. The maximres ipsa loquituris resorted to when an accident is shown to have occurred and the cause of the accident is primarily within the knowledge of the defendant. The mere fact that the cause of the accident is unknown does not prevent the plaintiff from recovering the damages, if the proper inference to be drawn from the circumstances which are known is that it was caused by the negligence of the defendant. The fact of the accident may, sometimes, constitute evidence of negligence and then the maximres ipsa loquiturapplies.

10.The maxim is stated in its classic form by Erle, C.J.: [Scottv.London & St. Katherine Docks, (1865) 3 H&C 596, 601]

"... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as

in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

The maxim does not embody any rule of substantive law nor a rule of evidence. It is perhaps not a rule of any kind but simply the caption to an argument on the evidence. Lord Shaw remarked that if the phrase had not been in Latin, nobody would have called it a principle [Ballardv.North British Railway Co., 1923 SC (HL) 43] . The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff were invariably compelled to prove the precise cause of the accident and the defendant responsible for it even when the facts bearing on these matters are at the outset unknown to him and often within the knowledge of the defendant. But though the parties' relative access to evidence is an influential factor, it is not controlling. Thus, the fact that the defendant is as much at a loss to explain the accident or himself died in it, does not preclude an adverse inference against him, if the odds otherwise point to his negligence (see John G. Fleming,The Law of Torts, 4th Edn., p. 264). The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based as commonsense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant (seeBarkwayv.S. Wales Transo[(1950) 1 All ER 392, 399]).

11.The plaintiff merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendants, the doctrine ofres ipsa loquituris said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability.

12.The answer needed by the defendant to meet the plaintiff's case may take alternative forms. Firstly, it may consist in a positive explanation by the defendant of how the accident did in fact occur, of such a kind as to exonerate the defendant from any charge of negligence.

13.It should be noticed that the defendant does not advance his case by inventing fanciful theories, unsupported by evidence, of how the event might have occurred. The whole inquiry is concerned with probabilities, and facts are required, not mere conjecture unsupported by facts. As Lord Macmillan said in his dissenting judgment inJonesv.Great Western[(1930) 47 PLR 39] :

"The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference, in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution, of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability. Where the coincidence of cause and effect is not a

matter of actual observation there is necessarily a hiatus in the direct evidence, but this may be legitimately bridged by an inference from the facts actually observed and proved."

In other words, an inference is a deduction from established facts and an assumption or a guess is something quite different but not necessarily related to established facts.

14.Alternatively, in those instances where the defendant is unable to explain the accident, it is incumbent upon him to advance positive proof that he had taken all reasonable steps to avert foreseeable harm.

15.Res ipsa loquituris an immensely important vehicle for importing strict liability into negligence cases. In practice, there are many cases whereres ipsa loquituris properly invoked in which the defendant is unable to show affirmatively either that he took all reasonable precautions to avoid injury or that the particular cause of the injury was not associated with negligence on his part. Industrial and traffic accidents and injuries caused by defective merchandise are so frequently of this type that the theoretical limitations of the maxim are quite overshadowed by its practical significance [Millner: "Negligence in Modern Law", 92] .

16.Over the years, the general trend in the application of the maxim has undoubtedly become more sympathetic to plaintiffs. Concomitant with the rise in safety standards and expanding knowledge of the mechanical devices of our age, less hesitation is felt in concluding that the miscarriage of a familiar activity is so unusual that it is most probably the result of some fault on the part of whoever is responsible for its safe performance (see John G. Fleming,The Law of Torts, 4th Edn., p.260).

17.We are inclined to think the learned District Judge was correct in inferring negligence on the part of the driver. Generally speaking, an ordinary road-worthy vehicle would not catch fire. We think that the driver was negligent in putting the vehicle on the road. From the evidence it is clear that the radiator was getting heated frequently and that the driver was pouring water in the radiator after every 6 or 7 miles of the journey. The vehicle took 9 hours to cover the distance of 70 miles between Chittorgarh and Pratapgarh. The fact that normally a motor vehicle would not catch fire if its mechanism is in order would indicate that there was some defect in it. The District Judge found on the basis of the evidence of the witnesses that the driver knew about this defective condition of the truck when he started from Bhilwara.

18.It is clear that the driver was in the management of the vehicle and the accident is such that it does not happen in the ordinary course of things. There is no evidence as to how the truck caught fire. There was no explanation by the defendant about it. It was a matter within the exclusive knowledge of the defendant. It was not possible for the plaintiff to give any evidence as to the cause of the accident."

Later in **Gujarat State Road Transport Corpn. Vs. Ramanbhai Prabhatbhai, (1987) 3 SCC 234,** the Supreme Court traced the need and origin of the Fatal Accidents Act, 1855 to similar development of statutory law in England. Thus, an action in tort was found maintainable to claim compensation for death arising from a tortious act, by specified legal representatives of the deceased. It would be useful for our discussion to extract the following passage of that report:-

"4. On account of the close association which came to be established

between India and Great Britain owing to the British rule which lasted for over two centuries, in the High Courts established in India the English Common Law which was based on principles of justice, equity and good conscience came to be applied wherever they were called upon to award damages or compensation for civil wrongs committed by the defendants in the suits. The application of the English Common Law, however, had to conform to Indian circumstances and conditions which necessarily involved a selective application of the English Law in India. "The adoption of the rules of English Law by the Indian Courts", observes M.C. Setalvad in his Common Law in India (The Hamlyn Lectures, Twelfth Series, p. 53), "was neither automatic nor uncritical. Although they started with a presumption that a rule of English Law would be in accordance with the principles of justice, equity and good conscience, they bore in mind the reservation which was later expressed by the Privy Council in the words 'if found applicable to Indian society and circumstances.". In the course of the application of the principles of the English Law of Torts in India the Indian courts came to recognise and apply the maxim actio personalis moritur cum persona- a personal action dies with the parties to the cause of action. An action for a tort had to be begun in the joint lifetime of the wrongdoer and the person injured. The development of railways in England, led to a great upsurge in the number of accidents, many of which were fatal. When it was realised that the cause of action for recovery of damages for the death of a person caused by the wrongful act of another person did not survive on the death of the person to his legal representatives in England as a measure of law reform the Fatal Accidents Act, 1855 was passed for compensating the families of persons killed in accidents. That Act provided that "whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured". The said Act further provided that "every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct." Within a few years after the passing of the said English Fatal Accidents Act, 1846, the Fatal Accidents Act, 1855 came to be passed on March 27, 1855 in India. This Act contains in all five sections. Its preamble runs thus:

"Whereas no action or suit is now maintainable in any Court against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him; it is enacted as follows:"

10. Thus as to substantive right existing in favour of the petitioner, who is the wife of the deceased to be compensated for the wrongful act, neglect or default on part of the functionaries of the State Government specifically the Rural Engineering Services, is undeniable. Prima facie Rural Engineering Services involved discharge of statutory obligation.

11. We have no doubt as to the sustainability of the same as the tortious event is attributable to the conduct of the employees/servants of the State who stored the molten Maxphalt/Bitumen in the tank that suffered a blast leading to its seepage into the official residence of the deceased causing the injuries and his death. Earlier, in **Kasturilal Ralia Ram Jain vs The State Of Uttar Pradesh, AIR 1965 SC 1039**, the Supreme Court opined, the answer to the question would depend upon the nature of duty discharged by the offending State employees and linked it to sovereign duty. However, that view was later departed in **Shyam Sunder Vs. State of Rajasthan (supra).** The pragmatic and thus easily enforceable rule of tortious liability existing viz-a-viz the sovereign, proprietary or commercial function was enforced. It was thus observed:-

20.It was, however, argued on behalf of the respondent that the State was engaged in performing a function appertaining to its character as sovereign as the driver was acting in the course of his employment in connection with famine relief work and therefore, even if the driver was negligent, the State would not be liable for damages. Reliance was placed on the ruling of this Court inKasturilal Ralia Ram Jainv.State of Uttar Pradesh[(1965) 1 SCR 375 : AIR 1965 SC 1039 : (1965) 2 SCJ 318] where this Court said that the liability of the State for a tort committed by its servant in the course of his employment would depend upon the question whether the employment was of the category which could claim the special characteristic of sovereign power. We do not pause to consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today. Its historic and jurisprudential support lies in the oft-quoted words of Blackstone: [Blackstone, Commentaries (10th Edn. 1887)]

"The king can do no wrong ... The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness."

In modern times, the chief proponent of the sovereign immunity doctrine has been Mr Justice Holmes who, in 1907, declared for a unanimous Supreme Court [Kawananakoav.Polyblank, 205 US 349, 353.] :

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Today, hardly anyone agrees that the stated ground for exempting the sovereign from suit is either logical or practical. We do not also think it necessary to consider whether there is any rational dividing line between the so-called sovereign and proprietory or commercial functions for determining the liability of the State.

21.We are of the view that, as the law stands today, it is not possible to say that famine relief work is a sovereign function of the State as it has been traditionally understood. It is a work which

can be and is being undertaken by private individuals. There is nothing peculiar about it so that it might be predicated that the State alone can legitimately undertake the work.

12. It cannot be disputed that at the relevant time the deceased was posted as Deputy Director, Animal Husbandry, Mirzapur Division, Mirzapur. It is also not disputed that at that time he was serving at Mirzapur. Occasioned by this posting and work, he had been allotted government accommodation under the relevant rules. Therefore, he was present at the place and time of occurrence. The establishment where Maxphalt/Bitumen had been stored belonged to the Government of Uttar Pradesh being maintained and managed by the Rural Engineering Services.

13. The act of wrongful neglect or default that may have caused the blast at the storage facility that led to the Maxphalt/Bitumen to flow out from the storage facility, to the residence of the deceased, may remain to be examined in criminal and/or departmental proceeding. It may also remain a matter between the principal and its agent i.e. the State and the actual offender and/or the employer and his employees. At the same time, since the deceased was the unsuspecting and non-contributory victim of that tortious act, the claim to compensation does arise.Insofar as the petitioner is the wife of the deceased, she is entitled to to claim such compensation.

14. We are mindful, under the Act, such action may normally be brought by filing a proper civil suit. In face of that remedy available under the common law, this Court may not be readily exercise its extraordinary jurisdiction under Article 226 of the Constitution of India in each and every matter involving claim for such compensation. By nature, such claims if made against private parties or involving disputed facts may never be entertained in exercise of jurisdiction under Article 226 of the Constitution of India.

15. However, in the present facts we note that the tortious act is attributable to the State and its agents only. Second, the victim of tortious act was none other thana government employee. For that reason, we required the higher functionaries of the State Government to give the claim due consideration and resolve the same. By means of the written instructions (X), it has been first disclosed that the Chief Secretary of the Government of Uttar Pradesh formed a twelve member Committee to look into the matter. It involved not less than four Additional Chief Secretaries, Secretary Finance, three Special Secretaries, the Director, the Chief Engineer, and an Executive Engineer of the Rural Engineering Department.

16. That Committee appears to have applied its mind to the claim but found itself unable to take a decision to pay any compensation etc. The consideration made by the Committee is contained in the communication dated 4.12.2023. We consider it appropriate to place on record that consideration offered by the said Committee. It is quoted below:-

"2. प्रश्नगत प्रकरण में संक्षेप में उल्लेखनीय है कि ग्रामीण अभियंत्रण विभाग प्रखण्ड. मिर्जापुर में स्थित प्रखण्डीय स्टोर में लूट मैक्सफाल्ट (बिटुमिनस) रखे जाने हेतु पूर्व में ही तीन टैंक बनवाये गये थे। उक्त टैंक से सटे ही उपनिदेशक पशुपालन विभाग, मिर्जापुर के आवास की बाउण्ड्रीवाल भी थी। दिनांक

17.07.2010 को सुबह अचानक टैंक की दीवार टूट गयी और मैक्सफाल्ट उपनिदेशक के आवास तक फैल गया, जिससे आवास में उपस्थित उपनिदेशक, पशुपालन विभाग, मिर्जापुर गम्भीर रूप से झुलस गये एवं कुछ दिनों बाद इलाज के दौरान उनकी मृत्यु हो गयी थी। इस संबंध में ग्रामीण अभियंत्रण विभाग के स्तर से प्रखण्डीय स्टोर के चौकीदार श्री सोनू यादव, अवर अभियंता (स्टोर) श्री आर एन सिंह एवं सहायक अभियंता (स्टोर) श्री जे. एन. प्रसाद को निलम्बित किया गया। जाँच अधिकारी अधीक्षण अभियंता, ग्रामीण अभियंत्रण

विभाग परिमण्डल- प्रयागराज द्वारा प्रकरण की जाँच की गयी, जिसमें अवर अभियंता (स्टोर) एवं सहायक अभियंता (स्टोर) पर आरोप सिद्ध नहीं पाया गया तथा पशुपालन विभाग द्वारा भी अवर अभियंता (स्टोर) एवं सहायक अभियंता (स्टोर) के विरुद्ध प्राथमिकी दर्ज करायी गयी। पुलिस विवेचना में भी अपराध स्थापित नहीं पाया गया।

3. मा० उच्च न्यायालय के उपर्युक्त आदेशों के अनुपालन में प्रश्नगत प्रकरण के संभावित समस्त पहलुओं पर विचार-विमर्श करते हुये उक्त दुर्भाग्यपूर्ण घटना हेतु समिति द्वारा शोक व्यक्त किया गया। बैठक में सम्यक विचारोपरांत यह पाया गया कि शासन द्वारा ऐसी कोई नीति निर्धारित नहीं की गयी है जिसके अंतर्गत प्रश्नगत प्रकरण में हुये दुर्घटना के कारण याची को एक्स-ग्रेसिया (अनुग्रह भुगतान) की धनराशि दी जा सके। प्रश्नगत दुर्घटना के उपरांत मृतक डा० प्रसाद के पुत्र श्री आशुतोष मोहन को कार्यालय निदेशक पशुपालन विभाग, उत्तर प्रदेश लखनऊ के कार्यालय आदेश दिनांक 19.02.2015 द्वारा मृतक आश्रित के रूप में अनुकम्पा के आधार पर कनिष्ठ सहायक के पद पर सेवायोजित किया जा चुका है और अन्य समस्त विभागीय देयकों का भुगतान डा० प्रसाद के आश्रितों को किया जा चुका है।

4. यद्यपि वित्त (सामान्य) अनुभाग-3, उत्तर प्रदेश शासन के कार्यालय ज्ञाप संख्या-सा-3-1508/दस-2008-308-97 दिनांक 08.12.2008 के प्रस्तर-9 के अनुसार "जिन सरकारी सेवकों की मृत्यु सरकारी कार्य के दायित्वों के निर्वहन के फलस्वरूप हो जाती है, उन्हें राज्य सरकार द्वारा एक्स-ग्रेसिया की धनराशि का एक मुश्त भुगतान किया जाता है", किन्तु बैठक में विचारोपरांत यह पाया गया कि डा० रवीन्द्र मोहन प्रसाद, उप निदेशक की मृत्यु सरकारी कार्य के दायित्वों के निर्वहन के दौरान नहीं हुई थी, अतः उक्त व्यवस्था, प्रश्नगत प्रकरण में लागू नहीं हो सकती है।"

17. Perusal of the same reaffirms that the occurrence of blast at the storage facility where molten Maxphalt/Bitument had been stored. It is also not disputed that as a result of that blast Maxphalt/Bitumen flowed into the official residential premise of the deceased, causing serious burn injuries to him. He succumbed to those injuries after a few days. As to the F.I.R. lodged with respect to that occurrence, it has been noted, none was found guilty. Besides noting grant of compassionate appointment to the son of the deceased and payment of terminal dues, as to reason to deny payment of compensation, it has been noted, there does not exist any policy whereunder such payment may be made and the case of the deceased it not covered under the existing policy as he was not on duty at the time of occurrence.

18. We may only reiterate, in the first place, occurrence of blast at the storage facility of such hazardous material was not a normal or predictable act. On no principle of law and on no test of prudence it may ever be accepted by any Court that occurrence of the blast of the Maxphalt/Bitumen tank was a normal or

predictable event. It was accidental. Alternatively, if it may be assumed (for the sake of it), that such occurrence was normal or predictable even then the neglect on part of the State functionaries would stand absolutely established as it is undisputed to them that the storage facility for such hazardous material had been located dangerously near the official residential accommodation of the deceased. In that event, it would remain an inescapable conclusion that it was known from before that hazardous material may seep out from the storage facility into the adjoining residential premises and cause severe injuries, including death. Thus the principle of res ipsa loquitor wholly applies to the present facts.

19. Therefore, whichever way the occurrence may be looked at, the accidental occurrence remains a wrongful act arising from neglect. To that extent that tortious liability stands fully established. The fact that the State authorities have chosen not to proceed against the negligent agent is a matter of policy or inaction. While good governance may have compelled the administrators to take decisive, prompt and adequate action in real time to ensure that due remedy was made available to the victim and also to ensure that such occurrences do not reoccur, that has not been done. The grief expressed at the occurrence is no compensation for their tortious act.

20. Thus the conduct of the State authorities may not detain us for a moment. We only record, the State authorities have failed to address/ remedy the wrong. Coming back to the claim made by the petitioner, the Committee constituted by the Chief Secretary appears to have offered its consideration to the State Policy dated 08th December, 2008 (hereinafter referred to as 'the Policy'). Relevant extract of the said policy being Clause 9 reads as below:-

9- एक्स-ग्रेसिया एक मुश्त कम्पेन्सेशन-

वर्तमान व्यवस्था के अधीन जिन सरकारी सेवकों की मृत्यु सरकारी कार्य के दायित्वों के निर्वहन के फलस्वरूप हो जाती है उन्हें राज्य सरकार द्वारा एक्स-ग्रेसिया की धनराशि का एक मुश्त भुगतान किया जाता है। इस कार्यालय-ज्ञाप के निर्गत होने की तिथि से पूर्व निर्धारित दरों में निम्नलिखित संशोधन किया जाता हैः-

		रूपया
(क)	यदि कर्तव्य पालन की अवधि में दुर्घटना में मृत्यु हो जाती है	10.00 लाख
(ख)	कर्तव्य पालन के समय आतंकवादी/अराजक तत्वों की गतिविधियों में हुयी हिंसा के फलस्वरूप हुयी मृत्यु	10.00 लाख
(ग)	देश की सीमा पर अन्तर्राष्ट्रीय युद्ध या सीमा पर छुटपुट घटनाओं/अथवा लड़ाकू/आतंकवादियों, अथवा अतिवादी आदि की गतिविधियों के फलस्वरूप मृत्यु होने पर	15.00 लाख
(घ)	अति दुर्लभ पहाड़ी ऊँचाईयों/दुर्लभ सीमा तथा प्राकृतिक विपदाओं अथवा अति खराब मौसम में कर्तव्य पालन करते हुए मृत्यु होने पर	15.00 लाख

संगत नियम उक्त सीमा तक संशोधित समझे जायेंगे।

21. While considering the above, the Committee constituted by the Chief Secretary has practically rejected the claim on the reasoning that the occurrence was purely accidental and that the deceased was not on Government duty at that time. The said decision of the Committee is wholly unacceptable. For the present purposes we note that the same arises on erroneous

consideration. In the first place accidental occurrences by very nature do involve commission of tortious act as may expose the wrong doer to a civil liability of compensation. Therefore, merely because the occurrence was accidental, would make no difference to the liability to which the State and its functionaries stood exposed.

22. Second, to say that the deceased was not on Government duty is to rub salt to injury. It is not the case of the State that the deceased was abstaining from work or that he was residing in a non-approved private accommodation. At the time of occurrence, the deceased was posted as Deputy Director, Animal Husbandary at Mirzapur and was residing at his official accommodation for reason of that posting. It may be true that he was resting at his official residence after his work hours but it cannot be denied that the occurrence took place while the deceased was resting at his official residence for reason of his posting.

23 By virtue of clear language of the Act and by very nature of a tortious liability it is not dependent on whether the deceased was on active government duty or whether the occurrence (whether accidental or otherwise) took place while he was performing such government duty. As noted above that liability arose upon commission of the accidental occurrence. To the extent the policy Clause 9(क) seeks to limit the statutory liability under the Act, the same would remain unenforceable. Therefore, we find that the State remains liable to first compensate the petitioner for the tortious act committed by the actual tort feasor.

24. In any case, compensation for a tortious liability, may never be examined and/or quantified on the test of an ex-gratia payment. That is an entirely different concept where the payment arises from the grace shown by the payer and not from the entitlement of the payee. It is not applicable to tortious liabilities. Then, compensation for the tortious liability thus incurred may not be defeated occasioned by grant of compassionate appointment to the son of the deceased and/or upon payment of terminal dues, to his wife. Those relief are traceable directly and only to the terms of service of the deceased and/or grace shown by the payer and not to compensation for the liability for tortious injury suffered.

25. In view of above noted admitted facts, no useful purpose would be served in relegating the petitioner to the forum of alternative remedy, or filing a suit proceeding. Again as noted above, the tort feasor were government agencies and servants accountable to the respondents themselves. Therefore, the matter should have been best addressed by the respondents, internally. In any case, we gave that opportunity to the highest administrative functionaries of the State to ensure that justice is meted out expeditiously. Unfortunately that could not be done. Hence we have proceeded to deal with the matter, ourselves.

26. Coming to the issue of the quantification, under the Act, wide discretion is vested with the Court to award such damages as it may think proportionate to the loss. Since these are writ proceedings and no evidence has yet been led by the parties, we seek to adopt a rough and ready method to compute the compensation to bring a quick end to this avoidable litigation that has already suffered a procedural delay of 12 years, the writ petition having been filed within a year of the occurrence.

27. In **Lata Wadhwa Vs. State of Bihar (2001) 8 SCC 197**, amongst others issue arose as to quantification of compensation for death of minor children arising from a tortious act of accidental fire caused at a 'Pandal' set up by a corporation to celebrate the birth anniversary of its founder. The learned arbitrator entrusted to deal with the same, relied on the principle of multiplier, by them firmly entrenched in the context of determination of compensation arising from motor accidents (see **General Manager, Kerala S.R.T.C vs Susamma Thomas (1994) 2 SCC 176**). Unlike the Motor Vehicles Act, though no statutory basis was pre-existing under the Act, yet that principle was found to be most reliable to be applied of the act as well. The Supreme Court negated the challenge laid thereto and made the following pertinent observations:-

"8. So far as the determination of compensation in death cases are concerned, apart from the three decisions of Andhra Pradesh High Court, which had been mentioned in the order of this Court dated 115-12-1993, this Court in the case of G.M., Kerala SRTC v. Susamma thomas [(1994) 2 SCC 176: 1994 SCC (Cri) 335] exhaustively dealt with the question. It has been held in the aforesaid case that for assessment of damages to compensate the dependants, it has to take into account many imponderables, as to the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income altogether. The Court further observed that the manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants, and thereafter, it should be capitalised by multiplying it by a figure representing the proper number of years' purchase. It was also stated that much of the calculation necessarily remains in the realm of hypothesis and in that region, arithmetic is a good servant but a bad master, since there are so often many imponderables. In every case, "it is the overall picture that matters", and the court must try to assess as best as it can, the loss suffered. On the acceptability of the multiplier method, the Court observed:

"The multiplier method is logically sound and legally well-established method of ensuring a 'just' compensation which will make for uniformity and certainty of the awards. A departure from this method can only be justified in rare and extraordinary circumstances and very exceptional cases."

The Court also further observed that the proper method of computation is the multiplier method and any departure, except in exceptional and extraordinary cases, would introduce inconsistency of principle, lack of uniformity and an element of unpredictability in the assessment of compensation. The Court disapproved the contrary views taken by some of the High Courts and explained away the earlier view of the Supreme Court on the point. After considering a series of English decisions, it

was held that the multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up over the period for which the dependency is expected to last. In view of the aforesaid authoritative pronouncement of this Court and having regard to the determination made in the Report by Shri Justice Chandrachud, on the basis of the aforesaid multiplier method, it is difficult for us to accept the contention of Ms Rani Jethmalani that the settled principle for determination of compensation has not been followed in the present case. The further submission of the learned counsel that the determination made is arbitrary, is devoid of any substance, as Shri Justice Chandrachud has correctly applied the multiplier, on consideration of all the relevant factors. Damages are awarded on the basis of financial loss and the financial loss is assessed in the same way as prospective loss of earnings. The basic figure, instead of being the net earnings, is the net contribution to the support of the defendants, which would have been derived from the future income of the deceased. When the basic figure is fixed, then an estimate has to be made of the probable length of time for which the earnings or contribution would have continued and then a suitable multiple has to be determined (a number of years' purchase), which will reduce the total loss to its present value, taking into account the proved risks of rise or fall in the income. In the case of Mallett v. McMonagle [1970 AC 166:(1969) 2 All ER 178 (HL) Lord Diplock gave a full analysis of the uncertainties, which arise at various stages in the estimate and the practical ways of dealing with them. In the case of Davies v. Taylor [1974 AC 207 : (1972) 3 All ER 836 (HL)], it was held that the Court, in looking at future uncertain events, does not decide whether on balance one thing is more likely to happen than another, but merely puts a value on the chances. A possibility may be ignored if it is slight and remote. Any method of calculation is subordinate to the necessity for compensating the real loss. But a practical approach to the calculation of the damages has been stated by Lord Wright, in a passage which is frequently quoted, in Davies v. Powell Duffryn Associated Collieries Ltd. [(1942)] 1 All ER 657 (HL)], to the following effect: (All ER p.665A-B)

The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase."

That rule was reiterated in **M.S. Grewal & Anr vs Deep Chand Sood & Ors, (2001) 8 SCC 151.** In that case, the dispute involved was amongst others as to computation of compensation for death caused to minor children, from drowning at a school excursion trip.

28. Thus we recognise, standardised formula exist under two other enactments, to provide for compensation for tortious liability. First, under the Motor Vehicle Act, 1988 a schedule exists with respect to which law is fairly well settled in view of **Sarla Verma & Ors. v. Delhi Tranpsort Corporation & Anr. (2009) 6 SCC 121 and National Insurance Company Limited. vs. Pranay Sethi and others (2017) 16 SCC 680**. Also, another structured formula exists under the Employees Compensation Act, 1923. If the schedule under the Motor Vehicle Act, 1988 were to be considered/applied to such facts, compensation not less than 53 Lakhs (plus interest) would be payable. In contrast, under the Employees Compensation Act, that amount may be computed around Rs. 34 Lakhs (plus interest). These estimates have been made on the undisputed facts that the deceased was about 52 years of age on the date of his death. He was gainfully employed as a Government servant earning about INR 46,100/- per month by way of salary and had four dependents being three children and a wife.

29. Accordingly, we award compensation- Rs. 50 Lakh to be paid to the petitioner by respondent no.1 within a period of three months from today together with interest on that amount @ 6 % per annum from the date of occurrence till the date of actual payment.

30. The petition is accordingly **allowed**. No order as to costs.

(2024) 1 ILRA 823
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SHEKHAR B. SARAF, J.

Writ-C No. 39914 of 2023

M/s Trilok Chand Fabrication ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rahul Sripat (Sr. Advocate), Sri Ishir Sripat, Sri Saurabh Patel

Counsel for the Respondents:
Addl. C.S.C., Sri Sanjai Singh, Sri Udayan Nandan, Sri Shashi Nandan (Sr. Advocate)

Civil Law - Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Sections 14 & 34 - Code of Civil Procedure, 1908 - Section 9 - Respondent Nos. 5 to 7 obtained loan from Respondent No. 4 by mortgaging their immovable property - Upon default, loan classified as NPA, mortgaged property auctioned - Respondent No. 4 moved application before Respondent No. 2 for possession - During pendency, property sold to petitioner through auction- Respondent No. 8 instituted Civil Suit seeking injunction against eviction, claiming tenancy under Respondent No. 5 on basis of 12-year lease - Temporary injunction granted in favour of Respondent No. 8 - Section 14 proceedings transferred to Respondent No. 3, who, considering civil court's injunction, kept application under abeyance till disposal of suit - Petitioner challenged impugned order by contending tenancy without registered lease cannot exceed 11 months and Respondent No. 3 erred in keeping Section 14 proceedings in abeyance instead of deciding tenancy validity - Under Section 107, TPA and Section 17 and 49, Registration Act, lease of immovable property exceeding one year can be created by registered instrument; oral agreements or unregistered leases are unenforceable - Month-to-month tenancy cannot confer right to retain possession of secured asset in proceedings u/s 14 SARFAESI Act - To claim possession, tenant must hold registered lease - Upon initiation of Section 14 proceedings, tenant may either approach authorised officer/DM/CMM or

surrender possession - Where tenant resists, authorised officer shall move DM/CMM and DM/CMM shall adjudicate tenancy rights - If valid lease exists, possession will not be handed over to creditor - If tenant approach DRT, u/s 17 SARFAESI Act, DRT restore possession only to borrower, not to tenant - Directions accordingly. (**Para 2, 6, 40)**

Writ petition allowed. (E-13)

List of Cases cited:

1. Harshad Govardhan Sondagar Vs International Assets Reconstruction Company Ltd. & ors. (2014) 6 SCC 1, (Paras 26, 27, 28, 32, 36)

2. Bajrang Shyamsundar Agarwal Vs Central Bank of India & ors. (2019) 9 SCC 94, (Paras 17, 18, 23, 24) **(Relied)**

3. Hemraj Ratnakar Salian Vs HDFC Bank Ltd., AIR 2021 SC 3880, (Para 12) **(Relied)**

4. Agme Marketing Pvt. Ltd.Vs Canara Bank & ors. 2019 (8) ADJ 272, (Para 30) **(Relied)**

5. ICICI Bank Ltd. & ors. Vs Umakanta Mohapatra & ors. (2019) 13 SCC 497, (Para 2)

6. Authorized Officer, St. Bank of Travancore & anr. Vs Mathew K.C., (2018) 3 SCC 85, (Paras 5, 10)

7. Intazar Ali Vs St. of U.P. & ors. Writ-C No. 12664 of 2019, dated April 24, 2019 **(Followed)**

8. Shri Janki Devi Bhagat Trust, Agra Vs Ram Swarup Jain (Dead) by Lrs., (1995) 5 SCC 314, (Para 4)

9. Kiran Dhawan Vs Vivek Mittal & anr., 2018 SCC OnLine All 25

10. Samir Mukherjee Vs Davinder Kumar Bajaj, (2001) 5 SCC 259, (Paras 8 to 10)

11. Mardia Chemicals Ltd. & ors. Vs U.O.I. & ors. (2004) 4 SCC 311, (Paras 50, 51)

12. Punjab and Sind Bank Vs Frontline Corporation Ltd., 2023 SCC OnLine SC 470, (Paras 23, 24)

13. SREE Anandhakumar Mills Ltd.Vs Indian Overseas Bank & ors. MANU/SCOR/15183/2018

14. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai & ors. (1998) 8 SCC 1, (Paras 14 to 16)

15. Central Council for Research in Ayurvedic Sciences & anr. Vs Bikartan Das & ors. 2023 SCC OnLine SC 996, (Para 65)

16. Nagendra Nath Bora & anr. Vs The Commissioner of Hills Division and Appeal, Assam & ors. 1958 SCC OnLine SC 45, (Para 36)

(Delivered by Hon'ble Siddhartha Varma, J. & Hon'ble Shekhar B. Saraf, J.)

1. The instant writ petition has been filed by the petitioner, M/s Trilokchand Fabrication Pvt. Ltd. praying for the issuance of a writ of certiorari quashing the order dated April 18, 2023 (hereinafter referred to as the 'impugned order') passed by The Additional District Magistrate, Finance and Revenue, Bulandshahr (hereinafter referred to as the 'Respondent No. 3') and/or a writ of or in the nature of Mandamus directing the Respondent No. 3 to allow the application filed 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') without being affected by the temporary injunction order dated November 9, 2021 (hereinafter referred to as the 'injunction order').

Facts

2. Factual matrix of the instant case is delineated down below:

a. M/s JN Robotics Automation Pvt. Ltd. (hereinafter referred to as the 'Respondent No. 5'), Shri Navneet Sharma, Director, Respondent No. 5 (hereinafter

referred to as the 'Respondent No. 6') and, Shri Jyoti Sharma, Director, Respondent No. 5 (hereinafter referred to as the 'Respondent No. 7') had taken a loan from the Punjab National Bank, Circle Shastra Centre, Ghaziabad (hereinafter referred to as the 'Respondent No. 4'). As a security for the said loan, they had mortgaged their immovable property being plot nos. N1 and N2, Industrial Area, Sikandrabad, District Bulandshahr admeasuring total area 2000 square meters (hereinafter referred to as the 'immovable property').

b. Respondents No. 5, 6, and 7 defaulted on the loan and after the classification of the loan as a 'Non-Performing Asset' under the provisions of the SARFAESI Act, the immovable property belonging to the Respondents No. 5, 6, and 7 was auctioned.

c. Respondent No. 4 preferred an application under Section 14 of the SARFAESI Act before the District Magistrate, Bulandshahr (hereinafter referred to as the 'Respondent No. 2') for taking possession of the immovable property. During the pendency of the proceedings under Section 14 of the SARFAESI Act, the Respondent No. 4 sold the property to the petitioner vide an auction on December 14, 2022.

d. During the pendency of the proceedings under Section 14 of the SARFAESI Act, a Civil Suit for Injunction, being Original Suit No. 198 of 2021 was preferred by one Sanjiv Kumar (hereinafter referred to as the 'Respondent No. 8') against the Respondent No. 5 praying for a decree of injunction against evicting him without following the due process of law on the ground that the Respondent No. 8 is the tenant of the Respondent No. 5 and has duly entered into a lease for a period of 12 years.

e. Vide order dated November 11, 2021, the Court of Civil Judge, Senior Division, Bulandshahar granted temporary injunction to the Respondent No. 8 over the immovable property against the Respondent No. 5.

f. Application under Section 14 of the SARFAESI Act was later transferred to the Respondent No. 3. Respondent No. 3, keeping in mind, the injunction order passed by the civil court, vide its order dated April 18, 2023, directed the application filed under Section 14 of the SARFAESI Act to be kept under abeyance till the disposal of Original Suit No. 198 of 2021. The instant writ petition has been preferred against the said order dated April 18, 2023.

Contentions by the Petitioner

3. Shri Rahul Sripat, learned Senior Advocate, has advanced the following arguments on the behalf of the petitioner:

a. The immovable property was leased by the U.P. State Industrial Development Corporation Ltd. (hereinafter referred to as 'UPSIDC') and hence as per the lease deed dated November 15, 2017, the same could not have been sub-let by the borrower.

b. There is no registered lease deed for the immovable property. Hence no lease beyond a period of 11 months is permissible without there being a registered lease deed in as much as the lease of the Respondent No. 5 from the UPSIDCS also prohibits sub-letting of the plot.

c. Order dated April 18, 2023, is patently illegal to the extent that neither the Petitioner nor the Respondent No. 4 is a party to the Original Suit No. 198 of 2021 and hence the said temporary injunction has no binding effect and only the Respondent No. 5 was injuncted in interfering with the possession of the Respondent No. 8.

d. Order dated April 18, 2023, besides being illegal, unjust and arbitrary is also hit by Articles 14, 21, and 300A of the Constitution of India. The said order is in teeth of the settled propositions of law in as much as the Respondent No. 3 ought to have called upon the Respondent No. 8 to submit his lease deed whereafter the Respondent No. 3 based on the provisions of law ought to have passed its order on merits. Reliance was placed on the judgment of the Hon'ble Supreme Court of India in ***Harshad Govardhan Sondagar -v- International Assets Reconstruction Company Ltd. and Ors, (2014) 6 SCC 1.***

e. From the aforesaid judgement it is abundantly clear that such injunction orders obtained by illegal occupants referring themselves as the tenants cannot be any reason for keeping the proceedings under Section 14 of the SARFAESI Act under abeyance in as the same will very conveniently frustrate the aims and objectives of the SARFAESI Act.

f. Petitioner has also filed application in Original Suit No. 198 of 2021 to apprise the learned court below of the correct facts and circumstances. However, filing of the said application does not create an estoppel against the Petitioner from challenging the impugned order and getting its rights executed under the law.

g. Petitioner is a bonafide auction purchaser who has invested huge amounts of money and is unable to enjoy the fruits of his purchase due as a result of the impugned order. Although the impugned order has been passed upon the application of the Respondent No. 4 but it is only the Petitioner who is the affected party. Therefore, the petitioner has the locus standi to challenge the impugned order.

h. Under the facts and circumstances of the instant case it is expedient in the interest of justice that this Court stays the effect and operation of the impugned order during the pendency of the instant writ petition before this Court. The impugned order is not a final order under Section 14 of the SARFAESI Act and hence the Petitioner has no other alternative efficacious remedy other than to approach this Court under Article 226 of the Constitution of India.

i. To support the petitioner's case, judgments of the Hon'ble Supreme Court of India in ***Bajrang Shyamsundar Agarwal -v- Central Bank of India and Ors. , (2019) 9 SCC 94 , Hemraj Ratnakar Salian -v- HDFC Bank Ltd. , AIR 2021 SC 3880, Agme Marketing Pvt. Ltd. -v- Canara Bank and Ors. , 2019 (8) ADJ 272*** were relied upon.

j. It is a settled proposition of law that no lease beyond a period of 11 months can be created without a registered instrument as the same is barred by Section 106 of the Transfer of Property Act, 1882 (hereinafter referred to as the 'TPA 1882'). Since the lease is said to be by means of an oral agreement the same is to be considered to be a monthly lease wherein after the expiry of the monthly lease period, fresh oral lease is created and hence after classification of the loan of the Respondents No. 5,6 and 7 as a NPA on August 29, 2020 and the subsequent issue of notice under Section 13(2) of the SARFAESI Act on October 13, 2020, the alleged oral lease in favour of the Respondent No. 8 is barred by Section 13(13) of the SARFAESI Act.

k. The Respondent No. 8 has not produced any document to prove the lease to be a valid lease. As such, the Respondent No. 8 has no right as a tenant in the said property and the injunction order passed in the Original Suit No. 198 of 2021 has no application in the present proceedings nor does it have any binding effect upon the

present proceedings. Only the Borrower and the Respondent No. 8 are parties to the said suit. The said suit has been instituted after commencement of proceedings under Section 14 of the SARFAESI Act, and hence the same is barred by Section 34 and Section 35 of the SARFAESI Act. Even otherwise the Respondent No. 8 cannot seek injunction from eviction without due process of law.

l. The interim injunction will have no binding effect on the present proceedings as the same is barred by the SARFAESI Act. The oral tenancy alleged to have been created in the instant case is governed by the provisions of Section 65A of the TPA 1882 and hence the Respondent No. 8 is not eligible for any relief.

Contentions by The Respondent No. 8

4. Learned advocate appearing on behalf of the respondent no. 8 has made the following submissions:

a. Respondent No. 8 is in actual physical possession of the immovable property in question as a tenant of the said property. The tenancy in question has been entered into between the Respondent No. 6 and the Respondent No. 8 herein and in pursuance thereto, the Respondent No. 8 has deposited rent equivalent to 12 years as an advance payment. The parties have also executed a declaratory document in this regard on May 02, 2019. In pursuance to the tenancy created between the parties on August 10, 2018, the Respondent No. 8 is in physical possession of the property in question.

b. It is submitted that the present writ petition against the impugned order passed under Section 14 of the SARFAESI Act can only be challenged in proceedings under Section 17 of the SARFAESI Act. The present writ petition challenging the impugned order is not maintainable before this Court.

c. The aforesaid principle of law has been clearly laid down by the Hon'ble Supreme Court in the case of ***ICICI Bank Limited and Others -v- Umakanta Mohapatra and Ors., (2019) 13 SCC 497*** and in ***Authorized Officer, State Bank of Travancore and Anr. -v- Mathew K.C., (2018) 3 SCC 85***.

d. The aforesaid judgments have been followed by this Court in Writ-C No. 12664 of 2019 **(Intazar Ali -v- State of U.P. & 3 Others)** dated April 24, 2019. In view of the aforesaid judgments, the present writ petition is not maintainable under Article 226 of the Constitution of India, as the petitioner has an alternative efficacious remedy in the form of Section 17 of the SARFAESI Act.

e. It is further stated that the injunction order does not in any manner contravene the provisions of Section 34 r/w Section 35 of the SARFAESI Act, inasmuch as, the jurisdiction of the civil court has only been barred in respect of any debts, which are within the jurisdiction of the tribunals constituted under the SARFAESI Act. Since the suit in question was only a suit for injunction instituted by the tenant against his landlord/lessor, the same is not barred either by Section 34 or Section 35 of the SARFAESI Act.

f. The Additional District Magistrate could not have ignored the order passed by a competent civil court while deciding the application filed under Section 14 of the SARFAESI Act and hence, it has rightly stayed its hands in view of the injunction order.

g. The tenancy in question is a tenancy, where no term or period has been fixed between the parties and in view of

such fact, the tenancy in question is deemed to be on month-to-month basis. Registration of such a tenancy is not necessary and hence the same would not be hit by the provisions of Section 49 of the Indian Registration Act, 1908 (hereinafter referred to as the IRA, 1908).

h. Even in case of a tenancy, which is not registered or in the case a month-to-month tenancy, the court is not precluded from taking into consideration, the factum of creation of a tenancy or the agreement between the lessor and the lessee. Creation of a month-to-month tenancy created prior to issuance of notice under Section 13(2) of the SARFAESI Act cannot be rejected solely on the ground that the same is contained in an unregistered document.

i. The lease/agreement entered between the borrower and the tenant has not been determined till date and therefore, the tenant cannot be dispossessed by the auction purchaser from the property in question.

j. In view of such facts and circumstances, it is submitted that the present writ petition is not maintainable before this Court under Article 226 of the Constitution of India, and therefore, the present writ petition is liable to be dismissed by this Court.

Analysis and Conclusion

5. We have heard the learned counsel appearing for the parties and perused the materials on record.

6. In the instant case, the petitioner has challenged the order dated April 18, 2023, on primarily two grounds. First, that in the absence of a registered lease deed, no tenancy can last beyond a period of 11 months, and second, that the Respondent No. 3 should have determined the validity of the tenancy itself, instead of keeping the proceedings initiated under Section 14 of the SARFAESI Act under abeyance. Hence, for better adjudication of the issue at hand, I have divided this judgment into four issues:

Issue No. 1: - How are tenancy rights determined beyond the period of 1 year under the TPA 1882?

Issue No. 2: - What is the recourse available to a tenant during the pendency of an application under Section 14 of the SARFAESI Act?

Issue No. 3: - Can civil suits/proceedings be instituted during the pendency of an application under Section 14 of the SARFAESI Act?

Issue No. 4: - Does the present case call for the exercise of writ jurisdiction by this Court?

Issue No. 1

7. Section 107 of the TPA 1882 states that a lease of immovable property, for any term exceeding one year, can be made only by a registered instrument:

"107. Leases how made.—*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.*

[All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.]

[Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:

Provided that the State Government may, [***] from time to time, by notification in the OfficialGazette, direct

that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."

8. Section 17 of the IRA, 1908 also states that leases of immovable property beyond any term exceeding one year must be registered:

"17. Documents of which registration is compulsory.*—(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 examined on or after the date on which, Act XVI of 1864, or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration Act, 1877 (3 of 1877), or this Act came or comes into force, namely—*

(a) instruments of gift of immovable property;

(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, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property :

Provided that the State Government may, by order published in the OfficialGazette, exempt, from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees"

9. In ***Shri Janki Devi Bhagat Trust, Agra -v- Ram Swarup Jain (Dead) by Lrs., (1995) 5 SCC 314***, the Hon'ble Supreme Court held that the lease of an immovable property, beyond any term exceeding one year can only be made through a registered instrument. Relevant paragraph from the said judgment has been reproduced below:

"4.Under Section 107 of the Transfer of Property Act a lease of immovable property from year to year or for any term exceeding one year can be made only by a registered instrument. Any lease of this kind would be void unless it is created by a registered instrument. All other leases of immovable property may be made either by a registered instrument or by an oral agreement accompanied by delivery of possession. All the courts below have held that there was a valid lease. The High Court has also recorded that it was not the contention of the respondent that his lease was from year to year. The contention was that the lease was for a term exceeding one year and was, therefore, compulsorily registerable under the first part of Section 107 of the Transfer of Property Act. This

contention has been negatived by the High Court as also by both the courts below. The High Court has held that the lease was not for a term exceeding one year, and so was not compulsorily registerable under the first part of Section 107. It, however, held that since the lease was for a manufacturing purpose, six months' notice to quit was required under Section 106. In its absence, termination was not valid."

10. This Court, in **Kiran Dhawan -v- Vivek Mittal and Anr., 2018 SCC OnLine All 25**, expounded that only through a registered instrument, can a lease for any term exceeding one year be made. This Court after considering the Hon'ble Supreme Court's judgment in ***Samir Mukherjee -v- Davinder Kumar Bajaj, (2001) 5 SCC 259*** reiterated that an oral agreement, cannot result in creation of a valid lease from year to year. Relevant paragraphs from the aforesaid judgment have been extracted below:

"8. Under Section 107, 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. The second paragraph of Section 107, as applicable in the State of U.P. provided that all other leases of immovable property may be made either by a registered instrument or, by an agreement oral or accompanied by delivery of possession. Section 106, provides that in the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice. Under the U.P. Amendment, the period of notice stood substituted to thirty days. Later on, by virtue of Central Amendment by Act 3 of 2003, the earlier position stood restored, however, nothing turns upon the same as the notice is not being challenged on the said ground.

9. InSamir Mukerjee(supra), upon which reliance has been placed by the court below, an identical plea was considered. The tenancy in that case was created by an oral agreement. The Supreme Court, after considering the interplay between Section 106 and Section 107 held that Section 106 lays down a rule of construction which would apply only when the parties had not specifically agreed upon as to whether the lease is yearly or monthly. It was held that in case there was a valid agreement between the parties regarding the duration of a lease, section 106 would have no application. On the other hand, Section 107 prescribes the procedure for execution of lease. Thus, where the lease is from year to year or for any term exceeding one year or reserving yearly rent, it can be made only by a registered instrument and not otherwise. The Supreme Court held that since there was no registered lease agreement but only an oral agreement, it would not result in creation of a valid lease from year to year in view of the inhibition contained in first paragraph of Section 107 nor the rule of construction embodied in Section 106 would come into play. The relevant observations made in this regard in the said judgement are quoted below:—

"5. Section 106 lays down a rule of construction, which is to apply when the parties have not specifically agreed upon as to whether the lease is yearly or monthly between the parties. On a plain reading of this section it is clear that legislature has

classified leases in two categories according to their purposes and this section would be attracted to construe the duration of a valid lease in the absence of a contract or local law or usage to the contrary. Where the parties by a contract have indicated the duration of a lease; this section would not apply. What this section does is to prescribe the duration of the period of different kinds of leases by legal fiction-leases for agricultural or manufacturing purposes shall be deemed to be lease from year to year and all other leases shall be deemed to be from month to month. Existence of a valid lease is a pre-requisite to invoke the rule of construction embodied in Section 106 of Transfer of Property Act.

6. Section 107 prescribes the procedure for execution of a lease between the parties. Under the first paragraph of this section a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by registered instrument and remaining classes of leases are governed by the second paragraph that is to say all other leases of immovable property can be made either by registered instrument or by oral agreement accompanied by delivery of possession.

7. In the case in hand we are concerned with an oral lease which is hit by the first paragraph of Section 107 of the Transfer of Property Act. Under Section 107 parties have an option to enter into a lease in respect of an immovable property either for a term less than a year or from year to year, for any term exceeding one year or reserving a yearly rent. If they decide upon having a lease in respect of any immovable property from year to year or for any term exceeding one year, or reserving yearly rent, such a lease has to be only by a registered instrument. In absence of a registered instrument no valid lease from year to year or for a term exceeding one year or reserving a yearly rent can be created. If the lease is not a valid lease within the meaning of the opening words of Section 106 the rule of construction embodied therein would not be attracted. The above is the legal position on a harmonious reading of both the sections.

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10. In the present case though the appellant has claimed that it was a lease for manufacturing purpose, admittedly there was no registered written lease. Therefore, rule of construction as envisaged in Section 106 would not be applicable as the statutory requirement of Section 107 of the Act has not been satisfied. The plea of the appellant that 15 days notice terminating the present tendency is bad in law would not be sustainable"

11. What emerges from a perusal of the aforesaid judgments is that the bar contained under Section 107 of the TPA 1872 is absolute. As a result, under no circumstances an unregistered instrument can create a valid lease beyond a period of one year. Furthermore, an oral argument cannot create a valid lease from year to year. IRA, 1908 also compulsorily requires lease of an immovable property created for a term exceeding one year to be registered. In absence of such registration, courts cannot take such a lease into consideration as the same would attract the bar contained under Section 49 of the IRA, 1908.

12. It was argued by the Respondent No. 8 before this Court that since the tenancy in question is a tenancy, where no period has been fixed, the tenancy in question is deemed to be on month-to-month basis and as such, registration is not

necessary. However, this argument bears no weight given the present circumstances. As the law stands, if a tenant claims possession of a secured asset beyond the prescribed period under Section 107 of the TPA 1872, he is required to produce a registered instrument executed in his favour.

13. This Court in ***Agme Marketing Private Limited and Anr. -v- Canara Bank and Ors. (supra)***, considered the rights of a tenant in case of a monthly tenancy, and the proceedings initiated under the SARFAESI Act, 2002 as follows:

"30. The Court may then consider the rights of the petitioners proceeding on the assumption that a monthly tenancy came to be created in their favour. If this contention were to be accepted, it would necessarily bid the Court to presume the creation of a tenancy on the first date of every month and its expiry on the last date of that month. The problem, however, in considering whether this tenancy would stand saved and not be contrary to the provisions of the 2002 Act arises when one takes into consideration the injunction as engrafted in Section 13(13) thereof. Subsection (13) restrains a borrower from transferring by way of sale, lease or otherwise the secured asset after receipt of a notice under Section 13(2) without the prior written consent of the secured creditor. Undisputedly even a monthly tenancy can be recognised to have come into existence only as an outcome of a bilateral and consensual act of parties. The acceptance of the contention addressed at the behest of the petitioners compels this Court to view the creation of a monthly tenancy by the original borrower in favour of the petitioners at the beginning of every month. This would logically lead to the creation of a monthly tenancy even after 09 October 2012 when the Section 13(2) notice came to be issued. The creation of a monthly tenancy cannot be viewed as an extension or renewal of an earlier term. It essentially and in law amounts to the creation of a fresh tenancy at the beginning of every month. If this submission of a monthly tenancy as urged on behalf of the petitioners is accepted, it would lead to a logical conclusion of a monthly tenancy being created and coming into existence even after the Section 13(2) notice came to be issued. It is not the case of the petitioners that the so called monthly tenancy came to be created with the prior and written consent of the secured creditor. Viewed in that light it is manifest that the provisions of Section 13(13) would stand breached. The contention that the statutory restraint engrafted in Section 13(13) of the SARFAESI Act operates only against the lessor/original debtor is misconceived. The creation of a tenancy is the formation of a contract based upon the action of two parties assenting to enter into a legal relationship. The acceptance of this submission would not only be contrary to the plain legislative intent infusing that provision, it would also deprive it of rigour and purpose."

Therefore, a monthly tenancy, cannot entitle a lessee to claim possession of a secured asset after proceedings have been initiated under Section 14 of the SARFAESI Act.

14. At this juncture, this Court also considers it pertinent to refer to the judgment of the Hon'ble Supreme Court in ***Harshad Govardhan Sondagar -v- International Assets Reconstruction Company Ltd (supra)***, wherein the Hon'ble Supreme Court held that if a tenant claims possession of a secured asset for any term exceeding one year from the date of the

lease made in his favour, he must produce a registered instrument. We have extracted the relevant paragraphs from the said judgment below:

"36. We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. 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 a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord."***

(Emphasis Added)

15. Furthermore, the Hon'ble Supreme Court in its judgment in ***Bajrang Shyamsunder Agarwal -v- Central Bank of India (supra)*** examined the interplay between the SARFAESI Act and the rights of the tenants. The Hon'ble Supreme Court in the aforesaid case held that in case a tenant claims possession of a secured asset based on an unregistered instrument or an oral agreement, accompanied by delivery of possession, the tenant will not be entitled to the possession of the secured asset beyond the period prescribed under Section 107 of the TPA 1882. Relevant paragraphs from the said judgment have been extracted below:

"17.The interplay between theSarfaesiAct and the right of the tenant was first examined by this Court inHarshad Govardhan case[Harshad Govardhan Sondagarv.International Assets Reconstruction Co. Ltd., (2014) 6 SCC 1 : (2014) 3 SCC (Civ) 1] . It may be noted that the present appellant was a party to the aforesaid proceedings. This Court was confronted with the question as to whether the provisions of theSarfaesiAct affect the right of a lessee to remain in possession of the secured asset during the period of the lease. After noticing the scheme of the Act, this Court held that if the lawful possession of the secured asset is not with the borrower, but with a lessee under a valid lease, the secured creditor cannot take possession of the secured asset 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 in Section 13 of theSarfaesiAct. Accordingly, this Court concluded that the Chief Metropolitan Magistrate/District Magistrate can pass an order for delivery of possession of secured asset in favour of secured creditor only when he finds that the lease has been determined in accordance with Section 111 of the TP Act.

18.The Court further held that if the Chief Metropolitan Magistrate/District Magistrate is satisfied that a valid lease is

created before the mortgage and the lease has not been determined in accordance with Section 111 of the TP Act, then he cannot pass an order for delivery of possession of the secured asset 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 the creation of the mortgage satisfying the requirements of Section 65-A of the TP Act or even though there is a valid lease the same stands determined in accordance with Section 111 of the TP Act, he can pass an order for delivery of possession of the secured asset to the secured creditor.

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23. While we agree with the principle laid out inVishal N. Kalsaria case[Vishal N. Kalsariav.Bank of India, (2016) 3 SCC 762 : (2016) 2 SCC (Civ) 452] that the tenancy rights under the Rent Act need to be respected in appropriate cases, however, we believe that the holding with respect to the restricted application of the non obstante clause under Section 35 of theSarfaesiAct, to only apply to the laws operating in the same field is too narrow and such a proposition does not follow from the ruling of this Court inHarshad Govardhan case[Harshad Govardhan Sondagarv.International Assets Reconstruction Co. Ltd., (2014) 6 SCC 1 : (2014) 3 SCC (Civ) 1] .

24.In our view, the objective of theSarfaesiAct, coupled with the TP Act and the Rent Act are required to be reconciled herein in the following manner:

24.1.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 theSarfaesiAct proceedings.

24.2.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 theSarfaesiAct, it has to satisfy the conditions of Section 65-A of the TP Act.

24.3.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 TP Act."

(Emphasis Added)

16. What flows from the aforesaid discussion is that in absence of a registered instrument executed in its favour, a tenant, cannot be permitted to claim possession of a secured asset for a term beyond one year from the date on which the lease is claimed to have come into effect. If a tenant intends to safeguard his possession of the secured asset, presence of a registered lease deed executed in his favour is the sine qua non for the same. Having concluded that, it is

further held that an oral agreement accompanied by delivery of possession, or an unregistered lease deed cannot be relied upon by a tenant to claim possession of a secured asset beyond the period prescribed under Section 107 of the TPA 1872. We also hold that the tenant, who claims tenancy month by month, would not get any advantage as per the judgment of the Supreme Court in **Agme Marketing Pvt. Ltd. (Supra)** as it clearly holds that a month to month tenancy comes to an end at the end of the month and commences at the beginning of every month. If that is the case, then as per Section 13 (13) of the SARFAESI Act, a new tenancy would not commence after the notice under Section 13 (2) of the SARFAESI Act was issued to the borrower-landlord and, therefore, whenever in any case a plea is taken that the tenant was a tenant on a month to month basis then he would not get any advantage of that assertion as the commencement of tenancy on the first of every month would be a definite breach of the provisions of Section 13 (13) of the SARFAESI Act.

Issue No. 2

17. It has been conclusively established by this Court under Issue No. 1 that only through a registered instrument, a tenant can claim possession of a secured asset beyond the prescribed period under Section 107 of the TPA 1872. Therefore, the question which now emerges is - what is the remedy available to a tenant, in case, during the validity of his tenancy, proceedings are initiated under Section 14 of the SARFAESI Act?

18. Rules 8 (1) and 8(2) of the Security Interest (Enforcement) Rules, 2002 require that in case the secured asset is an immovable property, the officer, authorized by the DM/CMM, as the case maybe, before taking possession, shall deliver a possession notice on the **outer door or at a conspicuous place** of the property. The said possession notice shall also be published, in two leading newspapers, including, one newspaper in the local language. The Hon'ble Supreme Court in ***Harshad Govardhan Sondagar (supra),*** held that after a lessee becomes aware, of such a possession notice, he can either resist the attempt of the secured creditor to take possession of the secured asset, or surrender the possession. The lessee, in case, he resists possession, is required to produce proof before the authorized officer, that his tenancy was created prior to creation of the mortgage or under the mortgagor, he was a lessee in accordance with Section 65-A of the TPA 1872. The authorized officer is then required to file an application before the CMM/DM, under Section 14 of the SARFAESI Act. The affidavit accompanying the application must state the name and address of the person claiming to be the lessee. On receipt of such an application, the CMM/DM must give notice and an opportunity of hearing to the person who is claiming to be the lessee. Thereafter, if existence of a valid lease is established to the satisfaction of the CMM/DM, he shall not pass an order delivering the possession of secured asset to the secured creditor. If in case, no valid lease exists, the CMM/DM, will pass an order delivering to the secured creditor, the possession of the secured asset. Relevant paragraphs from ***Harshad Govardhan Sondagar (supra)*** have been extracted below:

"26. The opening words of sub-section (1) of Section 14 of theSarfaesiAct also provides that if any of the secured

assets is required to be sold or transferred by the secured creditor under the provisions of the Act, the secured creditor may take the assistance of the Chief Metropolitan Magistrate or the District Magistrate. Where, therefore, such a request is made by the secured creditor and the Chief Metropolitan Magistrate or the District Magistrate finds that the secured asset is in possession of a lessee but the lease under which the lessee claims to be in possession of the secured asset stands determined in accordance with Section 111 of the Transfer of Property Act, the Chief Metropolitan Magistrate or the District Magistrate may pass an order for delivery of possession of secured asset in favour of the secured creditor to enable the secured creditor to sell and transfer the same under the provisions of the Sarfaesi Act. Sub-section (6) of Section 13 of the Sarfaesi Act provides that any transfer of secured asset after taking possession of secured asset by the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. In other words, the transferee of a secured asset will not acquire any right [Ed.: It would seem that if the sale or transfer of the secured asset is made under theSarfaesiAct, 2002 without the secured creditor having taken over possession, then the transferee would obtain the secured asset subject to incumbrances i.e. stand in the shoes of the secured creditor. It is to obtain the benefit of S. 13(6),SarfaesiAct, 2002 i.e. to obtain the secured asset free of incumbrances that possession would have to be taken by secured creditor prior to the transfer. Section 5,SarfaesiAct, 2002 provides for the transfer of the secured assetsubjectto incumbrances.] in a secured asset under sub-section (6) of Section 13 of the Sarfaesi Act, unless it has been effected after the secured creditor has taken over possession of the secured asset. Thus, for the purpose of transferring the secured asset and for realising the secured debt, the secured creditor will require the assistance of the Chief Metropolitan Magistrate or the District Magistrate for taking possession of a secured asset from the lessee where the lease stands determined by any of the modes mentioned in Section 111 of the Transfer of Property Act.

27. We may now deal with the remedies available to the lessee where he is threatened to be dispossessed by any action taken by the secured creditor under Section 13 of theSarfaesiAct. Sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 provide for a possession notice where the secured asset is an immovable property. Sub-rules (1), (2) and (3) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 as well as Appendix IV of the said Rules, which is the form of such possession notice, are extracted hereunder:

"8. Sale of immovable secured assets.—(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these Rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the

authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property."

"Appendix IV
[SeeRule 8(1)]
Possession Notice
(For Immovable Property)
Whereas

The undersigned being the authorised officer of the …… (name of the institution) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) and in exercise of powers conferred under Section 13(12) read with Rule 9 of the Security Interest (Enforcement) Rules, 2002 issued a demand notice dated …….. calling upon the borrower Shri ……./M/s ……to repay the amount mentioned in the notice being Rs …….. (in words……..) within 60 days from the date of receipt of the said notice.

The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described hereinbelow in exercise of powers conferred on him/her under Section 13(4) of the said Act read with Rule 9 of the said Rules on this …….. day of …… of the year …….

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the …… (name of the institution) for an amount Rs …… and interest thereon.

Description of the immovable property

All that part and parcel of the property consisting of Flat No. ……/Plot No. …… in Survey No. ……/City or Town Survey No. ……/Khasra No. …… within the registration sub-district …….. and District ……

Bounded;
On the north by
On the south by
On the east by
On the west by
sd/-
Authorised Officer
(Name of the institution)
Date:
Place:"

28. A reading of sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 would show that the possession notice will have to be affixed on the outer door or at the conspicuous place of the property and also published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer. At this stage, the lessee of an immovable property will have notice of the secured creditor making efforts to take possession of the secured assets of the borrower. When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of which he is the lessee, from the possession notice which is delivered, affixed or published in sub-rule (1) and sub-rule (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, he may either surrender possession or resist the attempt of the secured creditor to take the possession of the secured asset by producing before the authorised officer proof that he was inducted as a lessee prior

to the creation of the mortgage or that he was a lessee under the mortgagor in accordance with the provisions of Section 65-A of the Transfer of Property Act and that the lease does not stand determined in accordance with Section 111 of the Transfer of Property Act. If the lessee surrenders possession, the lease, even if valid, gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of theSarfaesiAct and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee. When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. If the Chief Metropolitan Magistrate or the District Magistrate is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65-A of the Transfer of Property Act and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. But in case he comes to the conclusion that there is in fact no valid lease made either before creation of the mortgage or after creation of the mortgage satisfying the requirements of Section 65-A of the Transfer of Property Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of the Transfer of Property Act, he can pass an order for delivering possession of the secured asset to the secured creditor."

19. It is not under dispute that, if a valid tenancy can be established by the tenant under the provisions of the TPA 1872, a secured creditor cannot disturb the tenant's possession of the secured asset. Proceedings under the SARFAESI Act cannot be used to frustrate the rights of a rightful tenant. However, possession of a secured asset for a term exceeding one year, can only be claimed through a registered lease deed. While considering it's earlier judgement in ***Bajrang Shyamsunder Agarwal -v- Central Bank of India (supra)***, the Hon'ble Supreme Court in ***Hemraj Ratnakar Salian -v- HDFC Bank Ltd. And Ors. (supra)***, reiterated this view:

"12. A Three-Judge Bench of this Court inBajarang Shyamsunder Agarwalv.Central Bank of India3, after considering almost all decisions of this Court, in relation to the right of a tenant in possession of the secured asset, has held that if a valid tenancy under law is in existence even prior to the creation of the mortgage, such tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. If a tenancy under law comes into existence after the creation of a mortgage but prior to issuance of a notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the Transfer of Property Act, 1882. If a tenant claims 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 said

decision of this Court, it was clarified that in the absence of a registered instrument, if the tenant only relies upon 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 the provisions of the Transfer of Property Act..."

20. As far as approaching the DRT against the action of the secured creditor is concerned, the Hon'ble Supreme Court in ***Harshad Govardhan Sondagar (supra)***, held that while the recourse to approach the DRT maybe availed by the tenant, the DRT has no power to restore the possession of the secured asset to the lessee/tenant. The DRT can only restore possession of the secured asset to the borrower. Relevant paragraph from the aforesaid judgment has been extracted below:

"32. When we read sub-section (1) of Section 17 of theSarfaesiAct, we find that under the said sub-section "any person (including borrower)", aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under the chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with Mr Vikas Singh that the words "any person" are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read sub-section (3) of Section 17 of theSarfaesiAct, we find that the Debts Recovery Tribunal has powers to restore possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even if the Debts Recovery Tribunal comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65-A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under Section 17 of theSarfaesiAct to the lessee to protect his lawful possession under a valid lease."

21. What can be concluded is that a tenant can avail either of the following two options, as a recourse to the proceedings initiated under Section 14 of SARFAESI Act –

a. A tenant, on becoming aware of the proceedings initiated under Section 14 of SARFAESI Act, may approach the authorized officer empowered by the DM/CMM, to take possession of the secured asset. The authorized officer, on receipt of such an application, will then file an affidavit and submit the application for

determination of tenancy rights before the DM/CMM. On receipt of such an application, the DM/CMM will provide an opportunity to the tenant to present his case, and then determine the validity of tenancy in accordance with the law. In case, the DM/CMM concludes that the tenant has a valid lease, in accordance with the law, he may not pass an order under Section 14 of SARFAESI Act, delivering the possession of asset in question to the secured creditor.

Or,

b. A tenant can surrender possession of the secured asset, of which he claims to be the leaseholder. The lease, in such a case, will be determined in accordance with Section 111 of the TPA 1882.

22. Issue No. 2 is answered accordingly in the aforesaid terms.

Issue No. 3

23. In order to protect his possession in the instant case, the tenant approached the concerned civil court, to obtain an injunction against the borrower from evicting him without the due process of law. Taking into consideration the order passed by the civil court, the Respondent No. 3, kept the proceedings initiated under Section 14 of the SARFAESI Act under abeyance. The issue which arises for consideration of this Court now, therefore, is whether the Respondent No. 3 could have done so, and whether the tenant could have approached the civil court.

24. Section 34 of the SARFAESI Act places a bar on the institution of civil suits in respect of any matter in which a Debts Recovery Tribunal or the Appellate Tribunal has jurisdiction:

*"**34. Civil court not to have jurisdiction.**—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."*

25. In ***Mardia Chemicals Ltd. And Ors. -v- Union of India and Ors., (2004) 4 SCC 311,*** the Hon'ble Supreme Court, stated that Section 34 of the SARFAESI Act places a bar on the civil courts from entertaining an application in any matter in which a DRT or an Appellate Tribunal have jurisdiction. The Hon'ble Supreme Court further outlined that only in extremely limited cases, jurisdiction of a civil court can be invoked in such matters. Relevant paragraphs from the aforesaid judgment have been extracted below:

"50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as

advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely,V. Narasimhachariar[AIR 1955 Mad 135] , AIR at pp. 141 and 144, a judgment of the learned Single Judge where it is observed as follows in para 22: (AIR p. 143)

"22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought:Adamsv.Scott[(1859) 7 WR 213, 249] . I need not point out that this restraint on the exercise of the power of sale will be exercised by courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Ghose, Rashbehary:Law of Mortgages, Vol. II, 4th Edn., p. 784.)"

26. The Hon'ble Supreme Court in ***Punjab and Sind Bank -v- Frontline Corporation Ltd., 2023 SCC OnLine SC 470***, expounded on its earlier judgment in ***Mardia Chemicals (supra)***. Relevant paragraphs have been reproduced below:

"23. It could thus be seen that this Court has held that the jurisdiction of the civil court is barred in respect of matters which a DRT or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". The Court has held that the prohibition covers even matters which may be taken cognizance of by the DRT though no measure in that direction has so far been

taken under subsection (4) of Section13of theSARFAESI Act. It has been held that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. It has categorically been held that any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The Court held that the bar of civil court thus applies to all such matters which may be taken cognizance of by the DRT, apart from those matters in which measures have already been taken under sub-section (4) of Section13of theSARFAESI Act.

24.This Court has further held that, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages."

27. Again, in ***SREE Anandhakumar Mills Ltd. -v- Indian Overseas Bank & Ors., MANU/SCOR/15183/2018***, the Hon'ble Supreme Court reiterated that no civil court shall have jurisdiction to entertain any suit or proceeding if an aggrieved person has got any grievance against any measures taken under Section 13(4) of the SARFAESI Act –

"*…The opening portion of Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression in respect of any matter referred to in Section 34 would take in the measures provided under sub-section (4) of Section 13 of the Securitisation Act.*

Consequently, if any aggrieved person has got any grievance against any measures taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal.

Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well."

28. Before concluding this issue, reference is made to Section 9 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC 1908' which states as follows:

9. Courts to try all civil suits unless barred.—The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. 4[Explanation I].—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. 5[Explanation II].—For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]"

Upon an examination of Section 9 of the CPC 1908 read in conjunction with Section 34 of the SARFAESI Act, it can unequivocally be ascertained that civil courts are precluded from adjudicating suits pertaining to a subject matter which falls within the jurisdiction of a DRT or an Appellate Tribunal under the SARFAESI Act, except in exceptional circumstances.

29. In the instant case, the tenant erred in seeking redress before the Court of Civil Judge, Senior Division, Bulandshahar, for safeguarding his tenancy rights. Legal provisions do not sanction such a course of action. The lessee should have availed himself of the appropriate remedy before the DM/CMM, as per the Security Interest (Enforcement) Rules, 2002, and the SARFAESI Act, or surrender possession of the secured asset. Respondent No. 3, possessing the requisite authority, was both empowered and obligated by law to ascertain the tenancy rights of Respondent No. 8 in accordance with the law. Issue No. 3 is accordingly answered in the negative.

Issue No. 4

30. It was also argued before this Court that the petitioner should have approached the DRT under Section 17 of the SARFAESI Act, instead of seeking to avail the writ jurisdiction of this Court under Article 226 of the Constitution of India.

31. It is not disputed that if an efficacious alternative remedy exists, the High Courts will typically refrain from invoking their writ jurisdiction. Nonetheless, presence of an alternative efficacious remedy does not constitute an absolute impediment, in entertaining a writ petition. This view was reiterated by the Hon'ble Supreme Court in ***Whirlpool Corporation -v- Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 1***. Relevant paragraphs have been extracted below:

"14.The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose"

15.Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. ***But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.***

16. Rashid Ahmedv.Municipal Board, Kairana[1950 SCC 221 : AIR 1950 SC 163

: 1950 SCR 566] laid down that existence of an adequate legal remedy was a factor to be taken into consideration in the matter of granting writs. ***This was followed by another Rashid case, namely,K.S. Rashid & Sonv.Income Tax Investigation Commission[AIR 1954 SC 207 : (1954) 25 ITR 167] which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise of discretion to refuse to interfere in a petition under Article 226. This proposition was, however, qualified by the significant words, "unless there are good grounds therefor", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Article 226 could still be entertained in exceptional circumstances."***

(Emphasis Added)

32. The Respondent No. 8 in the instant case relied upon a judgment of the Hon'ble Supreme Court in the case of ***ICICI Bank Limited and Ors. -v- Umakanta Mohapatra and Ors. (supra)***, to argue against the maintainability of the writ petition in the instant case. The Hon'ble Supreme Court in the said case had remarked as follows:

"2.Despite several judgments of this Court, including a judgment by Hon'ble Navin Sinha, J., as recently as on 30-1-2018, inState Bank of Travancorev.Mathew K.C.[State Bank of Travancorev.Mathew K.C., (2018) 3 SCC 85 : (2018) 2 SCC (Civ) 41] , the High Courts continue to entertain matters which arise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Sarfaesi), and keep granting interim orders in favour of persons who are non-performing assets (NPAs)."

However, the said judgment, to our mind, fails to advance the case of the Respondent No. 8 in the instant case. The Hon'ble Supreme Court in the aforesaid judgment was dealing with a case wherein the borrower had approached the writ court. However, in the instant case, the Petitioner is not the borrower but an auction purchaser, who has approached this Court to protect his rights.

33. Next, the Respondent No. 8 relied upon the judgment of the Hon'ble Supreme Court in ***Authorized Officer, State Bank of Travancore and Anr. -v- Mathew K.C. (surpa)***. The Hon'ble Supreme Court in the aforesaid case held that that the presence of an alternative efficacious remedy would normally bar a writ petition under Article 226 of the Constitution of India:

5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loath to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. ***The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed inCITv.Chhabil Dass Agarwal*** *[CITv.Chhabil Dass Agarwal, (2014) 1 SCC 603] , as follows:*

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. 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, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down inThansingh Nathmal case[Thansingh Nathmalv.Supt. of Taxes, AIR 1964 SC 1419] ,Titaghur Paper Mills case[Titaghur Paper Mills Co. Ltd.v.State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments 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 still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

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10. InSatyawati Tondon[United Bank of Indiav.Satyawati Tondon, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260] the High Court had restrained [Satyawati Tondonv.State of U.P., 2009 SCC OnLine All 2608] further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under theSarfaesiAct, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp. 123 & 128, paras 43 & 55)

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are 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.

***

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and theSarfaesiAct and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

(Emphasis Added)

The Hon'ble Supreme Court, therein was dealing with a case where a borrower

had approached the writ court for appropriate orders. The Hon'ble Supreme Court deprecated the practice of the High Courts exercising their jurisdiction under Article 226 of the Constitution of India despite availability of alternative remedies under the Debts Recovery Tribunal Act (hereinafter referred to as the 'DRT Act') and the SARFAESI Act. Nevertheless, the Hon'ble Supreme Court also affirmed the exceptions to the rule of alternative efficacious remedy. Therefore, the aforesaid case also does not help the Respondent No.8.

34. From a reading of the aforesaid judgments, three conditions emerge which would warrant the exercise of the writ jurisdiction under Article 226 of the Constitution of India despite the presence of alternative efficacious remedy –

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.

35. The impugned order dated April 18, 2023, is a blatant failure of the Additional District Magistrate, Finance and Revenue, Bulandshahr, to act in accordance with the provisions of the SARFAESI Act and other relevant rules. The respondent No.3 was required to take a decision on merits with regard to the tenancy rights of the respondent No.8 (alleged tenant) in terms of the Apex Court judgment in ***Harshad Govardhan Sondagar (supra)*** and the other Apex Court judgments cited above. The respondent No.3 failed to do so, and accordingly, the impugned order is a typical case of an authority failing to exercise proper jurisdiction. Ergo, the impugned order falls within the exceptions defined by the Hon'ble Supreme Court which would call for the exercise of writ jurisdiction, even if an alternative efficacious remedy is present.

36. The judgments relied upon by the respondent No.8 in support of the argument that this Court should not interfere as an efficacious alternative remedy exists by way of an appeal under Section 17 of the SARFAESI Act, is an argument in sophistry, as the Supreme Court in all these judgments laid down the ratio that a borrower cannot be allowed to frustrate the provisions of the SARFAESI Act by seeking a relief under the discretionary jurisdiction under Article 226 of the Constitution of India. In the present case, the Article 226 jurisdiction has been invoked by the auction purchaser to enforce his just rights under the SARFAESI Act and to ensure that the fruits of his labour are not rendered infructuous. The objections raised by the respondent No.8, who is an alleged tenant, with regard to the maintainability of the writ petition are for the sole purpose of elongating the lis, and the same is evident from the fact that actions have been taken by the respondent No.8 in clear contravention of the law laid down by the Supreme Court. Having acted contrary to the dictum of the Supreme Court, the respondent No.8 cannot and should not be allowed to resist the present writ petition on the ground that an alternative remedy exists. This Court is duty bound to protect the laws passed by the Legislature and the interpretation of the same as laid down by the Supreme Court of India. In light of the same, it is crystal clear that the preliminary objection of the

respondent No.8 with regard to maintainability of the petitioner is superfluous and without any basis in law, hence the same is rejected outrightly.

37. Having concluded earlier that the impugned order is a failure of the Respondent No. 3 to exercise its jurisdiction, the instant case is the one which would call for the issuance of the writ of certiorari. Reference is made in this regard to the ***Central Council for Research in Ayurvedic Sciences and Another -v- Bikartan Das and Others, 2023 SCC OnLine SC 996***, wherein the Supreme Court reiterated the circumstances under which a writ of certiorari can be issued –

"65. Thus, from the various decisions referred to above, we have no hesitation in reaching to the conclusion that a writ of certiorari is a high prerogative writ and should not be issued on mere asking. For the issue of a writ of certiorari, the party concerned has to make out a definite case for the same and is not a matter of course. To put it pithily, certiorari shall issue to correct errors of jurisdiction, that is to say, absence, excess or failure to exercise and also when in the exercise of undoubted jurisdiction, there has been illegality. It shall also issue to correct an error in the decision or determination itself, if it is an error manifest on the face of the proceedings. By its exercise, only a patent error can be corrected but not also a wrong decision. It should be well remembered at the cost of repetition that certiorari is not appellate but only supervisory."

38. A Constitution Bench of the Hon'ble Supreme Court in ***Nagendra Nath Bora and Anr. -v- The Commissioner of Hills Division and Appeal, Assam and Ors.*, 1958 SCC OnLine SC 45**, after extensively considering both Indian and English precedents, delineated the principles for issuance of a writ of certiorari:

"36.So far as we know, it has never been contended before this Court that an error of fact, even though apparent on the face of the record, could be a ground for interference by the court exercising its writ jurisdiction. No ruling was brought to our notice in support of the proposition that the court exercising its powers under Article 226 of the Constitution, could quash an order of an inferior tribunal, on the ground of a mistake of fact apparent on the face of the record.

37.But the question still remains as to what is the legal import of the expression 'error of law apparent on the face of the record'. Is it every error of law that can attract the supervisory jurisdiction of the High Court, to quash the order impugned? This court, as observed above, has settled the law in this respect by laying down that in order to attract such jurisdiction, it is essential that the error should be something more than a mere error of law; that it must be one which is manifest on the face of the record. In this respect, the law in India and the law in England, are, therefore, the same. It is also clear, on an examination of all the authorities of this Court and of those in England, referred to above, as also those considered in the several judgments of this Court, that the common-law writ, now called order of certiorari, which was also adopted by our Constitution, is not meant to take the place of an appeal where the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, **whether the inferior tribunal has exceeded its**

jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer. *Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction."*

(Emphasis Added)

39. A mere error of law would not warrant the issuance of a writ of certiorari. The error must be an **error of law apparent on the face of record**. The impugned order in the instant case passed by the Respondent No. 3, does not merely suffer from an error of law. It is a result of the failure of the Respondent No. 3 to perform what it was mandated under the law to do. As such, it can be classified as an error of such a nature, that it would call upon this Court to exercise its supervisory jurisdiction as the custodian of the Constitution and quash the said order.

Summary

40. 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.

Epilogue

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.

Conclusion and Directions

42. Since, the impugned order in the instant case, suffers from the failure of the Respondent No. 3 to exercise its jurisdiction, it warrants the issuance of a writ of certiorari. Accordingly, let there be a writ of certiorari issued against the order dated April 18, 2023 passed by Respondent No. 3. The said order is quashed and set aside.

43. This Court further directs the Respondent No 3 to determine the tenancy rights of the Respondent No. 8 in

accordance with law and proceed to decide the application filed under Section 14 of the SARFAESI Act, without taking into consideration any order passed by the Court of Civil Judge, Senior Division, Bulandshahar.

44. This writ petition is allowed in the aforesaid terms. There shall be no order as to the costs.

45. Urgent photostat-certified copy of this order, if applied for, should be readily made available to the parties upon compliance with the requisite formalities.

(2024) 1 ILRA 850
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 44323 of 2023

Sabiha Khatoon ...Petitioner
Versus
Presiding Auth./Up- Ziladhikari, Sant Kabir Nagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Singh, Sri K.R. Singh

Counsel for the Respondents:
C.S.C., Sri Akhtar Ali, Sri Prashant Gupta, Sri Ravindra Prakash Srivastava, Sri V.K. Singh(Sr. Advocate)

Civil Law - U.P. Panchayat Raj Act, 1947 - Section 12-C - U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994 - Rule 3 - Petitioner elected Gram Pradhan on 21.04.2021, result declared on 02.05.2021, securing 524 votes against respondent No.2 Ferzana's 522 - Respondent No.2 challenged election alleging that though 1868 votes polled, only 1819 counted, leaving 49 votes unaccounted - Case set up by Returned Candidate is that election petition lacks pleading to effect that grounds to be taken in election petition warranting interference by Election Tribunal is not there, pleading in stricto sensu as to non inclusion of 49 votes in counting would materially affect result of Returned Candidate - Emphasized that election petition under Section 12-C of Act, 1947 must contain concise St.ment of material facts, akin to Section 83 of Representation of People Act - Issue is no more res integra, settled by Full Bench in Ram Adhar Singh (relying on Ram Sewak Yadav), holding that inspection of ballot papers permissible only if petition discloses specific grounds with supporting circumstances and authority prima facie satisfied that such inspection necessary to decide dispute - Petition dismissed, directions accordingly. (Para 2, 3, 24, 25)

Writ petition dismissed. (E-13)

List of Cases cited:

1. Ram Adhar Singh Vs The District Judge, Ghazipur & ors. 1985 AWC 246 (FB), (Paras 17 to 19)

2. Ram Sewak Yadav Vs Hussain Kamil Kidwai, AIR 1964 SC 1249, (Para 6 to 8)

3. Ram Abhilakh Tewari Vs Election Tribunal, Gonda AIR 1958 Allahabad 663

4. L.R.Shivaramagowda & ors. Vs T.M. Chandrashekar (Dead) by Lrs. & ors. (1999) 1 SCC 666

5. Jyoti Basu & ors. Vs Debi Ghosal & ors. AIR 1982 SC 983, (Para 8)

6. Vijay Singh Vs Rajdeep Singh & anr., Writ-C No.23105 of 2023, decided on 02.08.2023

7. Om Prakash Upadhyay Vs St. of U.P. & ors. 2008 (105) RD 58

8. Godawari Vs Zubaida & ors. 2020 (11) ADJ 233

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. This writ petition filed under Article 226 of the Constitution of India questions the order passed by Prescribed Authority/Sub Divisional Officer, Mehdawal, District Sant Kabir Nagar dated 16.12.2023 passed in Election Petition No.02145 of 2021 directing for recounting of votes.

2. The petitioner was elected Pradhan of Gram Panchayat Mehdupar, Block Satha, District Sant Kabir Nagar in the election held on 21.04.2021 and result being declared on 02.05.2021, securing 524 votes while respondent No.2 Ferzana lost election securing 522 votes.

3. Respondent No.2 questioned the election of the petitioner by moving application under Section 12-C of U.P. Panchayat Raj Act, 1947 (*hereinafter called as "Act of 1947"*) before respondent No.1 on the ground that total number of votes polled was 1868 while counting had taken place for only 1819 votes and 49 votes were not counted.

4. In the election petition it was averred that in Booth No.1, which consists of Ward Nos.1, 2 and 3, total number of votes polled were 384 while only 383 votes have been counted. In Booth No.2, which consists of Ward Nos.4, 5 and 6, total number of votes polled were 429 and only 381 votes were counted. Similarly, in Booth No.3, which consists of Ward Nos.7, 8 & 9, total number of votes polled were 366 and 366 votes were counted while in Booth No.4, which consists of Ward Nos.10, 11 & 12, total number of votes polled were 363 and the same number was counted, while Booth No.5, which consisted of Ward Nos.13, 14 & 15, total number of votes polled were 326 and the same number was counted.

5. The allegation is in regard to 49 votes, which remained uncounted, though polled in two Booths being Booth Nos.1 & 2, for which prayer for recounting has been made.

6. Paragraphs No.7, 8, 9 and 10 of the application of the election petitioner spells out the grounds for filing the same before Prescribed Authority. The Prescribed Authority on 07.04.2022 framed following issues :

"1. क्या वाद पत्र में वर्णित अभिकथनों के आधार पर याची ग्राम पंचायत / न्याय पंचायत मेंहदूपार विकास खण्ड सांथा के ग्राम पंचायत मेंहदूपार के निर्वाचन परिणाम दिनांक 02.05.2021 को शून्य एवं अवैध मानकर याची को यथाविधि निर्वाचित घोषित होने का अधिकार है?

2. क्या वाद पत्र में वर्णित अभिकथनों के आधार पर उपर वर्णित ग्राम पंचायत का पुनर्मतगणना करा पाने का अधिकारी है?

3. क्या वाद पत्र में वर्णित कथनों के आधार पर याची किसी अन्य अनुतोष को प्राप्त करने का अधिकारी है?

4. क्या याचिका वाद आवश्यक शुल्क 1994 के रूल्स के अनुसार चुनाव याचिका में जमा प्रतिभूति राशि कम व अपर्याप्त है?

5. क्या याचिका वाद पोषणीय है?

6. क्या याचिका वाद में पक्षकारों के कुसंयोजन का दोष है?

7. क्या याचिका वाद नियमानुसार प्रमाणित है?

8. क्या याचिका वाद टाईम बार्ड है?

9. क्या दावा वादीगण अतिविलम्बित है?

10. क्या वादीगण अन्य अनुतोष पाने का अधिकारी है?"

7. The Prescribed Authority on 01.02.2023 directed for recounting of votes. The said order was challenged before this Court through Writ-C No.5784 of 2023, and the said order was set aside by this Court on 21.02.2023 and the matter was remitted back to pass order afresh. Post remand, the Prescribed Authority had proceeded to decide Issue Nos.2 to 10, framed earlier. Issue No.2 is in regard to whether any ground exist in the election petition for recounting of votes.

8. By an interim order, the Prescribed Authority on 16.12.2023 while deciding issue No.2 with other issues except issue No.1, directed for recounting of votes. Aggrieved by the said order, the petitioner (Returned Candidate) has filed the present writ petition.

9. Sri K.R.Singh, learned counsel for the petitioner submitted that election petitioner had not made material disclosure in the election petition alleging that those 49 votes, which were removed at the time of counting were polled in her favour and not counting them would materially affect the result of the election. According to him, Section 12-C(1)(b)(ii) of Act of 1947 would only be attracted once the pleadings are clear in the election petition. According to him, the election petitioner has not alleged the number of valid votes she has received. The only pleading made is that the election petitioner has received majority of valid votes. As the objections were raised at the time of counting by election petitioner, twice recounting was done but the result remained the same.

10. He then contended that the Prescribed Authority while deciding issue No.2 failed to consider the allegations in the election petition and the evidence led in support of the petition. According to him, once 49 ballot papers were removed from counting, then those ballot papers could not be recovered in recounting process. The order passed for recounting, according to him, is unsustainable in the eyes of law.

11. Learned counsel then submitted that the procedure for filing election petition under Section 12-C of Act of 1947 has been given in Rule 3 of U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994 (*hereinafter called as "Rules of 1994"*). According to him, Rule 3(1) provides for filing of election petition specifying the ground or grounds on which election is questioned and shall contain a summary of circumstances alleged to justify the election being questioned on such ground. According to him, Section 12-C(1) of Act of 1947 has to be read with Rule 3 of Rules of 1994 where a disclosure as to the grounds on which the election petition has been filed is to be made by the election petitioner disclosing the material facts containing summary of circumstances.

12. According to petitioner's counsel, the provision and procedure for filing and conducting election petition under Act of 1947 is the same as given under Section 83 of Representation of Peoples Act, 1951. Reliance has been placed upon decision of Full Bench of this Court rendered in **Ram Adhar Singh vs. The District Judge, Ghazipur & others 1985 AWC 246 (FB)**. Relevant paras 17, 18 and 19 of the judgments are extracted hereasunder :

"17. Learned Counsel appearing for the Petitioner submitted that whereas

Section 83 of the Representation of the Peoples Act requires that the election petition presented under that Act must give out a concise statement of material facts on which the Petitioner relies, the requirement under Rub 24 of the Rules framed under the U.P. Panchayat Kaj Act, in this regard is that the election petition presented under Section 12-C of the Act is merely to contain the grounds together with the summary of circumstances alleged to justify the election being questioned on such grounds. He urged that there is a substantial difference between requiring a Petitioner to make a concise statement of material facts on which he seeks to rely and in requiring a person to specify in the petition the summary of circumstances providing a justification for questioning the election on a particular ground. Moreover, Section 12-C(5) of the U.P. Panchayat Raj Act countenances framing of a rule permitting summary hearing and disposal of an election petition under Section 12-C(1) of the Act, the State Government has, vide Clause (2) of proviso (1) to Rule 25(1) stipulated that it shall not be necessary for the Sub-Divisional Officer, (the authority competent to deal with an election petition under Section 12-C of the Act) to record the evidence in full and that he may maintain only a memorandum of evidence produced by the parties before him. This, according to the learned Counsel, indicates that the requirement in the U.P. Panchayat Raj Act with regard to contents of an election petition and the procedure for its trial is very much less formal and stringent than the corresponding provision concerning pleadings and procedure for trial of an election petition under the Representation of the Peoples Act, He, therefore, contends that it would, under the circumstances, not be apt to fetter the discretion of an authority hearing an election petition under the U.P. Panchayat Raj Act with regard to perusal and inspection of ballot papers by the same strict conditions for the purpose laid down by the Supreme Court in relation to cases arising under the Representation of the People Act.

18. We are unable to accept the submission made by the learned Counsel. As already explained the Supreme Court has, in cases arising under the Representation of the People Act, spelt out the condition that all the courts dealing with an election petition should not exercise its discretion to permit inspection of ballot papers unless the petition contains an adequate statement of material facts on which the Petitioner relies in support of his case (viz. that the petition meets the requirements of Section 83(1) of the Representation of the People Act regarding contents of an election petition) for the reason that under the Act, it is a matter of utmost importance to maintain the secrecy of ballot which is sacrosanct and which should not be lightly allowed to be violated on vague and indefinite allegations. This reason applies equally to an election held under the U.P. Panchayat Raj Act which too cherishes secrecy of ballot to the same extent. Viewed from this angle, it becomes evident that the amplitude and purpose of the requirement of Section 83(1)(a) of the Representation of the People Act that the election petition must contain a concise statements of material facts on which the Petitioner relies and that of Rule 24 of the Rules framed under the U.P. Panchayat Raj Act to the effect that an application under Section 12-C(1) of the Act must specify the grounds on which the election of the Respondent is being questioned as also a summary of circumstances alleged to justify the election being questioned on such grounds, is the same, viz. that the court or the authority dealing with an election

petition under the respective enactments, should not countenance or proceed to investigate into any ground taken in the election petition unless the ground as well as the material in support of such ground have been adequately disclosed in the petition. Neither of the two enactments countenances the court or the authority to permit the election Petitioner to make or indulge into making of a roving enquiry with a view to fish out material for declaring an election void; and it is this weighty factor which impels the court or the authority not to look into or permit inspection of ballot papers unless the foundation for the purpose has been properly laid in the petition by specifying the ground and the material or the circumstances in support of such ground. Viewed in this light, the provisions contained in the U.P. Panchayat Raj Rules permitting the summary hearing of an application under Section 12-C(1) of the Act and authorising the Sub-Divisional Officer to, instead of recording evidence in full, merely maintain a memorandum thereof, has no bearing on the question regarding circumstances in which the ballot papers can either be looked into or permitted to be inspected in proceedings under Section 12-C of the U.P. Panchayat Raj Act.

19. Applying the principle with regard to inspection of ballot papers enunciated by the Supreme Court in cases arising under the Representation of the People Act to an election petition dealt with under the provisions of the U.P. Panchayat Raj Act, there is no escape from the conclusion that before an authority hearing the election petition under the said Act can be permitted to look into or to direct inspection of the ballot papers, following two conditions must co-exist:

(1) that the petition for setting aside an election contains the grounds on which the election of the Respondent is being questioned as also the summary of the circumstances alleged to justify the election being questioned on such ground; and

(2) the authority is, prima facie, satisfied on the basis of the materials produced before it that there is ground for believing the existence of such ground and that making of such an inspection is imperatively necessary for deciding the dispute and for doing complete justice between the parties.

It, therefore, follows that in the absence of any specification with regard to the ground on which the election of the Respondent is being questioned together with summary of the circumstances alleged to justify the election being questioned on I such ground, it is not open to the authority dealing with an application under Section 12-C of the U.P. Panchayat Raj Act, either to look into or direct inspection of ballot papers merely on the ground that it feels that it would be in the interest of justice to look into or permit inspection of the ballot papers. In the context, such satisfaction has necessarily to be based on specific averments made in and the materials indicated in the election petition which could, prima facie, satisfy the authority about the existence of the ground on which the election is sought, to be questioned."

13. Reliance has also been placed upon decision of Constitution Bench of Apex Court rendered in **Ram Sewak Yadav vs. Hussain Kamil Kidwai, AIR 1964 SC 1249.** Relevant paras 6, 7 & 8 are extracted hereasunder :

"6. An election petition must contain a concise statement of the material facts on which the petitioner relies in support of his case. If such material facts are set out the Tribunal has undoubtedly the power to direct discovery and inspection of

documents with which a civil court is invested under the Code of Civil Procedure when trying a suit. But the power which the civil court may exercise in the trial of suits is confined to the narrow limits of O. 11, Code of Civil Procedure. Inspection of documents under O. 11, Code of Civil Procedure may be ordered under rule 15, of documents which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party, and under rule 18(2) of other documents in the possession or power of the other party. The Returning Officer is not a party to an election petition, and an order for production of the ballot papers cannot be made under O. 11 Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interests of justice demand it, the Tribunal may call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers. That power is clearly implicit in Sections 100(1)(d)(iii), 101, 102 and rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from O. 11 Code of Civil Procedure may be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by 94 and 128(1).

7. An order for inspection may not be granted as a matter of course : having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a more allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection.

8. It must be remembered that the rules framed under the Representation of the People Act, 1951, set up an elaborate machinery relating to the stage of counting of votes by the Returning Officer, and provide ample opportunity to the candidate who has contested the election or his agents to remain present and to keep an eye on any improper action which may be taken by the Returning Officer. Rule 53 provides for the admission only certain classes of persons to the place fixed for counting and amongst such persons are expressly included candidates, their election agents and counting agents, who may watch the counting subject to the directions which the returning officer may give. Rule 55 deals with the procedure for scrutiny and opening of ballot boxes. The Returning Officer has to satisfy himself that "none of the ballot boxes has in fact been tampered with" and before any ballot box is opened at the counting table, the counting agents present at that table are allowed to inspect the seal affixed thereon and to satisfy themselves that it is intact. If the Returning Officer is satisfied that any ballot box has in fact been tampered with, he is prohibited from

counting the ballot papers contained in that box and he has to follow the procedure prescribed in that behalf in s. 58. Clause (1) of rule 56 provides for the scrutiny and rejection of ballot papers. Clause (2) sets out detailed provisions relating to cases in which the Returning Officer shall reject a ballot paper. By clause (3) it is provided that before rejecting any ballot paper under sub-rule (2), the returning officer shall allow each counting agent present a reasonable opportunity to inspect such ballot papers. The Returning Officer has then to record on every ballot paper which he rejects the grounds of rejection. All the rejected ballot papers are required to be put in one bundle. Rule 57 deals with the counting of votes. Each ballot paper which is not rejected is counted as one valid vote. The Returning Officer has to make to entries in a result sheet in Form 20 after counting of the ballot papers contained in all the ballot boxes used at the polling stations. Clause (3) of rule 57 enacts an elaborate set of rules about the entries to be made in respect of the counting and scrutiny of the ballot papers. By rule 60 counting has to be continuous, and rule 63(1) provides that after the completion of the counting, the Returning Officer shall record in the result sheet in Form 20 the total number of votes polled by each candidate and announce the result. By clause (2) of rule 63 it is provided that after such announcement is made, a candidate or his election agent may apply in writing to the Returning Officer for a re-count of all or any of the ballot papers already counted stating the grounds on which he demands such re-count. The Returning Officer must decide the application and record his reasons in support of his decision and he may allow the application in whole or in part or may reject it if it appears to him to be frivolous or unreasonable. After the total number of votes polled by each candidate has been announced, the Returning Officer must complete and sign the result sheet in Form 20 and after such form is completed no application for re-count may be entertained. Under rule 64 the declaration of the result of the election is made by declaring elected a candidate who has secured the largest number of valid votes, and the Returning Officer is required to complete and certify the return of election."

14. Reliance has also been placed upon Division Bench decision of this Court in **Ram Abhilakh Tewari vs. Election Tribunal, Gonda AIR 1958 Allahabad 663** and decision of Apex Court rendered in **L.R.Shivaramagowda & Ors. vs. T.M. Chandrashekar (Dead) by Lrs. & Ors. (1999) 1 SCC 666** wherein the Court had held that pleadings should be specific by the election petitioner pleading that result of election insofar as it concerned the returned candidate had been materially affected by the alleged non-compliance of the provisions of the Act or Rules.

15. Reliance has also been placed upon decision of Apex Court in case of **Jyoti Basu and others vs. Debi Ghosal and others AIR 1982 SC 983**. Relevant para 8 of the judgment is extracted hereas under :

"8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An Election petition is not an

action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance With the statutory creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained code within which must be found any rights claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say ?"

16. Lastly counsel has placed reliance upon decision of coordinate Bench of this Court rendered in **Writ-C No.23105 of 2023 (Vijay Singh vs. Rajdeep Singh & Anr.**) decided on 02.08.2023 wherein this Court, relying upon earlier decisions, have held that recounting should not be made lightly or as a matter of course as the same touches upon the secrecy of the ballot papers and introduces the element of uncertainties.

17. Replying to the arguments of the petitioner's counsel, Sri V.K.Singh, Senior Advocate, submitted that the pleadings of election petitioner is specific and in para 7 it has been averred that in Booth No.1, out of 384 votes polled, only 383 votes have been counted, while in Booth No.2, out of total 429 votes polled, only 381 votes have been counted. Thus, 49 votes, which were cast, have not been counted and the Returned Candidate has been declared winner by 2 (two) votes. He further contended that in para 9, there is a specific pleading that election petitioner had got more than 522 votes but by not counting 49 votes, which were polled, the election result have been declared which has materially affected the result.

18. He further contended that the grounds for filing the election petition has been given in para 10 of the election petition and concise summary as per Rule 3 of Rules of 1994 has been set out therein. In sub-clause (vi) of para 10 of the election petition, wherein it has been specifically mentioned that out of total 1868 votes polled, only 1819 votes have been counted.

19. He then contended that under Right to Information Act, election petitioner had gathered the information on 20.01.2022 in regard to total number of votes polled and votes counted, which had been the basis for filing of election petition and the Prescribed Authority, relying upon the documentary evidence, so submitted, had proceeded to pass the order for recounting, which needs no interference by this Court.

20. Pursuant to the order dated 22.12.2023, learned Standing Counsel has placed before the Court the records received by him. According to the records, Form 36, as maintained, disclosed that total number of votes polled in Booth-1 are 384 while in Booth-2 are 429. Similarly total number of votes polled in Booth Nos.3, 4 & 5 are 366, 363 and 326 respectively.

21. I have heard respective counsels for the parties and perused the material on record.

22. The Returned Candidate before this Court had earlier questioned the legality of the order passed by Prescribed Authority deciding election petition of Returned Candidate and directing for recounting of votes on 01.02.2023, through Writ-C No.5784 of 2023, which was allowed on 21.02.2023 and the matter was remitted to the Prescribed Authority for deciding the matter afresh.

23. It is post-remand that the Prescribed Authority proceeded to examine the witnesses of the parties and considered the documentary evidence on record and decided issue Nos.2 to 10. Issue No.2 was as to whether on the basis of pleading made in the election petition and the ground taken therein, recounting can be ordered? The Prescribed Authority, relying upon the documentary evidence, which was in the form of information given to the election petitioner under Right to Information Act on 20.01.2022 that the Prescribed Authority found that out of total 1868 votes polled, only 1819 votes were counted and 49 votes were left from the counting, which he ordered for recounting.

24. The case set up by the Returned Candidate is that election petition lacks pleading to the effect that grounds to be taken in the election petition warranting interference by the Election Tribunal is not there and the pleading in stricto sensu as to the non inclusion of 49 votes in the counting would materially affect the result of the Returned Candidate.

25. Emphasis have been made to show that election petition filed under Section 12-C of the Act of 1947 should contain the concise statement of material facts on which the election petitioner relies as is there under Section 83 of Representation of Peoples Act. The matter is no more res integra and the Full Bench of this Court in **Ram Adhar Singh (supra)** relying upon decision of Apex Court in case of **Ram Sewak Yadav (supra)** had clearly held that hearing an election petition, the authority under the Act, can be permitted to look into or to direct inspection of ballot papers, two conditions must co-exist;-

(i) that the petition for setting aside an election contains the grounds on which election of respondent is being questioned as also the summary of the circumstances alleged to justify the election being questioned on such ground; and

(ii) the authority is, prima facie, satisfied on the basis of materials produced

before it that there is ground for believing the existence of such ground and that making of such an inspection is imperatively necessary for deciding the dispute and for doing complete justice between the parties.

26. The decisions relied by Returned Candidate in case of **Ram Abhilakh Tewari (supra), L.R. Shivaramagowda & Ors. (supra)** and **Jyoti Basu & Ors. (supra)** only emphasises the fact that the language used under the provisions of Representation of Peoples Act and the rules framed thereunder is that the election petitioner has to plead that result of election insofar as it concerned the returned candidate had been materially affected by alleged non-compliance of the provisions of the Act or Rules.

27. Likewise, the decision of coordinate Bench of this Court, which has relied upon the various decisions of this Court as well as the Apex Court, had found that order of recounting should not be made lightly or as a matter of course as the same touches upon the secrecy of the ballot papers and introduces the element of uncertainties.

28. In the instant case, the election petitioner had challenged the election of Returned Candidate on the ground of non inclusion of 49 votes, which were cast and had remained uncounted. The information, which had been sought by the election petitioner under Right to Information Act and placed as a documentary evidence before Prescribed Authority dated 20.01.2022 reveals that total number of votes polled was 1868 and total number of votes counted are only 1819. No reason has been assigned as to why 49 votes remained uncounted, which were cast.

29. This Court on 22.12.2023 had directed the Sanding Counsel to place the entire records before this Court pursuant to which the records were placed at the time of hearing on 08.01.2024. From perusal of the records, it was clear that total number of votes polled are 1868, which is reflected from From 36. The break up of which are; votes polled in Booth -1 are 384 and in Booth -2 are 429. Similarly, votes polled in Booths – 3, 4 & 5 are 366, 363 & 326 respectively. On adding the entire votes polled in these five booths, it comes to 1868 votes while counting has been done of only 1819 votes.

30. Perusal of paras 7, 8, 9 and 10 of election petition clearly reveals that election petitioner has questioned the election of Returned Candidate disclosing the entire factum of vote polled in each of the booths and the vote counted. Moreover, in para 9 of the election petition it has been averred that election petitioner had got more than 522 votes but without taking into consideration 49 votes in counting, the Returned Candidate had been declared elected by two votes. The election petitioner has set out the grounds and the concise summary of facts as per Rule 3 of Rules of 1994 read along with Section 12-C(1) of Act of 1947 complying the requirements of the election petition.

31. The co-ordinate Bench of this Court in **Om Prakash Upadhyay vs. State of U.P. & others 2008 (105) RD 58** in somewhat similar situation after taking note of the judgment of Constitution Bench of Apex Court rendered in **Ram Sewak Yadav (supra)** proceeded to recounting of votes.

32. In an identical situation, this Court in **Godawari vs. Zubaida and Ors.**

2020 (11) ADJ 233 ordered for recounting wherein total number of votes polled were 1139 while the counting was done of 1129 votes.

33. The argument raised by the Returned Candidate as to the pleading of material facts in the election petition, which would materially affect the election of Returned Candidate, finds place in paras 9 and 10 and reliance placed upon various decisions does not help his cause as it is not in dispute that 1868 votes were polled and only 1819 votes were counted leaving 49 votes and the victory margin is of only 2 (two) votes. Neither the decision rendered in **Ram Sewak Yadav (supra)** by the Constitution Bench helps the case of the petitioner (Returned Candidate) nor the judgment rendered by the Full Bench in case of **Ram Adhar Singh (supra).**

34. In fact, the Full Bench had laid down the conditions, upon the satisfaction of which the authority can proceed to grant relief when the material is produced before it and there is a ground for believing the existence of such ground and for doing complete justice between the parties.

35. In the instant case, total number of votes polled are 1868 while votes counted are only 1819. The pleadings are specific as to the result of the election has been materially affected by gross failure to comply with the provisions of Act of 1947 and the rules framed thereunder.

36. Considering the facts and circumstances of the case and perusing the material on record as well as records summoned by the Court, I find that no case for interference is made out in the order dated 16.12.2023 passed by respondent No.1 directing for recounting of votes as total number of votes polled are 1868 while only 1819 votes have been counted.

37. Writ petition fails and is hereby **dismissed**. Respondent No.1 is directed to fix the date for recounting of votes within one week from the date of production of a certified copy of this order.

(2024) 1 ILRA 860
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1006638 of 2014

The Asst. G.M., Alld. Bank Zonal Office & Anr. ...Petitioners
Versus
The Presiding Officer Central Govt. Indus. Tribunal & Anr. ...Respondents

Counsel for the Petitioners:
Gopal Kumar Srivastava

Counsel for the Respondents:
akhil Pratap Singh, Anurag Srivastava

A. Labour Law – Validity of Undertaking in Employment Transfer – Petitioner bank challenged the Tribunal's award dated 19.06.2014 granting halting allowance to the respondent-workman, arguing that an undertaking dated 22.01.2001 waived such claims – Held, the undertaking, in which the workman agreed not to claim halting allowance while working at Gonda post-transfer to Lucknow, remained valid despite his reversion from Special Assistant to Clerk-cum-Cashier, as the reversion did not materially alter the undertaking's conditions, and the workman never sought to withdraw it. (Paras 3, 7, 13, 14, 15)

B. Halting Allowance – Proof of Entitlement – Respondent-workman claimed halting allowance for the period from

19.12.2001 to 10.05.2004, asserting entitlement post-reversion – Held, the workman failed to produce any rule or provision before the Tribunal or the court to establish eligibility for halting allowance for an extended period, and oral testimony alone cannot prove the existence of such a rule, rendering the Tribunal's reliance on oral evidence erroneous. (Paras 7, 8, 10, 16, 17)

C. Industrial Dispute – Burden of Proof – The Tribunal allowed the workman's claim based on uncontroverted oral evidence, citing *St. of U.P. Vs Sheo Shanker Lal Srivastava* – Held, the Tribunal erred in accepting oral evidence without documentary proof of the rule governing halting allowance, as the bank consistently denied the existence of such a rule, and the workman's failure to produce evidence shifted the burden unmet, making the award arbitrary. (Paras 9, 10, 17)

D. Estoppel by Undertaking – The bank argued that the workman's undertaking estopped him from claiming halting allowance – Held, the workman's voluntary undertaking on 22.01.2001, incorporated into the transfer order dated 30.01.2001, bound him for the duration of his work at Gonda (until 10.05.2004), and his failure to notify the bank of any intent to withdraw the undertaking due to changed circumstances (reversion) upheld the estoppel, barring his claim. (Paras 7, 11, 14, 15)

E. Judicial Review of Tribunal's Award – The petitioner challenged the Tribunal's award as arbitrary for lacking evidence of rules and ignoring the undertaking – Held, the Tribunal misdirected itself by relying on oral evidence without requiring the workman to produce the applicable rule and by overlooking the binding nature of the undertaking, justifying interference with the award. (Paras 11, 17, 18)

Writ Petition Allowed.

List of Cases cited:

1. St. of U.P. Vs Sheo Shanker Lal Srivastava, (2006) 3 SCC 276

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

1. Heard Sri Gopal Kumar Srivastava, learned counsel for the petitioners as well as Sri Anurag Srivastava on behalf of respondent No.2- workman.

2. This petition has been filed on behalf of Allahabad Bank Zonal Office, Hazratganj, Lucknow assailing the validity of the award dated 19.6.2014 passed by Central Government Industrial Tribunal cum Labour Court, Lucknow (the Tribunal in short) in ID Case No.27/2006 (The Secretary, Allahabad Bank Staff Association Vs. The Assistant Generla Manager, Allahabad Bank and others).

3. Brief facts of the case are that respondent No.2 was an employee of the petitioners and was working on the post of Special Assistant at Allahabad Bank Krishi Utpadan Mandi Samiti Branch, Gonda. He had requested for his transfer to Lucknow and along with that request had given an undertaking on 22.1.2001 stating that after being transferred to Lucknow he shall join again at Gonda Branch of the Bank and continued to discharge his duties on the post of Special Assistant and for that purpose he shall not claim any Halting Allowance etc. and shall continue to work till an alternative arrangement is made and posting is made on the post of Special Assistant. In light of the undertaking given by the petitioner an order of transfer was passed on 30.1.2001 by Manager, Allahabad Bank transferring the petitioner from Gonda Branch to Kaiserbagh Branch at Lucknow and it was provided that he would continue to discharge the duties of Special Assistant at Gonda Branch with a condition that he shall not claim any allowance including the travel allowance

and halt allowance as agreed by petitioner No.2.

4. In pursuance of the transfer dated 30.1.2001 the petitioner was relieved from Kaiserbagh Branch at Lucknow on 1st February, 2001 and as per his request / transfer order, he joined back at Gonda Branch on 2nd February, 2001 and continued to discharge his duties as such. During this period certain disciplinary proceedings were pending against the petitioner and after giving opportunity of hearing an order of punishment was passed on 19.12.2001 by Assistant General manager/ disciplinary authority of the respondent-workman. According to the said punishment order the respondent-workman was found guilty of the charges and he was punished with reversion from the post of Special Assistant and it was further provided that he shall not be paid any special allowances. On this reversion the respondent-workman worked on the post of Clerk-cum-Cashier till 10th May, 2004 when he was relieved to join at Kaiserbagh Branch at Lucknow.

5. It is after his joining at Kaiserbagh Branch at Lucknow that the respondent-workman, namely Ram Lal through workmen' union raised an industrial dispute claiming Halting Allowance for the period he had worked in Gonda Branch on the post of Clerk-cum-Cashier in pursuance to his transfer order dated 20.12.2001 was liable to be paid to him.

6. The question which was referred for adjudication to the Tribunal was *"Whether the claim of Sri Ram Lal for payment of halting allowance for the period from 19.12.2001 to 10.5.2004 from the management of Allahabad bank is just and legal? If not, wheat relief is the disputant concerned entitled to ?"*

7. The Tribunal issued notices to the petitioner who had put in appearance and filed their objections to the claim made by the respondent-workman and they firstly stated that the respondent-workman had himself given an undertaking that in case he is allowed to join at Lucknow he shall continue to discharge his duties on the post of Special Assistant at Gonda Branch till such time as Special Assistant joins at Gonda. He further undertook that during such period as he discharges his duties at Gonda he shall not claim any allowance including the Halting Allowance. The petitioner had submitted that once an undertaking was given then the workman is estopped from claiming the same. It was further submitted that even otherwise Halting Allowance is granted to the employees /staff who are sent out of station for a short duration in connection with official work of the Bank so as to compensate the employee for the expenses incurred by them during the course of such stay. Such an allowance was never meant to be granted for an indefinite period of time as claimed by the workman. It was further stated that there is no provision either in the Rules or any where else for making payment of Halting Allowance as claimed by the workman and in absence of any rules in this regard the workman would not be entitled to the Halting Allowance as claimed by him.

8. The respondent-workman, on the other hand, has submitted that after his joining at Gonda he was inflicted with the punishment by means of order dated 14.12.2001 whereby he was reverted from the post of Special Assistant to the post of Clerk cum Cashier. He has further

submitted that once an order of reversion came into operation he was not discharging his duties as Special Assistant and accordingly the undertaking given by him on 22.1.2001 ceased to operate on his reversion to the post of Clerk-cum-Cashier and consequently he became entitled for the Halting Allowance.

9. Learned Central Government Industrial cum Labour Court, Lucknow while adjudicating the said case has allowed the claim of the workman stating that the petitioner could not prove that the Halting Allowance is only paid where the staff is sent for a short duration with regard to official work and the same can also not be demonstrate from the bipartite settlement. In absence of nay pleadings or evidence led by the petitioner, the Tribunal relied upon the version of the workman who had submitted that such Halting Allowance is, in fact, payable and also relied upon the judgment of Apex Court in the case of ***State of U.P. Vs. Sheo Shanker Lal Srivastava and others, (2006) 3 SCC 276*** by stating that if the statement of witnesses is not controverted the Halting Allowance would be deemed to be admitted.

10. Merely on account of the fact that the Management could not show that there is any provision for Halting Allowance while on the other hand the view contrary to the same was proved by the workman as several of his witnesses who had orally submitted that the said Halting Allowance is, in fact, payable, a finding in this regard was recorded in favour of the respondent workman and directed the petitioner to pay the Halting Allowance to the petitioner from 19.12.2001 to 10.5.2004.

11. Learned counsel for the petitioner while assailing the impugned award passed by the Tribunal has submitted that once the undertaking had been given by the workman that he is ready and willing to work at Gonda Branch of the Bank till such time as the Bank deploys a suitable person to work on the post of Special Assistant he shall not claim any Halting Allowance would bind him for the duration he worked at Gonda branch. He submits that the undertaking was never withdrawn and continued in force till such time he worked at Gonda. He was relieved on 10.5.2004 from Gonda to join at Kaiserbagh Branch at Lucknow. He has further submitted that the rules providing for Halting Allowance cannot be proved by mere oral statement of the workman but the same had to be proved by evidence and producing the rules in this regard. As there was no such provision and existence of such a rule had been denied by the petitioner, the onus lay upon the workman to prove and produce before the Tribunal the said rule and the same could not have been proved only by oral evidence. He has further submitted that in this regard the Tribunal has misdirected itself and submitted that the award requires interference. In the counter affidavit filed by the workman before this Court also no such rules have been annexed which may demonstrate that any staff or workman is entitled to halting allowance even if he is posted for a long duration out of station.

12. I have heard learned counsel for the parties and perused the record.

13. The only question for determination is as to whether the undertaking given by the workman was valid even after passing of the order for reversion. It is noticed that the workman had given an undertaking to the effect that he shall not claim any allowance including Halting Allowance during the period he

worked at Gonda or till such time as Special Assistant is posted. In the meanwhile, the workman was reverted but the question has to be considered as to whether the order of reversion has materially altered the undertaking given by the petitioner on 22.1.2001.

14. This Court is of the considered opinion that the undertaking given by the workman was not materially altered even if he was reverted from the post of Special Assistant to the post of Clerk cum Cashier. It has been informed that the petitioner was transferred on his own volition from Gonda to Lucknow and it is in these circumstance that he had agreed that in case he is transferred to Lucknow he shall continue to discharge his duties of Special Assistant at Gonda till such time as alternate Special Assistant is posted at Gonda. He had voluntarily stated that during the time he is posted at Gonda, he shall not claim any allowance including Halting Allowance. His claim was duly incorporated in the order issued on 31.1.2001. The workman duly complied with the order dated 30.1.2001 and joined at Kaiserbagh Branch, Lucknow on 1.2.2001 and also joined back at Lucknow on 2.2.2001 and continued working there till 10.5.2004 when he was relieved from Gonda. During this period he never informed the management i.e. the Bank that there has been any material alteration in the circumstance and it was necessary to withdraw the undertaking dated 22.1.2001.

15. This Court is of the considered opinion that the undertaking given on 22.1.2001 was good and valid for the period of his working at Gonda despite his transfer to Lucknow by means of order dated 30.1.2001. In case, there was any alteration in the circumstances as per the workman, he should have informed the management his intention to withdraw his undertaking and once it was done it was open for the petitioner/management to have passed appropriate orders in these changed circumstance specially with regard to the undertaking dated 22.1.2001 and necessary orders would have been passed either relieving the workman to join at Lucknow and in these circumstance if he would have continued at Gonda he could have claimed special allowances as per the rules and accordingly this aspect of the matter is decided in favour of the petitioner.

16. The other question is with regard to existence of rules in compliance of which the relief was granted to the workman while allowing the claim petition. A perusal of the award clearly indicates that the rules benefit of which has been claimed by the workman has been seriously disputed by the petitioner. It is submitted that Halting Allowance is merely a compensatory allowance given to the staff who are sent for tours or official visits for a short period and it is not a fund which is payable for a long period of time or indefinitely to a person who is working other than his place of posting. Accordingly, even the workman could not place such a rules on record either before the Tribunal or before this Court in the counter affidavit filed by him demonstrating admissibility of Halting Allowance for a period of more than three years continuously.

17. There is no doubt that merely on the basis of oral testimony the rule was sought to be proved while it was the consistent claim of the management that such a rule does not exist. A provision of rule or law can only be proved by producing the said rule or law before the

authority and no amount of oral evidence can prove the existence of the same and accordingly the impugned order is arbitrary and requires interference. Merely holding existence of rules without producing the same nor the same having been brought on record, the Tribunal has erred in allowing the claim filed by the workman.

18. On both these counts, this Court is of the considered opinion that the award dated 19th June, 2014 requires interference and is accordingly set aside.

19. The writ petition is **allowed**.

(2024) 1 ILRA 865
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 3000109 of 2002

Shyam Kishore & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Anita Misra, Avadhesh Kumar, Lalta Prasad Misra

Counsel for the Respondents:
C.S.C., Avadhesh Mishra

A. Civil Law - U.P. Imposition of Ceiling on Land Holdings Act, 1960 – Section 12-A Application by Subsequent Purchasers – Petitioners challenged the orders dated 03.06.1992 and 30.09.2002, which allowed an application under Section 12-A(d) by subsequent purchasers (respondents no. 4 to 6) to exclude purchased plots from surplus land declaration – Held, Section 12-A explicitly grants the right to choose which land to retain within the ceiling limit solely to the recorded tenure holder, not subsequent purchasers, rendering the application by respondents no. 4 to 6 impermissible and the orders allowing it illegal. (Paras 7, 8, 9, 12)

B. Statutory Interpretation of Section 12-A – Respondents no. 4 to 6, who purchased plots from the tenure holder, sought exclusion of those plots via a Section 12-A(d) application – Held, the legislative intent in Section 12-A restricts the right to indicate the choice of land to be retained to the tenure holder, and no provision allows subsequent purchasers to exercise this right, making the Prescribed Authority's acceptance of their application contrary to the statute. (Paras 8, 9, 12)

C. Alternative Remedy Under Section 11(2) – Petitioners argued that subsequent purchasers could only seek exclusion of purchased land by filing objections under Section 11(2) – Held, the court agreed that subsequent purchasers, if seeking exclusion of their purchased land from surplus declaration, must file objections under Section 11(2), which the Prescribed Authority is duty-bound to consider, and respondents no. 4 to 6's failure to do so invalidated their Section 12-A application. (Paras 10, 11, 12)

D. Procedural Fairness in Ceiling Proceedings – Petitioners contended that the Prescribed Authority allowed the Section 12-A application without giving the recorded tenure holder an opportunity to be heard – Held, while the matter was remanded earlier by the court (Writ Petition No. 3473 of 1980) to ensure a hearing, the fundamental illegality of allowing a Section 12-A application by non-tenure holders rendered the orders dated 03.06.1992 and 30.09.2002 arbitrary and unsustainable. (Paras 4, 5, 6, 12)

E. Judicial Review of Ceiling Orders – The Prescribed Authority and Appellate Authority upheld the exclusion of plots based on the subsequent purchasers' application – Held, both authorities erred in law by allowing an application under Section 12-A(d) by respondents no. 4 to 6, who lacked the statutory right to file such an application, necessitating the quashing of the impugned

orders for being contrary to the Act's provisions. (Paras 6, 9, 12, 13)

Writ Petition Allowed.

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

1. Heard Shri Tarun Mishra, Advocate holding brief of Dr. L.P. Mishra, learned counsel for petitioners, learned Standing Counsel for the State, Shri Avadhesh Mishra, learned counsel for opposite party no. 4 to 6 and perused the material available on record.

2. By means of the present writ petition, the petitioners has challenged the order dated 03.06.1992 passed by the Prescribed Authority thereby allowing the application under Section 12 of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 preferred by the respondents and also rejected the appeal preferred by the petitioners before the Additional Commissioner, Lucknow Division,Lucknow in its order dated 30.09.2002.

3. The facts in brief are that the predecessor in interest of the petitioners, who was recorded tenure holder was served with the notice under Section 10 (2) of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 calling upon her to explain as to why area of 31-33 acres irrigated land be not declared surplus. The predecessor in interest of the petitioners, namely, Gayatri Devi filed her objections and contested the case before the Prescribed Authority. The Prescribed Authority rejected her objections against which an appeal was filed and the same was also dismissed. Assailing both the orders the recorded tenure holder had filed a writ petition before this Court. This Court had remanded the matter and certain aspects of the case were directed to be re-looked by the Prescribed Authority, and accordingly a fresh notice was issued where the Prescribed Authority again rejected the objections. Against the order of Prescribed Authority dated 31.03.1979, no appeal was filed by the recorded tenure holder and the order of the Prescribed Authority attained finality.

4. It seems that after the proceedings under Section 10 (2) of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 were finalized by the Prescribed Authority, opposite parties no. 4 to 6, who had purchased the land from the recorded tenure holder on 16.02.1972, moved an application under Section 12-A (d) and Section 13-A of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 praying that the order dated 31.05.1979 of the Prescribed Authority may be reviewed and two plots, which had been purchased by them, namely plot no. 298 and 324 may be excluded from the land, which had been declared surplus, at the hands of the recorded tenure holder. The Prescribed Authority considering the said application allowed the same by means of order dated 30.11.1979. The petitioners had preferred an appeal against the said order stating that no notices were issued by the Prescribed Authority and the recorded tenure holder was never given any opportunity of hearing for allowing the application under Section 12- A (d) of the Act of 1960 filed by the subsequent purchaser, but the appeal was also rejected by means of order dated 09.10.1980.

5. Aggrieved by both the orders allowing the application of the respondents, the petitioners had preferred a writ petition before this Court bearing Writ Petition No.

3473 of 1980 alleging that the Prescribed Authority had allowed the application under Section 12-A (d) of the Act of 1960 without giving any opportunity of hearing to the petitioners and this Court by means of its order dated 13.09.1988 allowed the writ petition and set aside the order of the Prescribed Authority dated 30.11.1979 and the appellate order dated 09.10.1980 and remitted the matter back to the Prescribed Authority for passing a fresh orders after giving an opportunity of hearing to the recorded tenure holder.

6. It is in the remand proceedings that the impugned order dated 03.06.1992 has been passed by the Prescribed Authority again allowing the application under Section 12-A (d) of the Act of 1960 and excluding plot no. 298 and324 from the surplus lands at the hands of the recorded tenure holder and further directed that the surplus land will be taken from plot no. 132 N and 294 N from the lands of the recorded tenure holder. The appeal preferred by the petitioners also met the same fate by means of the order dated 30.09.2002 passed by the Additional Commissioner, Lucknow Division, Lucknow who confirmed the order of the Prescribed Authority.

7. Learned counsel for the petitioners while assailing both the orders, namely, order dated 03.06.1992 passed by the Prescribed Authority as well as order dated 30.09.2002 passed by the appellate authority, has submitted that the application under Section 12-A (d) of the Act of 1960 can be moved only by the recorded tenure holder. He submits that the discretion, if any, for the choice of the land to be declared surplus lies with the recorded tenure holder and no such right is vested any subsequent purchaser to dictate to which of the land of the recorded tenure holders can be declared surplus.

8. In support of his submissions, he stated that mere provisions of Section 12-A of the Act of 1960 are demonstrative of the aforesaid fact where it is stated that in determining the surplus land under Section 11 and 12 of the Act of 1960, the Prescribed Authority shall as far as possible accept the choice indicated by the tenure holder to the plots of plot which he and other members of his family, if any, would like to retain as part of ceiling area applicable to him...

9. It is stated that Legislature in its wisdom had clearly stated that such an application under Section 12-A of the Act of 1960 for the choice of the land to be declared surplus lies only with the tenure holder. In case it was the intention of the legislature that such a choice can be given even by the subsequently purchased and the same would have been clearly mentioned in Section 12-A of the Act of 1960 but a clear prescription having been made in the statutory provisions with regard to such an application being made only by the tenure holder, it cannot be said that any person other than the tenure holder would be entitled to make an application under Section 12-A of the Act of 1960. He submits that the petitioners have always opposed the application of the respondent nos. 4 to 6 moved under Section 12-A of the Act of 1960 and accordingly once the recorded tenure holder has made objection neither the Prescribed Authority nor the Appellate Authority could have passed any order with regard to such an application moved at the behest of the subsequent purchasers, namely, respondent nos. 4 to 6.

10. Learned counsel for petitioners has further submitted that in case the subsequent purchasers of the land require the land to be excluded from being declared surplus then the only option available to them is by filing objections under Section 11 (2) of the Act of 1960. Once any objection under Section 11 (2) of the Act of 1960 are filed then the Prescribed Authority are duty bound to consider the same and pass appropriate orders with regard to exclusion of such land.

11. In the present case, undisputedly no objection under Section 11 (2) of the Act of 1960 was filed by the respondent nos. 4 to 6 for exclusion of the lands and they have been resorted to an application under Section 12-A of the Act of 1960 for the purpose of exclusion of the said land.

12. This Court is of the considered view that it does not lay with the subsequent purchasers to move an application under Section 12-A of the Act of 1960 for excluding the land from being taken surplus and such an application, if any, could have been filed only by the recorded tenure holders and once this Court is of the considered view that such an application could not have been moved by the respondent nos. 4 to 6, who are the subsequent purchasers, then the same could not have been allowed by the Prescribed Authority. Accordingly, to that extent only, the impugned orders allowing the application under Section 12-A (d) of the Act of 1960 at the behest of the respondent nos. 4 to 6 is clearly illegal and arbitrary and contrary to the provisions contained in Section 12-A of the Act of 1960.

13. In light of the above, both the impugned order dated 03.06.1992 passed by the Prescribed Authority as well as order dated 30.09.2002 passed by the appellate authority are set aside. The writ petition is accordingly, allowed.

(2024) 1 ILRA 868
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.01.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 206 of 2024

Nitin Tiwari & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Nadeem Martaza, Aditi Tripathi, Brij Mohan Sahai, Sudhanshu S, Tripathi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Sections 173(2), 173(8), 227, 228, 397 & 482 - Indian Penal Code, 1860 - Sections 147, 148, 149, 302, 307, 504, 506, 34 & 120-B - Applicants challenged orders rejecting second discharge application and framing charges, alleging failure to consider contradictory police reports. Court held: (1) Application u/s 482 is maintainable against rejection of discharge application and framing of charges despite revision remedy, but only in exceptional cases to prevent abuse of process or secure justice (Madhu Limaye Vs St. of Mah., (1977) 4 SCC 551). (2) Framing of charges on 02.08.2023 was proper, as rejection of first discharge application on 16.05.2023 was unchallenged, and Sessions Judge was statutorily bound under Section 228 to frame charges, especially with High Court's permission to proceed (Vinay Tyagi Vs Irshad Ali, (2013) 5 SCC 762). (3) Second discharge application was not maintainable after charges were framed, as courts lack jurisdiction to reconsider discharge post-charge framing

(Ratilal Bhanji Mithani Vs St. of Mah., (1979) 2 SCC 179). (4) Present application was not a second u/s 482 application, as it challenged a different order (rejection of second discharge application), making it maintainable. (5) Impugned order complied with requirement to consider all police reports, including contradictory ones, as mandated (Vinay Tyagi Vs Irshad Ali, (2013) 5 SCC 762; Luckose Zachariah Vs Joseph Joseph, 2022 SCC OnLine SC 241). Application rejected; trial court directed to conclude trial within one year. (Paras 14-32)

Application Rejected.

List of Cases cited:

1. Madhu Limaye Vs St. of Mah., (1977) 4 SCC 551 (Para 14)

2. Prabhu Chawla Vs St. of Raj., (2016) 16 SCC 30 (Para 15)

3. Vijay Vs St. of Mah., (2017) 13 SCC 317 (Para 16)

4. Sanjay Kumar Rai Vs St. of U.P., 2021 SCC OnLine SC 367 (Para 17)

5. Ram Shanker Singh Vs St. of U.P., Application u/s 482 No. 27288 of 2016 (Para 18)

6. Shailendra Agrawal Vs St. of U.P., Application u/s 482 No. 24354 of 2023 (Para 19)

7. Ravindra Pratap Shahi Vs St. of U.P., Criminal Revision No. 2183 of 2021 (Para 24)

8. Ratilal Bhanji Mithani Vs St. of Mah., (1979) 2 SCC 179 (Para 25)

9. Bharat Parikh Vs Central Bureau of Investigation, (2008) 10 SCC 109 (Para 26)

10. Vinay Tyagi Vs Irshad Ali, (2013) 5 SCC 762 (Para 29)

11. Luckose Zachariah Vs Joseph Joseph, 2022 SCC OnLine SC 241 (Para 30)

12. Bhisham Lal Verma Vs St. of U.P., 2023 SCC OnLine SC 1399 (Para 10)

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

1. Heard Sri Brij Mohan Sahai along with Sri Nadeem Murtuza, Sri Sudhanshu Shekhar Tripathi, Ms Snigdha Singh and Ms Akanksha Bajpai, learned counsel for the applicants, Sri Vikas Singh, along with Sri Sourabh Rastogi, learned counsel for opposite party no.2 and Sri Vinay Kumar Shahi, learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the impugned order dated 13.12.2023 passed by Additional Sessions Judge/Special Judge (E.C. Act), Court No.4, Sultanpur, as well as the impugned order dated 02.08.2023 passed by the learned Sessions Judge, Sultanpur in Sessions Trial No.119 of 2023 (State of U.P. v. Brijesh Kumar Yadav and Ors.) arising out of case crime no.78 of 2022, under Sections-147, 148, 149, 302, 307, 504, 506, 34, 120-B IPC, Police Station-Amethi, District-Amethi, pending in the Court of Additional Sessions Judge/Special Judge (E.C. Act), Court No.4, Sultanpur.

3. The factual matrix of the case is as follows:

The FIR was lodged on 16.03.2022 against the applicants and other co-accused persons u/s 147, 148, 149, 302, 307, 504, 506, 34, 120-B IPC, in case crime no.78 of 2022, Police Station-Amethi, District-Amethi. Police, after investigation, prepared the first chargesheet dated 22.05.2022, though it is disputed that this chargesheet was not submitted at that time by the police. But on the direction of the Superintendent of Police, a further investigation was also conducted. It is relevant to mention here, in the first chargesheet, which was mentioned as

chargesheet no.156, applicants were also named as accused and the same was filed along with subsequent chargesheet no.156A, which was filed in the Court on 14.06.2022. Applicants were also named as accused in that supplementary chargesheet, but one of the co-accused, Ram Shankar Tiwari, was exonerated. Subsequently, on the direction of the Principal Secretary, Government of U.P., the order was issued by the Superintendent of Police, Amethi, to conduct further investigation. After obtaining permission from the Court, the Investigating Officer again conducted the investigation and submitted third chargesheet bearing no.156B on 10.01.2023. In that chargesheet, the applicants' names were deleted, and certain sections were removed, including the section of 120-B IPC, it was filed against the other accused persons. Thereafter, the Investigating Officer, based on the third police report dated 10.01.2023, also applied to cancelling the warrant against the applicants who were in jail. The learned Chief Judicial Magistrate rejected that application by order dated 13.01.2023, and he also rejected the supplementary report dated 10.01.2023 and directed the case to be committed to Sessions Judge. After that, vide a separate order dated 16.01.2023, the case was also committed to Sessions Judge. The applicants and other accused persons have challenged the order dated 13.01.2023 before this Court by way of Revision no.113 of 2023, which is still pending. Thereafter, the present applicants moved a Discharge application dated 03.05.2023 u/s 227 Cr.P.C. on the ground that in the subsequent police report, the applicants were exonerated; therefore, there is no evidence against them, and on considering the subsequent police report, they may be discharged. The learned Sessions rejected this discharge application Judge by the order dated 16.05.2023. Thereafter, charges were also framed on 02.08.2023 against the applicants by the learned Sessions Judge u/s 228 Cr.P.C. In the meantime, the applicants had filed Application u/s 482 No.7193 of 2023 challenging the criminal proceeding of Sessions Trial No.119 of 2023 of the present case crime number. But in that 482 application, order of rejecting of discharge application dated 16.05.2023 was not challenged. This Court disposed of this application by order dated 30.08.2023 rejecting the prayer for quashing the proceeding of Sessions Trial No. 119 of 2023. However, the Court directed that in view of the law laid down by the Hon'ble Supreme Court in the case of **Vinay Tyagi Vs. Irshad Ali alias Deepak and Others reported in (2013) 5 SCC 762**, at the time of the proceeding of trial, the Court should consider both the police reports to evaluate all evidence collected by the Investigating Officer. In the aforesaid two chargesheets i.e. 14.06.2022 as well as 10.01.2023, it is relevant to mention here that the order in application u/s 482 no.7193 of 2023 was reserved on 28.07.2023 and delivered on 30.08.2023. Thereafter, the applicants had filed second discharge application on 02.09.2023 on the ground that the Hon'ble High Court in Application u/s 482 No.7193 of 2023 directed to consider both the police reports, therefore, both the police reports should be considered before framing any charge. This second discharge application was rejected by the impugned order dated 13.12.2023.

4. The order dated 13.12.2023 by which the discharge application of the applicants was rejected, as well as an order dated 02.08.2023 by which the charges were framed against the applicants was chalenged through the present application u/s 482 Cr.P.C.

5. Contention of learned counsel for the applicants is that while passing the impugned order, there is an appreciation of fact because it considered the chargesheet dated 22.05.2023 as the first chargesheet, though this chargesheet was never filed before the second chargesheet, but it was subsequently filed along with supplementary chargesheet dated 14.06.2022; therefore, the same cannot be treated as a chargesheet, but only the document sent with the second chargesheet. It was also submitted that the Court below also failed to consider the law laid down by the Hon'ble Supreme Court in **Vinay Tyagi's case (supra)**, (Paragraph no.42) as well as paragraphs nos.13, 15 and 16 of **Luckose Zachariah alias Zak Nedumchira Luke and others Vs. Joseph Joseph and others** reported in **2022 SCC OnLine SC 241**. It was also submitted by learned counsel for the applicants that the Court below has also illegally framed charges on 02.08.2023 because prior to that date, judgment in Application u/s 482 No.7193 of 2023 was reserved, and same was delivered on 30.08.2023, and it was incumbent upon the Court below to wait till the delivery of the judgement.

6. Learned counsel for the opposite party No. 2 had submitted that this Application u/s 482 is itself not maintainable because against the rejection of the discharge application, revision is maintainable and this is an abuse of process of law on the part of applicants themselves. In support of this contention, learned counsel for the opposite party no.2 has relied upon the judgement of the Hon'ble Supreme Court in **Madhu Limaye Vs. State of Maharashtra reported in 1997 (4) SCC 551,** paragraph no.15 as well as judgement of **Ram Shanker Singh Vs. State of U.P. And Another** passed by the Division Bench of this Court in **Application u/s 482 No.27288 of 2016** decided on **04.01.2017,** paragraphs nos.7, 8 and 9 and **Shailendra Agrawal And Another Vs. State of U.P. and Another** in **Application u/s 482 No.24354 of 2023.**

7. The second argument submitted by learned counsel for the opposite party no.2 is once the discharge application of the applicants was rejected on 16.05.2023, and the same was not challenged before the High Court, the second discharge application itself was not maintainable and it was further submitted that in paragraph no.7 of the earlier discharge application dated 03.05.2023, specific ground for consideration of two police reports was raised and same was considered by the Court in its order dated 16.05.2023 and after rejecting the discharge application, direction was also made to frame the charges and this order itself became final.

8. The third point raised by learned counsel for the opposite party no.2, it is very clear from perusal of Section 228 Cr.P.C. that immediately after discharge application, this Court is bound to frame the charges. Therefore, no question of waiting for the delivery of judgement arises at all. It was also submitted by learned counsel for the applicants that in earlier Application u/s 482 No.5578 of 2023 filed by co-accused Ram Shankar Tiwari, this Court had clearly directed by order dated 21.03.2023 that the trial may proceed in accordance with the law against the rest of the accused persons. Therefore, once there is direction of the Court itself, then question of waiting to frame charges till the delivery of judgment and disposal of Application u/s 482 No.7193 of 2023 does not arise once it is admitted that the discharge rejection order dated 16.05.2023

was not challenged in Application u/s 482 No.7193 of 2023.

9. Another argument raised by learned counsel for the opposite party no.2 is that it is established legal position that once the charge has been framed, then the discharge application itself is not maintainable, and in support of his contention, he has relied upon paragraph no.29 in the judgement of **Ravindra Pratap Shahi @ Pappu Shahi Vs. State of U.P. & Another** delivered in **Criminal Revision No.2183 of 2021.**

10. The last argument of learned counsel for the opposite party no.2 is that the present 482 application is virtually the second 482 application challenging the discharge rejection order because in the first application under section 482 filed by the applicants bearing no.7193 of 2023, the order rejecting the discharge application was not challenged, though that remedy was available to the applicants. Now the applicants have again challenged that discharge rejection order. In support of his contention, learned counsel for the applicants has relied upon the judgment of **Bhisham Lal Verma Vs. State of U.P. & Another** reported in **2023 SCC OnLine SC 1399.**

11. Learned AGA while adopting the argument of learned counsel for the opposite party no.2 had also submitted that there is no illegality in the impugned orders as the applicants were named in the FIR and chargesheet but on the basis of further investigation, they somehow succeeded to get them exonerated in second supplementary chargesheet and it was lastly argued by learned counsel for the State that this 482 application against the rejection of discharge application is not maintainable because the impugned order itself is reviseable.

12. In reply to the contention of learned counsel for the opposite party no.2 and learned AGA, learned counsel for the applicants submits that the Hon'ble Supreme Court in paragraph no.10 of **Vijay and Another Vs. State of Maharashtra and Another reported in (2017) 13 SCC 317**, as well as in the case of **Sanjay Kumar Rai Vs. State of Uttar Pradesh and Another** reported in **(2021) SCC OnLine SC 367**, has observed that an alternative remedy of filing revision is not a bar for filing the 482 application if, in appropriate cases, it is just in the interest of justice.

13. After considering the argument of the parties, the following question arises for determination:

(I) Whether the present application u/s 482 Cr.P.C. is maintainable against the rejection of discharge application and framing of charge despite the fact that both the orders are revisable?

(II) Whether the framing of charge on the part of Sessions Judge on 02.08.2023 is proper once the proceeding itself was under challenge in application u/s 482 no.7193 of 2023, and the matter was heard on 28.07.2023, and judgement was reserved, which was subsequently delivered on 30.08.2023?

(III) Once the discharge application dated 03.05.2023 of the applicants was rejected on 16.05.2023, which was not challenged and charges were framed on 02.08.2023, then subsequent discharge application dated 02.09.2023 is

maintainable, which was rejected by the impugned order dated 13.02.2023.

(IV) Whether the present 482 application is the second application against the rejection of discharge application of the petitioner once applicants failed to challenge the earlier rejection of discharge application in their earlier application, having no.7193 of 2023?

(V) While passing the impugned order, rejecting the discharge application dated 02.09.2023, learned Sessions Judge has failed to consider two contradictory police reports in light of the judgement of the Hon'ble Supreme Court in **Vinay Tyagi's case (supra)** as well as judgement of **Luckose Zachariah's case (supra).**

14. Insofar as the (I) question is concerned in support of his submission, learned counsel for the applicants has already relied upon paragraph no.10 of **Madhu Limaye's case (supra)**, which is being quoted as below:

"10. As pointed out in Amar Nath case the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding, is to bring about expeditious disposal of the cases finally. More often than not, the revisional power of the High Court was resorted to in relation to interlocutory orders delaying the final disposal of the proceedings. The Legislature in its wisdom decided to check this delay by introducing sub-section (2) in Section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of Section 482, however, it would follow that nothing in the Code, which would include sub-section (2) of Section 397 also, "shall be deemed to limit or affect the inherent powers of the High Court", But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases, would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of

the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case where a prosecution is launched under the Prevention of Corruption Act without a sanction, then the trial of the accused will be without jurisdiction and even after his acquittal a second trial, after proper sanction will not be barred on the doctrine of autrefois acquit. Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order, does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused up to the end? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible."

15. Similarly, the judgement of **Prabhu Chawla Vs. State of Rajasthan And Another** reported in **(2016) 16 SCC 30**, Hon'ble Supreme Court observed that remedy of revision is not an absolute bar for exercising power u/s 482 Cr.P.C. where abuse of process of Court or other extraordinary situation warrants the exercise of inherent jurisdiction, paragraph no.6 of the said judgement is being quoted as below:

"6. In our considered view any attempt to explain the law further as regards the issue relating to inherent power of the High Court under Section 482 CrPC is unwarranted. We would simply reiterate that Section 482 begins with a non obstante clause to state:

***"482. Saving of inherent powers of High Court**.-Nothing in this Code shall be deemed to limit or affect the inherent powers 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."*

A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J.

"abuse of the process of the court or other extraordinary situation excites the Court's jurisdiction. The limitation is self-restraint, nothing more". (Raj Kapoor V. State, (1980) 1 SCC 43)

We venture to add a further reason in support. Since Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation wholly unwarranted and undesirable."

16. Similarly in the case of **Vijay's case (supra)** relied upon by learned counsel for the applicants, Hon'ble Supreme Court observed that availability of alternative remedy cannot be a ground of disentitlement of the relief u/s 482 Cr.P.C. Paragraph nos.7 and 8 of the said judgement is being quoted as below:

"7. After hearing the counsel and also after perusing the impugned order, we are of the considered opinion that the order of the High Court has no legs to stand in view of the law laid down by this Court in Prabhu Chawla. In the above referred case, in view of the divergent opinions of this Court in Dhariwal Tobacco Products Ltd. and Mohit v. State of U.P, the matter was placed before the three-Judge Bench of this Court. The three-Judge Beach took the view that Section 482 CrPC begins with a non obstante clause to state:

***482. Saving of inherent powers of High Court**-Nothing in this Code shall be deemed to limit or affect the inherent powers 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."*

As Section 397 CrPC is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 CrPC only to petty interlocutory orders! A situation which is wholly unwarranted and undesirable. The three-Judge Bench has confirmed the law laid down by this Court in Dhariwal Tobacco Products Ltd.

8. In view of the above settled law, mere availability of alternative remedy cannot be a ground to disentitle the relief under Section 482 CrPC and, apart from this, we feel that the learned Judge without appreciating any of the factual and legal position, in a mechanical way, passed the impugned order, which warrants interference by this Court. Accordingly, the order of the High Court is set aside and the matter is remanded to the High Court for reconsideration in the light of the settled legal position."

17. In the judgement of **Sanjay Kumar Rai's case (supra),** Hon'ble Supreme Court again observed that framing of charge or refusing discharge are neither interlocutory nor final in nature, therefore, remedy of revision u/s 397 Cr.P.C. will not be a bar to exercise inherent jurisdiction to prevent abuse of process and to secure ends of justice. Paragraph no.16 of the above judgement is being quoted as below:

"16. The correct position of law as laid down in Madhu Limaye (supra), thus, is that orders framing charges or refusing discharge are neither interlocutory nor final in nature and are therefore not affected by the bar of Section 397 (2) of CrPC. That apart, this Court in the above-cited cases has unequivocally acknowledged that the High Court is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice having regard to the facts and circumstance of individual cases. As a caveat it may be stated that the High Court, while exercising its afore-stated Jurisdiction ought to be circumspect. The discretion vested in the High Court is to be invoked carefully and judiciously for effective and timely administration of criminal justice system. This Court, nonetheless, does not recommend a complete hands off approach. Albeit, there should be interference, may be, in exceptional cases, failing which there is likelihood of serious prejudice to the rights of a citizen. For example, when the contents of a complaint or the other purported material on record is a brazen attempt to persecute an innocent person, it

becomes imperative upon the Court to prevent the abuse of process of law."

18. Similarly in the case of **Ram Shanker Singh's case (supra),** Division Bench of this Court in paragraph nos.7, 8 and 9 clearly observed that rejecting of discharge application is revisable, therefore, there is no reason to approach the High Court u/s 482 Cr.P.C. against that order. Paragraph nos.7, 8 and 9 of the above judgement are being quoted as below:

"7. It is at this stage that the revisionist Ram Shanker Singh has filed this application under section 482 Cr.P.C. for quashing of the charges, leveled against the petitioner, as well as the order dated 16.2.2016 whereby the discharge application was rejected. It has further been prayed that the proceeding of Case No.235 of 2010 may be quashed. In paragraph 28 of the present application it has been stated that the other co-accused A.S. Chauhan has preferred Criminal Revision No.822 of 2016. What is the status of the said Criminal Revision is not known.

8. However the applicant, Ram Shanker Singh, in his wisdom has decided to approach this Court under section 482 Cr.P.C The contention raised on behalf of the applicant for not preferring criminal revision after he felt aggrieved by the order, rejecting the discharge application and after framing of the charge is that since against the order framing charge no criminal revision would be maintainable, the appellant has decided to approach this Court by means of this present application.

9. At the very outset we may record that the order rejecting the discharge application was made in the month of February, 2016 while the charge has been framed under order dated 24.8.2016. These are two distinct orders. The order rejecting the discharge application was admittedly revisable. Why the applicant did not think it proper to challenge the order rejecting the discharge application for more than six months, has not been explained. Against the order rejecting the discharge application, a criminal revision would be maintainable, there is little or no reason for the accused to approach this Court under section 482 Cr.P.C. against the said order."

19. Similarly, in the case of **Shailendra Agrawal's case (supra)**, a coordinate Bench of this Court observed that against the order of discharge, there is a remedy of criminal revision; therefore, there is no reason to entertain 482 application against that order. Paragraph no.6 of the above judgement is being quoted as below:

"6. As in this application, legality and propriety has been challenged against the order of discharge, there lies an alternative remedy of criminal revision which has not been availed by the applicants."

20. From the above-mentioned judgement, it is clear, though, that there is no absolute bar against entertaining 482 application against the rejection of discharge application as well as against framing of charge despite the fact that both the orders are revisable, but as observed in the cases mentioned above, such exercise should be adopted only in appropriate cases where the situation demands to exercise such power to prevent abuse of the process of the Court or other extraordinary situation. Therefore, the law is clear on this

point that against the rejection of discharge application and/or against framing of charge, normally revision should be filed, but application u/s 482 Cr.P.C. is maintainable in appropriate cases. **Therefore, whether the application u/s 482 Cr.P.C. should be entertained against the rejection of discharge application or framing of charges despite the remedy of revision will depend on the facts and circumstances of the cases which the Court itself could decide.**

21. In the present case, the impugned order rejecting the discharge application of the applicant was passed in pursuance of an order dated 31.07.2023 passed in application u/s 482 no.5578 of 2023. Even though earlier discharge application of the applicants was rejected on 16.05.2023; therefore, **in such circumstances, present 482 application against the impugned order rejecting the second discharge application and framing of charge is maintainable because of the peculiar circumstances of the case.**

22. So far as the (II) issue is concerned, in reply to that issue, learned counsel for the opposite party no.2 has submitted that once the discharge application is rejected u/s 227 Cr.P.C. after hearing the parties, then the learned Sessions Judge has no option except to frame charges u/s 228 Cr.P.C. and learned counsel for opposite party no.2 has also placed reliance on the petition filed by the co-accused, Ram Shankar Tiwari u/s 482 application having No.5578 of 2023 against his summoning in the present case crime number and in that case while passing the order dated 31.07.2023, the coordinate Bench though, stayed the proceeding against the co-accused Ram Shankar Tiwari but also permitted the trial court to proceed in accordance with law in relation to the rest of the accused persons. Sections 227 and 228 of Cr.P.C. are being quoted as below:

"*227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.*

228. Framing of charge.- *(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -*

(a) is not exclusively triable, by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, [or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to

the accused, and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

23. From the perusal of Sections 227 and 228 of Cr.P.C., it is clear that once the the court heard the accused person and prosecution u/s 227 Cr.P.C. and rejected the discharge application of the applicants, then Court is bound to frame charge u/s 228 (b) Cr.P.C., if same is exclusively triable by Sessions court and with further duty that after framing of charge, Sessions court will read and explain the charges to the accused persons, and the Court will also ask him whether he pleaded guilty of charge or claims to be tried. In the present case, after rejecting the discharge application of the applicants on 16.05.2023, learned Sessions Judge framed charge on 02.08.2023 in the presence of the applicants, taking into consideration the order dated 31.07.2023 passed by this Court in application u/s 482 no.5578 of 2023 and also rejected the application dated 02.08.2023 of the applicants that till delivery of judgement in application u/s 482 no.7193 of 2023; charge may not be framed. Therefore, charges were framed by applying the provision of Section 228 Cr.P.C. Therefore, this Court is of the view that once the discharge application of the applicants was rejected on 16.05.2023, which was not challenged by the applicants, then there was a statutory duty on the part of Sessions Judge to frame charge u/s 228 Cr.P.C. and merely because judgment has been reserved in application u/s 482 no.7193 of 2023 against the criminal proceeding of session trial, there is no reason to wait till the delivery of judgment, once the rejection of discharge application on 16.05.2022 was not challenged by the applicants in application u/s 482 no.7193 of 2023, and there was clear permission of this Court in application u/s 482 no.5578 of 2023 filed by the co-accused Ram Shankar Tiwari for the trial court to proceed against all accused persons, including the applicants. **Therefore, this Court holds that there is no illegality in framing the charge against the applicants on 02.08.2023, and this Court also holds that once the discharge application of an accused is rejected u/s 227 Cr.P.C. then unless the order rejecting the discharge application was challenged and stayed by higher Court, the Sessions Judge is under statutory duty to frame charges u/s 228 Cr.P.C.**

24. So far as the (III) issue is concerned that when the charge has been framed after rejecting the discharge application, then second discharge application is maintainable or not. This point was concerned in the case of **Ravindra Pratap Shahi's case (supra)** by the coordinate Bench of this Court and after relying upon several judgements of the Hon'ble Supreme Court held that after the framing of charge, issue relating to the discharge of the accused cannot be considered. Paragraphs nos.28 and 29 of the judgement mentioned above are being quoted as below:

"28. Having noted the law regarding exercise of jurisdiction under Section 227 Cr.P.C., this Court is further required to examine as to whether after charges have been framed the issue relating to discharge of an accused can be considered by court or not. Aforesaid issue is no longer res-integra and stands concluded by the judgement of Supreme Court in ***Ratilal Bhanji Mithani Vs. State of Maharastra and others (1979) 2 SCC 179,*** *paragraph 28, which has been*

followed in ***Bharat Parikh Vs. C.B.I. and another, (2008) 10 SCC 109, paragraph 16, State through C.B.I. New Delhi Vs. Jitendra Kumar Singh, (2014) 11 SCC, 724, paragraph 40, Hardeep Singh Vs. State of Punjab, (2014) 3 SCC, 92, paragraph 31.***

29. It is thus apparent that once charges have been framed, the issue of discharge becomes redundant, as Courts have no jurisdiction to allow discharge after charges having been framed. After charges have been framed, Court can either convict or acquit an accused. Admittedly, in the present case, charges have been framed, vide order dated 04.09.2021. Resultantly, this Court now cannot examine the veracity of order dated 02.09.2021, whereby discharge application filed by applicant was rejected."

25. In the case of **Ratilal Bhanji Mithani Vs. State of Maharashtra & Others reported in 1979 (2) SCC 179,** this question was considered by the Hon'ble Supreme Court and observed that once a charge is framed, the Magistrate has no power u/s 227 Cr.P.C. or any other provision of Cr.P.C. to cancel the charge. Paragraph no.28 of the aforesaid judgement is being quoted as under:

"28. Once a charge is framed, the Magistrate has no power under Section 227 or any other provision of the code to cancel the charge, and reverse the proceedings to the stage of Section-253 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of the charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in Sections-254 to 258 to a logical end."

26. Similarly in the case of **Bharat Parikh Vs. Central Bureau of Investigation & Another 2008 (10) SCC 109,** Hon'ble Supreme Court has observed that once the charge has been framed, an accused pleads not guilty then Magistrate is required to proceed with the trial to its logical end and he has no power to discharge the accused. He can either convict or acquit the accused. Paragraph no.17 of the above judgement is being quoted as below:

"17. Of the two propositions raised in this appeal, the first proposition has been completely answered in Debendra Nath Padhi case regarding the trial court's power to recall its order framing charge against an accused. Having regard to the language of Sections 207 and 227 of the Code of Criminal Procedure, while framing charges the trial court can only look into the materials produced by the prosecution while giving an opportunity to the accused to show that the said materials were insufficient for the purpose of framing charge. The decision in Satish Mehra case having been overruled in Debendra Nath Padhi case the contention of Mr Desai that the Magistrate should have reopened the matter on the basis of the documents produced by the prosecution at the instance of the accused, is no longer res integra. The question of discharge by the learned Magistrate after framing of charge does not, therefore, arise, notwithstanding the submissions advanced with regard to denial of natural justice and a fair and speedy trial as contemplated under Article 21 of the Constitution, which have no application whatsoever to the facts of this case."

27. **In view of the above legal position, it is clear that once the charge has been framed after rejecting the discharge application of the applicants, second discharge application is not maintainable** but even then the Court below has decided the second discharge application of the applicants because of the direction of this Court in application u/s 482 no.7193 of 2023, to consider both the reports in light of the judgement of the Hon'ble Supreme Court in the case of **Vinay Tyagi's case (supra),** even from the perusal of the order of this Court in application u/s 482 no.7193 of 2023 from Eagle's Eye; there is no specific direction to decide second discharge application of the applicants, but there was a simple direction that during trial, the Court below should consider both the police report and material collected during the investigation.

28. So far as the (IV) question is concerned, whether the present 482 application and second 482 application against the rejection of discharge application is concerned, from the perusal of the record, it is clear that in earlier application u/s 482 Cr.P.C., the proceedings of Session trial was challenged without challenging the rejection of discharge application dated 16.05.2023. Though, in the present case, the applicants have challenged the order passed on the second discharge application which was passed virtually in the garb of the order dated 30.08.2023 passed in application u/s 482 no.7193 of 2023. Therefore, even if the issue is the same but the order is different; therefore, present application u/s 482 cannot be said to be a second application u/s 482, therefore the same is very well maintainable.

29. So far as the (V) question regarding the consideration of contradictory police report in light of the judgement of **Vinay Tyagi's case (supra)** is concerned, from the perusal of the impugned order, it is clear that the learned Sessions Judge clearly considered the police report/supplementary chargesheet dated 14.06.2022 and 10.01.2023 as well as the first chargesheet dated 22.05.2022 which was subsequently filed along with supplementary chargesheet dated 14.06.2022. For framing of the charge, the police report, as well as all documents, are to be considered as per the judgement of Hon'ble Supreme Court in the case of **Vinay Tyagi's case (supra) and Luckose Zachariah's case (supra).** In paragraph no.53 of the judgement of **Vinay Tyagi's case (supra)**, it was observed that the competent Court is duty-bound to consider all reports, entire records and documents submitted therein by the investigating agency as its report in terms of Section 173 (2)Cr.P.C. **It was further observed that in the aforesaid judgement in paragraph no.60 that once the report u/s 173(2) Cr.P.C. has been filed, it cannot be cancelled by the investigating agency by submitting a contradictory report because the same power lies with the Court itself not on the investigating agency**. Paragraph nos.53 and 60 of the aforesaid judgement of **Vinay Tyagi's case (supra)** are being quoted as below:

"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.

60. Once a report under Section 173(2) of the Code has been filed, it can only be cancelled, proceeded further or case closed by the court of competent jurisdiction and that too in accordance with law. Neither the police nor a specialised investigating agency has any right to cancel the said report. Furthermore, in the present case, the High Court had passed no order or direction staying further investigation by Delhi Police or proceedings before the court of competent jurisdiction. On the contrary, the Court had noticed explicitly in its order that it was a case of supplementary or further investigation and filing of a "supplementary report". Once the Court has taken this view, there is no question of treating the first report as being withdrawn, cancelled or capable of being excluded from the records by the implication. In fact, except by a specific order of a higher court competent to make said orders, the previous as well as supplementary report shall form part of the record which the trial court is expected to consider for arriving at any appropriate conclusion, in accordance with law. It is also interesting to note that CBI itself understood the order of the Court and conducted only "further investigation" as is evident from the status report filed by CBI before the High Court on 28-11-2007."

30. Similarly in the case of **Luckose Zachariah's case (supra)**, Hon'ble Supreme Court has again reiterated the observations of the case of **Vinay Tyagi (supra**) and observed that Court concerned in case of two different reports must have due regard to both the reports and thereafter formed his opinion in accordance with law. Paragraph no.16 of the judgement of **Luckose Zachariah's case (supra)** is being quoted as below:

"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 Vinubhal 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 v. Irshad All alias Deepak and Vinubhai Haribhai Malaviya v. 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."

31. Therefore, from the above-mentioned legal position, it is clear that while framing charges, the Court must consider all the police reports, and the same were duly considered in the impugned order dated 13.12.2023 and merely making reference of the first chargesheet dated 22.05.2022, which was earlier not filed in Court but subsequently filed along with the supplementary chargesheet dated 14.06.2022 will not make the impugned order perverse. Therefore, this Court holds that there is sufficient compliance with the direction of Hon'ble Supreme Court in the case of **Vinay Tyagi' case (supra)** and **Luckose Zachariah's case (supra)** while passing the impugned orders.

32. In view of the above observations and findings, this Court is of the view that there is no illegality in the impugned order dated 13.12.2023, as well as order dated 02.08.2023; therefore present application is **rejected** with a further direction to the Court below to conclude the trial as expeditiously as possible without giving unnecessary adjournment to any of the parties and decide the same in time-bound manner, preferably within a period of one year.

(2024) 1 ILRA 882
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 314 of 2024

Deepshika ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Rakesh Kumar Shukla

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Section – 482 - Hindu Marriage Act, 1955 - Section – 13-B - Application U/s 482 filed by informant – for quashing the charge sheet, summoning order, and entire criminal proceedings, against her husband and in-laws – Matrimonial dispute - FIR – was lodge with allegations of dowry-harassment - Investigation – Settlement - Suit under section 13-B of HM Act was filed - Chargesheet – Summoning order – court finds that, both parties amicably settled their disputes and filed for mutual divorce under Section 13B of HM Act – therefore, held that the informant can seek quashing if it serves justice and prevents abuse of process, especially since the pending criminal case was delaying the divorce settlement and payment of the agreed alimony – consequently, Application is allowed – impugned summoning order and the entire proceedings are hereby quashed.
(Para – 7, 8, 12)

Application Allowed. (E-11)

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

1. Heard Sri Rakesh Kumar Shukla, the learned counsel for the applicant and Sri Anurag Verma, the learned AGA-I for the State.

2. By means of the instant application filed under Section 482 Cr.P.C., the informant herself has approached this Court

seeking quashing of charge sheet dated 14.08.2023 submitted in furtherance of an FIR No. 65/2023 dated 13.05.2022 lodged by the applicant alleging harassment of the applicant by the opposite party nos. 2 to 5, who are her husband and his family members, for demanding dowry, the impugned summoning order dated 23.11.2023 and the entire proceeding of Criminal Case No. 125014/2023 pending in the Court of learned Civil Judge (Jr. Div.)/FTC Crime Against Women, Lucknow.

3. After filing of the FIR, the parties amicably settled their disputes and filed a suit under Section 13B of the Hindu Marriage Act, 1955 on 30.12.2021 wherein it was agreed that the opposite party no. 2 Chandan Rai will pay the agreed amount towards alimony to the applicant and the articles given at the time of marriage will be returned by both the sides. It is also one of the terms of the suit filed under Section 13B of the Hindu Marriage Act that the applicant will get proceedings of the case instituted on the basis of FIR lodged by her, closed by herself.

4. The learned AGA-I has raised objection against the maintainability of the applicant by the informant herself and he has submitted that once the charge sheet has been filed and the trial court has taken cognizance of the offence and has summoned the accused-opposite parties no. 2 to 5, it is the opposite parties no. 2 to 5 themselves, who can challenge the validity of the summoning order and the informant cannot challenge the order and the proceedings.

5. I have considered the aforesaid facts and circumstances of the case and the statements made by the learned AGA.

6. Section 482 Cr.P.C. recognizes the inherent powers of High Court to make such orders as may be necessary to prevent the abuse of the process of any court or otherwise to secure the ends of justice. For invoking the inherent powers of the High Court, the mere existence of apprehended abuse of the process of the court or a need for passing of order to secure the ends of justice is necessary and there is no limitation as to who can bring the circumstances justifying exercise of inherent powers to the notice of this Court.

7. The peculiar facts of the present case indicate that the applicant, who is the informant, is also being prejudiced by the continuance of the criminal proceedings instituted by herself as unless the proceedings are quashed, the suit under Section 13B filed by the applicant and the opposite party no. 2 cannot be decided. The balance agreed settlement money i.e. Rs. 7 lakh will be paid to the applicant on the date of final disposal of the suit.

8. The final disposal of the suit under Section 13B of the Hindu Marriage Act and payment of Rs. 7 lakh to the applicant is being delayed because of pendency of the criminal proceedings instituted by the applicant. Therefore, in view of the aforesaid peculiar facts and circumstances of the case, I am of the view that the application filed by the applicant-informant is maintainable and I proceed to examine the merit of the case.

9. In the FIR lodged on 13.05.2022, the applicant had stated that she got married to the opposite party no. 2 on 31.01.2019 but thereafter she was harassed by the opposite party nos. 2 to 5 for demanding dowry. Soon after lodging of the FIR, the parties settled their dispute

amicably and they filed a suit for divorce by mutual consent under Section 13B of the Hindu Marriage Act. It is stated in the coplaint that the opposite party no. 2 will pay a sum of Rs. 12 lakh towards one time settlement, out of which Rs. 5 lakh were paid on the date of filing of the suit and the balance amount of Rs. 7 lakh would be paid on the date of final disposal of the suit.

10. It is also stated in the plaint that the parties have returned some of the articles given at the time of marriage to each other and rest of the articles will be exchanged before final decision of the suit.

11. The plaint further states that the parities will get the proceedings instituted by them against each other closed themselves.

12. The learned counsel for the applicant has submitted that the applicant had given a copy of the plaint under Section 13B of the Hindu Marriage Act to the Investigating Officer with a request to close the investigation and submit a final report but he did not accept the same and submitted a charge sheet and the Court has taken cognizance of the offence and summoned opposite party nos. 2 to 5 to face trial by means of the impugned order dated 23.11.2023. The learned counsel for the applicant has submitted that because of the pendency of criminal cases, the proceedings under Section 13B of the Hindu Marriage Act, 1955 are not being decided finally and the balance amount of one time settlement is not being paid to the applicant and some articles are also yet to be exchanged between the parties before final disposal of the suit.

13. As the prayer made in the application is in favour of the opposite party nos. 2 to 5 and it will not adversely affect them, there is no need to issued notice to the opposite party nos. 2 to 5 and the notice is dispensed with.

14. In view of the aforesaid facts, the application is ***allowed***.

15. The charge sheet dated 14.08.2023 submitted in furtherance of an FIR No. 65/2023 dated 13.05.2022, the impugned summoning order dated 23.11.2023 and the entire proceeding of Criminal Case No. 125014/2023 pending in the Court of learned Civil Judge (Jr. Div.)/FTC Crime Against Women, Lucknow, are hereby quashed.

(2024) 1 ILRA 884
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED:ALLAHABAD 12.10.2023

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482. No. 2969 of 2016

Neeraj Jain ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Raj Kumar Kesari

Counsel for the Opposite Parties:
G.A., Sri Birendra Kumar Mishra, Sri Abhyuday Mehrotra

Criminal Law - Negotiable Instruments Act, 1881 - Sections 138 & 139 - Code of Criminal Procedure, 1973 - Section 482 - Applicant challenged summoning order dated 24.09.2015 in Complaint Case No. 5972 of 2015 under Section 138 of NI Act, claiming cheque was issued as security, not for discharge of

debt. Court held: (1) At summoning stage, Magistrate need only assess prima facie case based on complaint and materials; disputed facts like cheque as security are for trial (M.M.T.C. Ltd. Vs Medchl Chemicals and Pharma Pvt. Ltd., (2002) 1 SCC 234). (2) Section 139 presumes holder's possession of cheque indicates legally enforceable debt, rebuttable during trial by accused (Rangappa Vs Sri Mohan, (2010) 11 SCC 441). (3) Disputed questions of fact (e.g., cheque purpose) cannot be adjudicated under Section 482; quashing limited to cases where no offence disclosed or abuse of process (Rajeshbhai Muljibhai Patel Vs St. of Guj., (2020) 3 SCC 794). (4) Complaint, dishonor memo, and demand notice established prima facie offence under Section 138; applicant's security defence to be proved at trial. (5) Vijay Kumar Upadhyay Vs St. of U.P. (2013 (1) ALL LJ 577) deemed per incuriam, as it overlooked Section 139 presumption.

Application dismissed.

List of Cases cited:

1. Vijay Kumar Upadhyay Vs St. of U.P., 2013 (1) ALL LJ 577 (Para 3)

2. M.M.T.C. Ltd. Vs Medchl Chemicals and Pharma Pvt. Ltd., (2002) 1 SCC 234 (Para 12)

3. Rangappa Vs Sri Mohan, (2010) 11 SCC 441 (Para 13)

4. Rajeshbhai Muljibhai Patel Vs St. of Guj., (2020) 3 SCC 794 (Para 14)

5. Rathish Babu Unnikrishnan Vs St. of NCT of Delhi, 2022 (4) SCR 989 (Para 17)

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

1. Heard Sri Raj Kumar Kesari, learned counsel for the applicant, Sri Abhyuday Mehrotra, Advocate holding brief of Sri Birendra Kumar Mishra, learned counsel for the opposite party no.2 and Sri Sandeep Choudhary, learned A.G.A. for the State.

2. The instant application u/s 482 Cr.P.C. (hereinafter referred as 'the Code') has been filed seeking quashing of the summoning order dated 24.09.2015 in complaint case no. 5972 of 2015 (Motor Oil Lubricants Pvt. Ltd. Vs Neeraj Jain) u/S 138 of Negotiable Instrument Act (hereinafter referred as "the Act'), passed by Additional Civil Judge (Junior Division)/Judicial Magistrate, Court No. 4, Agra, .

3. Learned counsel for the applicant submits that in the instant case, the impugned cheque was issued by the applicant herein as a security for the commercial transactions between the parties in the year, 2013, which has been misused by the opposite party no.2 and the instant complaint case has been filed by presenting the said cheque by filling up the amount as per his own convenience. Therefore, learned counsel applicant has submitted that on the basis of the said cheque, which was issued as a security for the commercial transactions between the parties, no offence u/S 138 of the Act, can be said to have been made out. In support of his arguments, learned counsel for the applicant has relied upon the judgement of the Co-ordinate Bench of this Court in ***Vijay Kumar Upadhyay vs. State of U.P. & Anr. : 2013 (1) ALL LJ 577*** and submitted that in that case also, the cheque was given as a security amount, which was not covered u/S 138 of the Act. Therefore, the Co-ordinate Bench of this Court has quashed the entire proceedings of the said complaint case u/S 138 of the Act, holding that the security cheques are not covered u/S 138 of the Act. Therefore, he has prayed for similar order, quashing the entire proceedings of the said complaint case against the applicant herein.

4. Per contra, learned counsel for the opposite party no.2 has submitted that in the instant case, challenge has been made by the applicant only to the summoning order dated 24.09.2015 and while taking the cognizance in the matter, the learned Magistrate is required to consider the materials available before him at the time of the summoning the accused persons for the offences u/S 138 of the Act and the Magistrate is required to satisfy himself whether from the materials available before him, an offence u/S 138 of the Act, prima facie constituted or not. After recording his satisfaction, it will be the duty of the learned Magistrate to issue summons against the accused persons so that he may contest the case in accordance with law.

5. In the instant case, the complaint filed by the opposite party no.2, categorically makes out a case that the opposite party no.2 had sold the oil to the applicant/complainant for which an amount of Rs. 48,40,783/- were due to be paid by the applicant to the opposite party no.2 and out of the said amount, the applicant had paid the sum of Rs. 36,10,821/- including the Cash Discount, Credit Note etc., and for the remaining amount, in discharge of the legal debt, the applicant has issued a cheque of Rs. 12,29,962/- on 16.06.2015, in favour of the opposite party no.2, which was presented for encashment by the opposite party no.2 in his bank and the same cheque was dishonoured on 20.06.2015 and after the said dishonour of cheque, on 10.07.2015, the legal notice was issued by the opposite party no.2, which was received by the applicant herein on 14.07.2015. Despite that, the applicant herein had failed to make payment of the said cheque amount to the opposite party no.2, within the period of notice. Therefore, after the expiry of 15 days from the receipt of the said notice, the offence u/S 138 of the Act, is constituted and the opposite party no.2 had filed the complaint case within the period of limitation i.e, on 05.08.2015. Therefore, the impugned cheque, the dishonour memo and the legal notice was placed alongwith the complaint before the learned Magistrate, on the basis of which the learned Magistrate has taken cognizance with the matter, after having satisfied himself that a prima facie offence u/S 138 of the Act, is constituted against the applicant herein. Therefore, the applicant was summoned vide order dated 24.09.2015.

6. Learned counsel for the opposite party no.2 further submits that the arguments on behalf of the applicant that the cheque was issued as a security or not, that is his defence, which is to be taken by the applicant during the trial of the said case. Whether there was a legal liability on the date of issuance of cheque that has to be decided during the trial. By the Magistrate, on the basis of the evidence led by the applicant. If a prima facie case is made out from the complaint, the proceedings u/S 138 of the Act, cannot be quashed while exercising the jurisdiction u/S 482 of the Code. In support of his arguments, learned counsel for the opposite party no.2 has relied upon a recent judgement of the Apex Court in ***Rathish Babu Unnikrishnan vs. The State (Govt. of NCT of Delhi) and Another : [2022] 4 S.C.R. 989,*** wherein it has been held by the Apex Court that the burden to prove whether there was any legally existing debt or liability against the accused in the case u/S 138 of the Act, is to be discharged during the trial. In the said judgement the Apex Court relying upon the judgement in the case of ***Rajeshbhai Muljibhai Patel vs State of Gujarat (2020) 3 SCC 494***, the Apex Court has held that a

disputed question of fact cannot be adjudicated while exercising the jurisdiction u/S 482 of the Code. It is further submitted by learned counsel for the opposite party no.2 that Apex Court has further held that at the stage of summoning order, when the factual controversy is yet to be contested and considered by the Trial Court, it will not be judicious and based upon a prima facie impression, element of criminality cannot be ruled out.

7. Learned counsel for the State has also supported the arguments of learned counsel for the opposite party no.2 and submitted that at the time of issuing summons in the complaint case u/S 138 of the Act, the duty of the Magistrate is to consider the materials available before him and record his prima facie satisfaction whether all the ingredients of Section 138 of the Act, are fulfilled and constitute the offence under the said section. If such a prima facie satisfaction as recorded by the Magistrate, the Magistrate has no option but to issue summons against the accused persons in the said proceedings.

8. Having heard the rival submissions made by learned counsels for the parties, this court has carefully perused the records of the case.

9. Before adverting to the rival contentions raised by the learned counsels for the parties, it will be relevant to consider the provisions of Sections 138 & 139 of the Act and Section 190 of the Code, which are reproduced below:

Section 138 in The Negotiable Instruments Act, 1881

"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.*

Section 190 in The Code Of Criminal Procedure, 1973

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."

10. To constitute the offences u/S 138 of the Act, what is required is that the cheque is presented to the Bank within a period of 6 months or within its validity period, whichever is earlier and the said cheque has been dishonoured by the Bank and within 30 days of said dishonour of the cheque, the holder of the cheque had issued a demand notice, informing about the said dishonour of cheque to the issuer of the cheque calling upon him to make the payment within 15 days from the receipt of the said notice, then the offence u/S 138 of the Act, is completed if the issuer fails to make the payment of cheque amount. Section 139 of the Act, creates a presumption in favour of the holder of the cheque that the said cheque was issued in discharge of a debt or other liability. Therefore, once the cheque is in a possession of a person, it will be presumed that the said cheque issued by the issuer of the cheque in discharge of his legal debt or liability. The burden to prove that the said cheque was not issued in discharge of any debt or liability, is on the issuer of the cheque during the trial of the case. So far as constituting a prima facie offence, the presumption shall be in favour of the holder of the cheque that the said cheque issued in discharge of the legal liability.

11. Section 190 of the Code provides that the Magistrate shall take cognizance of the offence upon receiving a complaint of fact, which constituted such offence. Therefore, before taking cognizance on issuing summons, the Magistrate is only required to look into the complaint and the relevant materials to form his opinion whether the prima facie case is constituted as alleged or not. If he is satisfied that a prima facie case is made out under the relevant provisions then he has no option but to issue summons against the accused persons after recording his prima facie satisfaction.

12. To summarize the principles of law with regard to quashing of the entire proceedings u/S 138 of the Act, it will be relevant to take note of few judgement of Apex Court. In ***M.M.T.C. Ltd. & Anr. vs. Medchl Chemicals and Pharma (P) Ltd. & Anr : (2002) 1 SCC 234***, the Apex Court has held as under:

"17. There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. This they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability."

13. In the case of ***Rangappa vs. Sri Mohan : (2010) 11 SCC 441***, the opinion of Justice K.G.Balakrishnan for a three judges Bench is relevant to be noted as under:

"26. ... 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. 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."

14. In the case of ***Rajeshbhai Muljibhai Patel vs. State of Gujarat : (2020) 3 SCC 794,*** it has been held by the Apex Court that whenever the facts are disputed, the truth should be allowed to emerge by weighing the evidence. The Apex Court has opined as under:

"22. ....When disputed questions of facts are involved which need to be adjudicated after the parties adduce evidence, the complaint under Section 138 of the NI Act ought not to have been quashed by the High Court by taking recourse to Section 482 CrPC. Though, the Court has the power to quash the criminal complaint filed under Section 138 of the NI Act on the legal issues like limitation, etc. criminal complaint filed under Section 138 of the NI Act against Yogeshbhai ought not to have been quashed merely on the ground that there are inter se disputes between Appellant 3 and Respondent 2. Without keeping in view the statutory presumption raised under Section 139 of the NI Act, the High Court, in our view, committed a serious error in quashing the criminal complaint in CC No. 367 of 2016 filed under Section 138 of the NI Act."

15. So far as quashing of the criminal proceedings in exercise of powers u/S 482 of the Code is concerned, the judgements of the Apex Court in ***State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426], Zandu Pharmaceutical Works Ltd. vs. Mohd. Saraful Haque : (2005) 1 SCC 122 and Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others : 2021 SCC OnLine SC 315***, are the guiding factors and limbs of such powers, were the prima facie on the facts and materials available before the Court, it is found that no case as alleged is made out then such proceedings can be quashed in exercise of the powers. The other is the case where the High Court case comes to the conclusion that the entire proceeding is

an abuse of the process of law then such powers can be exercised and proceedings can be quashed.

16. In the case of ***Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330***, the Apex Court has held as under:

"28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/ complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/ complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same."

17. In the case of ***Rathish Babu Unnikrishnan (Supra)***, which has been vehemently relied upon by the opposite party no.2, the Apex Court has held as under:

"16. The proposition of law as set out above makes it abundantly clear that the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint.

17. The consequences of scuttling the criminal process at a pre-trial stage can be grave and irreparable.Quashing proceedings at preliminary stages will result in finality without the parties having had an opportunity to adduce evidence and the consequence then is that the proper forum i.e., the trial Court is ousted from weighing the material evidence. If this is allowed, the accused may be given an un-merited advantage in the criminal process. Also because of the legal presumption, when the cheque and the signature are not disputed by the appellant, the balance of convenience at this stage is in favour of the complainant/prosecution, as the accused will have due opportunity to adduce defence evidence during the trial, to rebut the presumption.

18. Situated thus, to non-suit the complainant, at the stage of the summoning order, when the factual controversy is yet to be canvassed and considered by the trial court will not in our opinion be judicious. Based upon a prima facie impression, an element of criminality cannot entirely be ruled out here subject to the determination by the trial Court. Therefore,when the proceedings are at a nascent stage, scuttling of the criminal process is not merited."

18. From the above judgements, it is crystal clear that at the stage of summoning whether there is a legally subsisting liability or not, is not to be considered by the Magistrate. It is to be looked into during the trial and the burden to prove that there was no existing debt or liability, is on the accused/respondents, which is to be discharged during the trial. Section 139 of

the Act, raises presumption that the cheque was issued for a legally existing debt and such presumption can be rebutted by the respondent/accused, during the course of the trial. At the time of exercise of jurisdiction u/S 482 of the Act, the Court is not required to evaluate the truthfulness or otherwise the allegations levelled by the complainant against the accused whatever may be the defences of the accused, those defences can be examined only during the trial. Even if the accused is successful in showing some suspicion or doubt in the allegations levelled by the complainant, it would be impermissible to discharge the accused before trial. If the Magistrate is satisfied that prima facie case is made out, fulfilling all the ingredients of Section 138 of the Act. In view of the presumptions u/S 139 of the Act, such complaints cannot be quashed on the basis of the averments made by the accused with regard to his defences.

19. In the light of the aforesaid judgements of the Apex Court, if we test the judgement of the Co-ordinate Bench of this Court in ***Vijay Kumar Upadhyay(Supra),*** which has been heavily relied upon by the learned counsel for the applicant herein, the said judgement is prima facie appears to be per incuriam as the same has not considered the aforesaid settled propositions of law. While exercising the powers u/S 482 of the Code, the Co-ordinate Bench of this Court has totally ignored the provisions of Section 139 of the Act, which makes out a presumption in favour of the holder of the cheque, which is a rebuttable presumption and which can be rebuttted during the trial of the accused persons. Therefore, in considered opinion of this Court, the judgement in ***Vijay Kumar Upadhyay(Supra)*** is not a good law and is not applicable in the facts of the instant case. In the light of the aforesaid judgments, if we test the facts of the instant case, in the instant case the opposite party no.2 was in possession of the cheque, which was issued by the applicant herein, which was presented by him within its validity period in the Bank, which was dishonoured. Notice for dishonour and demand notice informing the dishonour of the cheque given by the opposite party no.2 herein to the applicant. Despite receipt of the said notice, the applicant has failed to make the payment of the said cheque amount. Therefore, the instant complaint has been filed within a period of limitation, as provided under the Act. Section 139 of the Act, raises a presumption in favour of the opposite party no.2, that the said cheque was issued by the applicant in discharge of its legal liability, which can be rebutted by the applicant only during the trial. Disputed defence raised by the applicant, that the said cheque was issued earlier in point of time as a security, which has been denied by the opposite party no.2, cannot be adjudicated while exercising the powers u/S 482 of the Code. This is a disputed question of fact that has to be decided by the Trial Court after the evidence is led by the parties.

20. Therefore, in the considered opinion of this Court, the instant application has no merits and is accordingly **dismissed.**

(2024) 1 ILRA 891
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2023

BEFORE

THE HON'BLE DINESH PATHAK, J.

Application U/S 482. No. 6533 of 2023

Virendra Kumar Kushwaha & Ors. ...Applicants

Versus

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

Counsel for the Applicants:
Sri Raj Kumar Kesari

Counsel for the Opposite Parties:
G.A., Sri Deepesh Kumar Ojha, Sri Prashant Drivedi

(A) Criminal Law – Criminal Procedure Code, 1973 - Section – 200, 202, 482 – Protection of Women from Domestic Violence Act, 2005 – Section 2(f), 2(q), 3, 5, 12, 18, 19, 20 & 22, 23 - Application u/s 482 CrPC – filed to challenge the summoning order and the impugned interim maintenance order – marriage was solemnized between applicant no. 1 and respondent no. 2 in 2019 – wife alleged dowry harassment and physical abuse by husband and in-laws – complaint filed u/s 12 of DV Act – summons were issued to all applicants – further direction were issued to District Probation Officer (DPO) to conduct inquiry – DPO recorded Statements and submitted the report – trial court passed ex-parte interim maintenance order of Rs. 3000/- per month in favour of respondent no. 2 (wife) – instant application - applicants argued allegations were omnibus, vague, and lacked specific instances, especially against applicant nos. 4 and 5 (sisters-in-law) who were living separately – applicant no. 4 employed as nurse in Noida, applicant no. 5 married and residing with her in-laws – Court finds that, allegations against applicant nos. 4 and 5 were casual and perfunctory – by relying on the Supreme Court judgment in Preeti Gupta Vs St. of Jharkhand, court held that, continuing proceedings against applicant nos. 4 and 5 would amount to abuse of process – hence, proceedings against applicant nos. 4 and 5 is quashed – proceedings to continue against applicant nos. 1, 2, and 3 – interim maintenance order upheld – applicants granted liberty to file detailed objections and adduce evidence before trial court within three weeks – directions issued accordingly – application is partly allowed. (Para – 24, 25, 26, 28, 29)

Application Partly Allowed. (E-11)

List of Cases cited:

1. Sandhya Manoj Wankhede Vs Manoj Bhimrao Wankhede, (2011) 3 SCC 650,

2. R.P. Kapur Vs St. of Punj. : AIR 1960 SC 866;

3. St. of Har. & ors. Vs Bhajan Lal & ors. : 1992 Supp (1) SCC 335;

4. Trisuns Chemical Industry Vs Rajesh Agarwal & ors. : (1999) 8 SCC 686 3;

5. M. Krishnan Vs Vijay Singh & anr. : (2001) 8 SCC 645;

6. Joseph Salvaraj A. Vs St. of Guj. & ors.: (2011) 7 SCC 59;

7. Arun Bhandari Vs St. of U.P. & ors. : (2013) 2 SCC 801;

8. Anand Kumar Mohatta & anr. Vs State (NCT of Delhi), D/o Home & anr. - (2019) 11 SCC 706,

9. Gian Singh Vs St. of Punj., (2012) 10 SCC 303,

10. Mohd. Allauddin Khan Vs St. of Bihar & ors., 2019 (6) SCC 107,

11. Chilakamarthi Venkateswarlu & anr. Vs St. of A.P. & anr.- SLP (Crl.) No.10762 of 2018,

12. Priti Saraf & anr. Vs St. of NCT of Delhi & anr.- 2021 SCC Online SC 206,

13. St. of Har. & ors. Vs Bhajan Lal & ors., (1992 Suppl (1) SCC 335).

14. Arnab Manoranjan Goswami Vs St. of Mah. & ors., 2020 SCC Online SC 964,

15. M/s Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah. & ors. - AIR 2021 SC 1918,

16. Geeta Mehrotra Vs St. of U.P., (2012)10 SCC 471

17. Kahkashan Kausar @ Sonam Vs St. of Bihar, (2022) 6 SCC 599,

18. Preeti Gupta & anr. Vs St. of Jhark. & anr., (2010) 7 SCC 667.

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri Raj Kumar Kesari, learned counsel for the applicants, Sri Prashant Dwivedi, learned counsel for the opposite party no.2 as well as learned AGA for the State.

2. The applicants have invoked the inherent jurisdiction of this Court assailing the impugned summoning order dated 5.4.2021 passed by the learned Civil Judge (Sr. Division), Kaushambi and order dated 3.12.2022 passed by the learned Civil Judge (Sr. Division)/ FTC/ ACJM Kaushambi under Section 23 of Protection of Women from Domestic Violence Act, 2005 (in brevity D.V.Act) in Complaint Case No. 369 of 2021 (Ritu Kumari Vs. Virendra Kushwaha & Ors.) under Section 12 of the D.V. Act.

3. Facts culled out from the avertments made in the instant application are that marriage of respondent no.2 was solemnized with applicant no.1 in the year 2019. It appears that owing to matrimonial bickering, respondent no.2 has moved a complaint dated 24.3.2021 against her husband and in-laws (mother-in-law, father-in-law and two sisters-in-law) under Section 12 of D.V. Act. The learned trial court, vide order dated 5.4.2021, has issued summons against the present applicants and directed the Probation/Protection Officer for submitting his report. In pursuance of the order dated 5.4.2021, the Probation/Protection Officer has submitted inquiry report/formal incident report dated 16.11.2021 in Form-I as required under Rule (5) of Domestic Violence Rules 2006. District Probation Officer in his report dated 16.11.2022 has mentioned the statements of complainant, husband, mother-in-law and father-in-law. During pendency of proceeding under Section 12 of D.V. Act, learned court has passed an ex-parte order dated 3.12.2022 under Section 23 of D.V. Act granting interim maintenance to the tune of Rs. 3000/- per mensem in favour the respondent no.2 (wife). Having been aggrieved, instant application has been filed assailing the order of interim maintenance dated 3.12.2022 and the summoning order dated 5.4.2021.

4. Learned counsel for the applicants has submitted that summoning order has illegally been issued in a very perfunctory manner without proper appreciating the facts of the complaint in the light of the provisions as enunciated under the D.V. Act. He has made emphasized on the maintainability of the present application against applicant nos. 4 and 5 who are sisters-in-law of respondent no.2. As per the averments made in the affidavit, applicant no.4 is unmarried sister-in-law and doing private job of Nurse at NOIDA, however, applicant no.5 is married and living separately with her in-laws. It is further submitted that learned court below has illegally assumed the income of the husband (applicant no.1) and granted interim maintenance to the tune of Rs. 3000/- per mensem without any justification. The applicant no.1 has no sufficient source of income to comply the order passed by the court below. It is further submitted that applicant no.1 is willing to keep his wife/respondent no.2 with him, however, she herself deserted the society of applicant no.1 and refused to live with him. It is next submitted that the order passed by the learned trial court is illegal and unwarranted under the law and tainted with regularities, therefore, the same is liable to be quashed.

5. Per contra, learned counsel for the respondent no.2 has vehemently opposed the submission of learned counsel for the applicant and contended that on the face of record, prima facie, the complicity of the present applicant in the commission of offence under D.V. Act cannot be ruled out. He has supported the summoning order dated 5.4.2021 and the order of interim maintenance dated 3.12.2022. It is next contended that considering the desertion of the respondent no.2, learned trial court has rightly passed the ex-parte order under Section 23 of D.V. Act in absence of applicant no.1 who has deliberately ignored the court proceeding despite the service of notice. The interim maintenance granted in favour of respondent no.2 to the tune of Rs.3000/- per mensem cannot be said to be exorbitant considering the notional income of applicant no.1. It is next contended that the present application is liable to be rejected being misconceived and devoid of merit.

6. Having considered the rival submissions advanced by the learned counsel for the parties and perusal of the record, it reveals that matrimonial status between applicant no.1 and respondent no.2 being husband-wife and the relationship of respondent no.2 with the applicant nos. 2 to 5 being in-laws have not been denied. In her complaint filed under Section 12 of D.V. Act, respondent no.2 has sought relief under Section 18,19, 20 and 22 of D.V. Act arraying the present applicants as respondents. Allegation of domestic violence has been levelled against respondents (applicants herein) in perfunctory manner without referring any particular incident of domestic violence attributing to any of them. The Probation/Protection Officer, while submitted his report, has recorded the statement of complainant (respondent no.2 herein) and the statements of respondent nos. 1,2 and 3 of the complaint (applicant nos. 1, 2, and 3 herein) to show his prima facie satisfaction qua cognizance of the case under Section 12 of D.V. Act. In clause-2 of the report as submitted in Form-I under Section 5(1) of the Domestic Violence Rules, names of all the applicants are mentioned. In clause-4, date of violence has been shown to be March 24, 2021 which was allegedly commissioned against the Ritu Kumari, (respondent no.2) wherein, as mentioned in remark column, she has allegedly been abused and pounded. Nature of violence has been shown as a demand of dowry, harassment, insult, radical and humiliation etc. A four wheeler and cash amounting Rs. 1 lakh has been also shown to be demanded from the respondent no.2. In her statement recorded before the District Probation Officer, she has stated that her marriage was solemnized with the applicant no.1 on 9.3.2019 according to hindu rites and rituals. Her father has expended about Rs. 8 lakhs in marriage which includes one lakh cash given in Tilak ceremony. In marriage ceremony, two gold finger rings, one motorcycle along with household goods and Stridhan have been gifted as well. While she came her in-laws house, one four wheeler and cash amounting Rs.1 lakh has been demand by her husband, father-in-law, mother-in-law and two sisters-in-law. She has been abused, thrashed and thrown out from her matrimonial house on 16.1.2021 for want of fulfillment of dowry. In the meantime, she gave birth to a boy on 28th September, 2020 out of wedlock with applicant no.1. Behavior of husband was not good towards the child to whom he disown and expressed his desire to solemnize second marriage. It is further stated by respondent no.2 that all her in-

laws, as arrayed in the complaint being respondents, have thrashed, abused and kicked her out for demand of additional dowry. She has narrated her ordeals to her parents who came and took her along with her child in private vehicle. Thereafter, she made a complaint of such incident in women police station, where both the parties have been called upon for amicable settlement, however, husband has refused to toe the line, therefore, she has resorted to legal recourse. As per her statement, husband (applicant no.1) is earning about Rs.30,000/- per month by operating Autorikshaw and running a Kharad shop.

7. Husband, respondent no.1 (applicant no.1 herein) has stated before District Probation Officer that the complainant was not happy with the marriage and used to said that the marriage has been solemnized against her own volition. She was interested to marry with some other boy, however, he used to ignore all these facts. Despite birth of a boy child, no change emanates in her behavior. On 18.01.2021, she took one neckless, payal, math bindiya (forehead dot), rings, waist belt, six payal chain and Rs.10,000/- cash from the almirah of the house and went to her maternal home without informing to her husband and in-laws. On 17th March, 2021, he along his mother went to the maternal house of the complainant to bring her back, however, her parents have misbehaved and refused to sent the complainant along with them. On a complaint moved by the complainant in women police station, applicant no.1 has been called upon and, after settlement, she became ready to live with the applicant no.1 and made promise that she will go to her matrimonial house on April 2, 2021, however, on the said date, she did not turn up. Applicant no.1 has instituted a case for restitution of conjugal rights under Section 9 of Hindu Marriage Act. He has never harassed physically and mentally to his wife for demand of dowry. He is still ready to keep his wife with him.

8. Applicant no.2 being respondent no.2 in the complaint (father-in-law) has made his statement that marriage of the applicant no.1 and respondent no.2 was solemnized without any dowry. She was not happy with the marriage on the pretext that her marriage was solemnized without her own volition. She fled to her maternal home along with her Stridhan, however, ever after several efforts being made she any how returned to her in-laws house. On 18.1.2021 she again went to her maternal home without informing to any one. On 17th March, 2021, while his son went to bring complainant back, she refused to come with him. Despite the amicable settlement took place in the women police station she never turned up. His son has filed a case of restitution of conjugal rights under Section 9 of Hindu Marriage Act. He has further stated that she has never been tortured or harassed for demand of dowry and a false case has been instituted against the applicants. His daughter is residing in NOIDA.

9. Applicant no.3, who is respondent no.3 in the complaint, (mother-in-law) has reiterated the facts as stated by her husband (applicant no.2) that the false and malicious prosecution has been instituted by respondent no.2 who has never been subjected to torture and cruelty for demand of dowry. Despite best efforts being made by applicants, respondent no.2 has refused to come back to her matrimonial house. Her daughter is residing in NOIDA and doing job of nursing in J.P. Hospital.

10. Applicant Nos. 4 and 5 (respondent nos. 4 and 5 in complaint), sisters-in-law of the respondent no.2, have not appeared before the District Probation Officer to get their statements recorded. District Probation Officer has observed that despite notices have been sent thrice, they did not turn up.

11. Considering the contents of the application under Section 12 D.V. Act, in light of the report submitted by the District Probation Officer and the statement of the complainant made before the District Probation Officer, it reveals that the names of all the family members of the husband has been taken by the complainant in casual manner on omnibus allegations without citing any particular incident attributing to any of the respondents (applicants herein). Mere domestic relationship between the parties is not sufficient to inculpate the person who is in the domestic relation with aggrieved person unless there is a specific incidents of domestic violence as defined under Section 3 of the D.V. Act. The District Probation Officer has submitted the domestic incident report form-1 in printed format wherein illustrations of the domestic violation are already mentioned and over some of the illustrations tick marks are made. In her statement, respondent no.2 has not whispered any particular incident as to how she has been subjected to the verbal and emotional abuse as marked in the form-1 by her in-laws who have been arrayed as respondents in the complaint.

12. Under Section 2(q) of the D.V. Act, phrase "respondent" has been defined wherein any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act will come within definition of respondent. As per dictum of the Hon'ble Apex Court in the matter **Sandhya Manoj Wankhede Vs. Manoj Bhimrao Wankhede, (2011) 3 SCC 650**, female relatives of husband are fall as well under the definition of respondent. The applicants herein, who have been arrayed as respondents in the complaint, may be treated to be a person under the definition of the respondents as enunciated under Section 2(q) of the D.V. Act, however, mere arraying the present applicants, particularly applicant nos. 4 & 5, being respondents in complaint, against whom aggrieved person (respondent no.2) has sought relief under D.V. Act, cannot be treated to be a paramount consideration for initiation of the penal proceeding unless case of the domestic violence as enunciated under Section 3 of the D.V. Act, prima facie, is made out and domestic relationship, as defined under Section 2 (f) of the D.V. Act is established with the aggrieved person from the complaint coupled with the domestic incident report submitted by the District Probation Officer.

13. Notably, complainant (respondent no.2) has named the family member of her husband including him by referring their names in a casual manner based on omnibus allegations, particularly names of the respondent nos. 4 and 5, sisters-in-law of respondent no.2, who are residing separately. Respondent no.4 is a Nurse by profession and doing a job in a hospital at NOIDA and respondent no.5 is married women living alongwith her in-laws. In this backdrops of the case, learned counsel for the applicant has urged to allow this application and rejected the complaint under Section 12 of the D.V. Act, so far as, it relates to the applicant nos. 4 and 5.

14. The power conferred under Section 482 Cr.P.C. is very specific and wide to secure the ends of justice or to prevent the abuse of the process of any Court or to make such orders as may be necessary to give effect to any order under this Code. No provision of this Code is deemed to limit or effect such inherent power of the High Court.

15. It has been held by the Apex Court in the cases of **R.P. Kapur Vs. State of Punjab : AIR 1960 SC 866; State of Haryana and Ors. Vs. Bhajan Lal and Others : 1992 Supp (1) SCC 335; Trisuns Chemical Industry Vs. Rajesh Agarwal and Ors. : (1999) 8 SCC 686 3; M. Krishnan Vs. Vijay Singh & Anr. : (2001) 8 SCC 645; Joseph Salvaraj A. Vs. State of Gujarat and Ors. : (2011) 7 SCC 59; Arun Bhandari Vs. State of Uttar Pradesh and Ors. : (2013) 2 SCC 801; Anand Kumar Mohatta and Anr. Vs. State (NCT of Delhi), Department of Home and Anr. : (2019) 11 SCC 706** that exercise of inherent power of the High Court under Section 482 of the Code of Criminal Procedure is an exceptional one. Great care should be taken by the High Court before embarking to scrutinise the complaint/FIR/charge-sheet in deciding whether the rarest of the rare case is made out to scuttle the prosecution in its inception.

16. In the case of Gian Singh vs. State of Punjab, (2012) 10 SCC 303, Hon'ble Supreme Court has made the following observation in Paragraph 61 which is quoted herein below :-

"61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or an FIR or a complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plentitude with no statutory limitation but it has to be exercised in accord with the guideline en-grafted in such power viz.: (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court."

17. In Criminal Appeal No. 675 of 2019 arising out of **SLP (Crl.) No. 1151 of 2018, Mohd. Allauddin Khan v. State of Bihar and others, 2019 (6) SCC 107**, the Apex Court has held that the High Court had no jurisdiction to appreciate the evidences of the proceedings under Section 482 Cr.P.C. because where there are contradictions or the inconsistencies in the statements of the witnesses, is essentially an issue relating to appreciation of evidences and the same can be gone into by the Judicial Magistrate during trial, when the entire evidence is adduced by the parties. The same view has also been reiterated in judgment dated 31.07.2019 passed by Apex Court in Criminal Appeal No.1082 of 2019, arising out of **SLP (Crl.) No.10762 of 2018, Chilakamarthi Venkateswarlu and Another v. State of Andhra Pradesh and Another.**

18. In the case of **Priti Saraf & anr. Vs. State of NCT of Delhi & anr. Criminal Appeal No(s). 296 of 2021 (Arising out of SLP(Crl.) No(s). 6364 of 2019] (judgment dated March 10, 2021) : 2021 SCC Online SC 206** the Apex Court while considering the powers under Section 482 Cr.P.C. has held as follows:

"23. It being a settled principle of law that to exercise powers under Section

482 CrPC, the complaint in its entirely shall have to be examined on the basis of the allegation made in the complaint/ FIR/charge-sheet and the High Court at that stage was not under an obligation to go into the matter or examine its correctness. Whatever appears on the face of the complaint/FIR/charge-sheet shall be taken into consideration without any critical examination of the same. The offence ought to appear ex facie on the complaint/FIR/charge-sheet and other documentary evidence, if any, on record.

19. The scope and ambit of the inherent jurisdiction of the High Court under Section 482 CrPC has been examined in detail by Hon'ble Apex Court in **State of Haryana and Others Vs. Bhajan Lal and Others, (1992 Suppl (1) SCC 335).** The relevant para is mentioned hereunder:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bur engrafted in any of the provisions of the Code on 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 10 private and personal grudge."

20. It has been further elucidated recently by Hon'ble Apex Court in **Arnab Manoranjan Goswami Vs. State of Maharashtra and Others, 2020 SCC Online SC 964** where jurisdiction of the High Court under Article 226 of the Constitution of India and Section 482 CrPC has been analysed at great length.

21. Further, in the case of **M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others** reported in **AIR 2021 SC 1918**, Full Bench of the Apex Court while considering the powers of quashing under Section 482 of the Criminal Procedure Code and/or Article 226 of the Constitution of India has illustrated the circumstances under which quashing of a criminal case can be done and/or interim order can be granted.

22. The Hon'ble Supreme Court has shown his concern in number of cases qua institution of criminal proceedings against the husband and his relatives on omnibus allegations by referring their name in a casual manner. In the matter of **Geeta Mehrotra Vs. State of U.P., (2012)10 SCC 471** and the Case of **Kahkashan Kausar @ Sonam Vs. State of Bihar, (2022) 6 SCC 599,** Hon'ble Apex Court has expounded that omnibus allegation by referring the name of the relatives of the husband in a casual manner are not sufficient to implicate them in criminal cases. Considering the ratio decided by the Hon'ble Supreme Court in the given circumstances of the present case, I am of the considered view that inculpating the applicant nos.4 and 5 in the complaint, who are sisters-in-law of the respondent no.2, is not justifiable in the eye of law. Enforcing them to face trial in mechanical manner would amount of abuse of judicial process.

23. Applicant nos.1, 2 and 3 have come with the specific plea in their statement before the District Probation Officer that applicant no.4 is residing in NOIDA. In paragraph nos. 11 and 15 of the affidavit filed in support of instant application, applicants came with specific plea that respondent no.4 is unmarried and doing her job in NOIDA and with respect to the applicant no.5 it has clearly been mentioned that she is married woman living separately alongwith her in-laws. There is no specific denial in the counter affidavit to the averments made in paragraph nos. 11 and 15 of the affidavit filed in support of instant application. Moreover, in the connected application filed by the applicant nos. 1 to 4 herein being Application u/s 482 Cr.P.C. No. 10036 of 2022, they have assailed the summoning order passed against them under Section 498-A, 323 IPC and 3/4 D.P. Act. In the aforesaid matter, while passing the summoning order dated 14.09.2021, learned Magistrate has exempted the Rubi Kushwaha (applicant no.5 herein). In the said application as well, applicants have come with specific plea that Priya Kushwaha (applicant no.4) is doing job of Nurse in J.P. Hospital at NOIDA. In support of their contention, applicants have filed registration certificate of the applicant no.4 showing diploma in "General Nursing and Midwifery" which was issued on

14.12.20218 after completion of three years training course from September 2015 to September 2018. They have also filed Attendance Report and Certificate dated April 05, 2022 issued from the authority concerned of J.P. Hospital, NOIDA to show that since 14.09.2020 she was throughout working in J.P. Hospital NOIDA. In the attendance report she has been shown present on the date of alleged incident i.e. on 16.01.2021. In reply to an averment of the applicants in this regard as mentioned in paragraph no.12 of affidavit filed in support of the application under Section 482 Cr.P.C. No. 10036 of 2022, no specific denial has been made by the respondent no.2 in the counter affidavit. Marital status of the applicant no.4 and her professional work being a Nurse has not been specifically denied.

24. In the present matter as well, which is arising out of the proceeding under Section 12 of D.V. Act, the marital status of applicant no.5 and professional status of applicant no.4 as Nurse have not been denied by respondent no.2 in her counter affidavit. Respondent no.2 has made omnibus allegation against all the family members of her husband by referring their names casually in her statement before the District Probation Officer, who has recorded her statement and submitted the domestic incident report in form-1, which is a printed format, as required under Section 5 of Domestic Violence Rules. In the matter of **Preeti Gupta and Another vs. State of Jharkhand and Another, (2010) 7 SCC 667, t**he Hon'ble Supreme Court has acknowledged the tendency to implicate the husband and all his immediate relatives in complaint arising out of matrimonial discord. Hon'ble Supreme Court has expounded that the court's have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities in the consideration while dealing with the matrimonial cases, as allegations of harassment by husband's close relatives, who are living in different city and never visited or rarely visited the place where the complainant resided, would add an entirely different complexion and such allegations would have to be scrutinized with great care and circumspection. In the given circumstances it is a specific case of applicants that the applicant no.4 is doing job being a Nurse in J.P. Hospital at NOIDA and applicant no.5 is a married woman and residing with her in-laws at matrimonial house. There is no justification to force the applicant nos.4 and 5 to face complicated penal provisions under the D.V. Act in a mechanical manner on the basis of omnibus allegation as allegedly mentioned by the respondent no.2 in perfunctory manner. Sisters-in-law who are residing outside and managing their own affairs could hardly be believed to abuse respondent no.2 verbally or emotionally for the purpose of making out a case of domestic violence as enunciated under Section 3 of D.V. Act. No particular instance has been given attributing to the overt act of applicant nos.4 and 5 to make out a case of domestic violence against them. In the complaint under Section 12 of the D.V. Act nothing has been whispered against the present applicants except arraying them in the cause title of the complaint. Even before the District Probation Officer no specific allegation has been made against applicant Nos. 4 & 5. Names of all the applicants have been taken in casual manner to anyhow trap them in the complication of the legal provisions as enunciated under the D.V. Act. Inculpating the present applicants under the D.V. Act is nothing but to abuse of process of the court

which is, in my opinion, liable to be discouraged to secure the ends of justice.

25. So far as granting an interim maintenance, by order impugned dated 3.12.2022, is concerned I found no illegality or perversity in the said order which has been passed ex-parte against the present applicant no.1. Perusal of the order-sheet of Case No. 369 of 2021, as appended with this application, reveals that the learned trial court has treated the services of notice sufficient upon respondent no. 1 to 5, vide order dated 19.4.2022, and by subsequent order dated 22.8.2022 matter was ordered to be proceeded ex-parte against the present applicants by stopping their opportunity of defence. Vide order dated 2.11.2022, further date was fixed for ex-parte evidence of the complainant. In the affidavit filed in support of the instant application, applicants have not whispered anything qua ex-parte proceedings. They have simply assailed the order dated 3.12.2022 qua amount of interim maintenance. Considering the high price of living the amount of Rs. 3000/- per mensem cannot be said to be exorbitant. Learned trial court has granted interim maintenance considering the notional income of the applicant no.1, prima facie, which cannot said to be excessive. He has still an opportunity to contest the case and put his defence before the trial court to prove his innocence.

26. In the peculiar facts and circumstances of the present case, I am of the considered view that the allegations as made against applicant nos. 4 and 5 are wholly insufficient and, prima facie, do not make out a case of domestic violence against them under the provision as enunciated in D.V. Act. Moreover, the allegation made against applicant nos.4 and 5 are far-fetched and improbable that no prudent person can conclude that there are sufficient grounds to proceed with the matter under the D.V. Act against the applicant nos.4 and 5. In effect, the matter in hand falls squarely in categories (1) and (5) as set out in the case of **Bhajan Lal (Supra)**. Permitting the proceeding to go on against the applicant nos.4 and 5 in such a situation would, therefore, result in clear and patent injustice. Therefore, it is fit case to quash the proceeding under D.V. Act in exercise of inherent jurisdiction under Section 482 Cr.P.C. so far as it relates to the applicant nos.4 and 5.

27. Resultantly, the instant application is **partly allowed** and summoning order dated 05.04.2021 passed by the learned Civil Judge (Senior Division) Kaushambi in Complaint Case No. 369 of 2021 under Section 12 of D.V. Act, so far as it relates to the applicant nos. 4 and 5, is here by quashed. Further proceeding will go on against the remaining applicant i.e. applicant nos. 1, 2 and 3.

28. It is made clear that the instant application is rejected against the order dated 03.12.2022 passed by Civil Judge (Senior Division)/F.T.C./Additional Chief Judicial Magistrate, Kaushambi under Section 23 of the D.V. Act, by which an interim maintenance has been granted in favour of the respondent no.2.

29. Before parting the matter, learned counsel for the applicants has prayed to give an opportunity to the present applicants for filing detailed objection in proceeding under Section 12 of D.V. Act and to issue a direction for expeditious disposal of the said proceeding. Though, the applicants have not assailed the order dated 22.8.2022 whereby the case was

ordered to be proceeded ex-parte and order dated 2.11.2022 whereby the complainant was permitted to adduce her evidence ex-parte,this Court is of the view, in the interest of justice, that it would be befitting to modify orders dated 22.8.2022 and 2.11.2022 to the extent that the opportunity may be given to the present applicants for filing their detailed objection and adduce the evidence in proceeding under Section 12 of D.V. Act. As such, in exercise of inherent power, in order to secure the ends of justice, the orders dated 22.8.2022 and 2.11.2022 are hereby modified to the extent that the present applicants are at liberty to file detailed objection and adduce evidence, if any, before the trial court in original proceeding under Section 12 of D.V. Act within a period of three weeks from today and the same shall be considered and decided in accordance with law after giving due opportunity of hearing to the parties concerned within statutory period as enunciated under Section 12 (5) of D.V. Act.

(2024) 1 ILRA 902
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2023

BEFORE

THE HON'BLE DINESH PATHAK, J.

Application U/S 482. No.10036 of 2022

Virendra Kumar Kushwaha & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Raj Kumar Kesari

Counsel for the Opposite Parties:
G.A.,Sri Prashant Dwivedi

Criminal Law – Criminal Procedure Code, 1973 - Sections 200, 202 & 482 – Indian Penal Code, 1860 - Sections 498-A & 323 - Dowry Prohibition Act, 1961 - Sections 3 & 4 - Application u/s 482 – for quashing the impugned summoning order – marriage was solemnized between applicant no. 1 and respondent no. 2 in 2019 – a complaint was filed by the wife in 2021 - levelling allegations of torture and cruelty for demands of dowry of a four-wheeler and Rs. 1 lakh in cash – she also alleged about repeated physical abuse, threats, and eventual expulsion from her matrimonial home - she also claimed her husband denied paternity of their child and threatened remarriage – Statement u/section 200 and 202 Cr.P.C. were recorded – issued summons by the Learned Magistrate against the applicants – instant application - plea taken that, the summoning order was based on vague and generalized allegations, amounting to false and malicious prosecution, with no specific role or incriminating material against them - especially against applicant no. 4, who lives separately and was wrongly implicated - The Court finds that the allegations against applicant no. 4 (sister-in-law), were vague, general, and unsupported by specific instances, especially since she was employed as a nurse in Noida and was proven to be at her workplace on the date of the alleged incident - Her implication appeared improbable and unjustified, amounting to over-implication and abuse of judicial process – hence, Court exercised its inherent powers under Section 482 CrPC to quash the summoning order against respondent no. 4 however, proceedings to be continue against the remaining applicants – held that, inherent powers should be exercised sparingly and only to prevent miscarriage of justice or abuse of process, which was not evident in this case – consequently, the application is partly allowed – directions issued accordingly. (Para – 15, 16, 17, 18, 19)

Application Partly Allowed. (E-11)

List of Cases cited:

1. Geeta Mehrotra Vs St. of U.P., (2012)10 SCC 471

2. Kahkashan Kausar @ Sonam Vs St. of Bihar, (2022) 6 SCC 599,

3. Rajesh Sharma & ors. Vs St. of U.P. & anr., (2018) 10 SCC 472,

4. Preeti Gupta & anr. Vs St. of Jharkhand & anr., (2010) 7 SCC 667.

5. Ramesh Vs St. of T.N. reported in (2005) SCC (Crl.) 735.

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri Raj Kumar Kesari, learned counsel for the applicants, Sri Prashant Dwivedi, learned counsel for the opposite party no.2 as well as learned AGA for the State and perused the record on board.

2. The applicants have invoked the inherent jurisdiction of this Court to quash the impugned summoning order dated 14.9.2021 passed by the Civil Judge (Jr. Division), Kaushambi in Complaint Case No. 368 of 2021 (Ritu Kumari Vs. Virendra & Ors.) under Sections- 498-A, 323 IPC and Section 3/4 of Dowry Prohibition Act (in brevity D.P. Act) Police Station- Karari, District-Kaushambi.1. Heard Sri Raj Kumar Kesari, learned counsel for the applicants, Sri Prashant Dwivedi, learned counsel for the opposite party no.2 as well as learned AGA for the State and perused the record on board.

3. Facts culled out from the avertments as made in the instant application supported by an affidavit are that the respondent no.2 (wife of the applicant no.1) has moved a complaint dated 24.3.2021 against her husband, mother-in-law, father-in-law and two sisters-in-law levelling allegation of torture and cruelty for demand of dowry with an averment that the marriage of the complainant was solemnized on 9.3.2019 with applicant no.1 in accordance with the hindu rites and rituals; that as per their capacity, family members of the complainant have given dowry and sent her with her-in-laws; that when she reached at matrimonial home she has been harassed for demand of four wheeler; that when she reached her maternal home, she narrated her ordeals qua the demand of four wheeler and Rs. 1 lakh cash, however, her family members have sent her back to the in-laws house by giving assurance that problem will be shorted out in some days; that family members of the complainant came at the residence of her in-laws and shown their inability to fulfill the demand of four wheeler and Rs. 1 lakh; that she has been beaten up many times and sent to her maternal house; that she has been subjected to torture and cruel behavior of her in-laws, however, in the meantime, she gave birth to a boy child on 28.9.2020; that for demand of dowry, she has been kicked out on 16.01.2021 by her in-laws from the house; that husband of the complainant has stated that the child is not born from his loin, therefore, he will not keep the complainant with him and he will solemnized second marriage; that the complainant has already moved a representation/application to the Police Station concerned and the Superintendent of Police, Kaushambi, however, till date no action has been taken, therefore, accused/respondents may be summoned and punished.

4. Learned Magistrate, after going through the contents of the complaint and the statement of the complainant under Section 200 Cr.P.C. and the statement of witnesses i.e. P.W.-1 and P.W.-2 under Section 202 Cr.P.C. has issued processed against the present applicants viz. husband, father-in-law, mother-in-law and one sister-in-law, exculpating Rubi Kushwaha

(another sister-in-law), under Sections 498-A, 323 IPC and Section 3/4 of D.P. Act vide its order impugned dated 14.9.2021.

5. Assailing the summoning order under challenge, learned counsel for the applicants (accused) has submitted that false and malicious prosecution has been made against the present applicants without any incriminating material on record and all the family members of the husband has illegally been roped in the criminal proceedings based on the general allegations and no specific instance has been given by the complainant attributing the accused concerned for making out a case of cognizable offence. It is further submitted that Priya Kushwaha (applicant no.4) has illegally been implicated being a sister-in-law who is residing in Noida and doing private job of Nurse, therefore, no case is made out against her. However, another sister-in-law namely Rubi Kushwaha, who was arrayed as an accused no. 5 in the complaint, has rightly been exempted from summoning. It is further submitted that no cognizable offence is made out against the present applicants. In support of his submissions learned counsel for the applicants has placed reliance on the cases of **Geeta Mehrotra Vs. State of U.P., (2012)10 SCC 471** and the Case of **Kahkashan Kausar @ Sonam Vs. State of Bihar, (2022) 6 SCC 599.**

6. Learned counsel for the respondent no.2 has vehemently opposed the submissions as raised by learned counsel for the applicants and contended that on the face of record, prima facie, the complicity of the present applicants in the commission of cognizable offence as narrated in the complaint cannot be ruled out. Clear cut allegation of torture and cruelty for demand of dowry has been levelled against all the accused-applicants who harassed the complainant during the period while she was residing in her matrimonial house. Learned counsel for the respondent no.2 has emphasized questionable conducted of the husband (applicant no.1) who has tortured and harassed the complainant by desoning her child on the pretext that child was not born from his loin. The husband has through out threatened the complainant to desert her and solemnize second. It is further contended that decision of Hon'ble Supreme Court as relied upon by the learned counsel for the applicants are distinguishable and are not fully applicable in the facts and circumstances of the present case. It is further contended that innocence of the present applicants as is being tried to put forward before this Court by the learned counsel for the applicants is a matter of trial and same cannot be inferred at this juncture in exercise of inherent jurisdiction under Section 482 Cr.P.C. It is next contended that the instant application is liable to be dismissed being misconceived and devoid of merits.

7. Having considered the rival submissions advanced by learned counsel for the parties and perusal of the record, it is manifested that there is admitted relationship between the applicant no.1 and respondent no.2 (complainant) being husband and wife. Showing her plights suffered after the marriage at the in-laws house, respondent no.2 has filed a complaint levelling allegation of torture and cruelty for demand of dowry against all the family members of her husband. Perusal of the complaint reveals that general allegations have been made against the husband, mother-in-law, father-in-law and two sisters-in-law by referring their names in a very casual manner. They have been blamed for harassing the complainant

for demand of four wheeler and Rs. 1 lakh cash in the nature of dowry. It is apposite to mention that in the complaint both sisters-in-law, namely Priya Kushawaha and Rubi Kushwaha have been inculpated as accused nos.4 and 5. However, while issuing process, Rubi Kushwaha has been exculpated on the ground that she is married and her name has not been taken by the complainant in her statement made under Section 200 Cr.P.C. Learned court below has observed that complainant has taken the names of her husband, mother-in-law, father-in-law and one of the sister-in-law, namely Priya Kushwaha, except the name of another sister-in-law namely Rubi Kushwaha, with an allegation that they all harassed her for demand of dowry.

8. Shukrulal (P.W.-1), father of the complainant, has also levelled general allegation of cruelty and torture for demand of dowry with an averment that his daughter has through out being harassed by her in-laws for demand of four wheeler and Rs. 1 lakh cash. She along with her baby in her lapse has been thrown out from in-laws house. Shivbabu (P.W.-2), brother-in-law of the father of the complainant, has supported the case of the complaint and he has levelled similar allegation as well. Learned Civil Judge (Jr. Division), vide order impugned dated 14.9.2021, has issued process against the present applicants under Sections- 498-A, 323 IPC and Section 3/4 of D.P. Act, after considering the statements recorded under Sections 200 Cr.P.C and 202 Cr.P.C.

9. Considering misuse of provisions relating to the matrimonial discord and significant increasement of the matrimonial litigation, Hon'ble Supreme Court at several occasions has tried to restrict the law relating to the matrimonial dispute on the ground of omnibus allegations against in-laws. In the matter of **Rajesh Sharma and Others Vs. State of U.P. and Another, (2018) 10 SCC 472**, Hon'ble Supreme Court has expressed his concerned qua misuse of provisions as enunciated under Section 498-A IPC with an observation that Section 498-A IPC was inserted in the statute with the laudable object of punishing cruelty at the hands of husband or his relatives against a wife particularly when such cruelty had potential to result in suicide or murder of a woman as mentioned in the statement of Objects and Reasons of the Act 46 of 1983. The expression 'cruelty' in Section 498-A IPC covers conduct which may drive the woman to commit suicide or cause grave injury (mental or physical) or danger to life or harassment with a view to coerce her to meet unlawful demand. It is a matter of serious concern that large number of cases continue to be filed under already referred to some of the statistics from the Crime Records Bureau. Hon'ble Apex Court further observed that this Court had earlier noticed the fact that most of such complaints are filed in the heat of the moment over trivial issues. Many of such complaints are not bona fide. At the time of filing of the complaint, implications and consequences are not visualized. At times such complaints lead to uncalled for harassment not only to the accused but also to the complainant. Uncalled for arrest may ruin the chances of settlement.

10. The Hon'ble Supreme Court in the matter of **Preeti Gupta and Another vs. State of Jharkhand and Another, (2010) 7 SCC 667** has tried to highlight the tendency in the present scenario to implicate the husband and all his immediate relatives in matrimonial litigation, therefore, it is expected that

while dealing such matters, learned members of the Bar must discharged their duties to the best of their ability to ensure that social fabric, peace and tranquility of the society remains intact. It has been observed that it is matter of common experience that most of the complaints under Section 498-A IPC are filed on 'spur of the moment' over the matrimonial bickering.

11. Considering the several judgments of its Court in the matter of Khakashan Kausar (supra), Hon'ble Supreme Court has shown his concerned over misuse of the provisions enunciated under Section 498-A IPC as well. The relevant paragraph nos. 18 and 19 of the aforesaid judgment is quoted herein below:

"*18. The above-mentioned decisions clearly demonstrate that this court has at numerous instances expressed concern over the misuse of Section 498-A IPC and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long term ramifications of a trial on the complainant as well as the accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them.*

19. Coming to the facts of this case, upon a perusal of the contents of the FIR dated 01.04.19, it is revealed that general allegations are levelled against the Appellants. The complainant alleged that 'all accused harassed her mentally and threatened her of terminating her pregnancy'. Furthermore, no specific and distinct allegations have been made against either of the Appellants herein, i.e., none of the Appellants have been attributed any specific role in furtherance of the general allegations made against them. This simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations are therefore general and omnibus and can at best be said to have been made out on account of small skirmishes. .....".

12. In the matter *Geeta Mehrotra (supra)*, as relied upon by the learned counsel for the applicants, brother-in-law and sister-in-law of the complainant has approached before Hon'ble Supreme Court on the ground that they have been illegally inculpated in the alleged offence on the basis of bald allegations and their names have been surfaced casually without attributing any incident. While deciding the matter, Hon'ble Supreme Court has considered the case of Ramesh Vs. State of Tamil Nadu reported in (2005) SCC (Crl.) 735 in para no. 15 to 17 of it's judgment, wherein Hon'ble Supreme Court has held that bald allegation made against the sister-in-law by the complainant appeared to suggest anxiety of the informant to rope in as many as of the husband's relatives as possible. It has also been observed that neither FIR nor charge-sheet furnished legal basis for the Magistrate to take cognizance of the offences alleged against the applicants. Hon'ble Supreme Court has quashed the proceedings against the married sister-in-law who undisputedly

not living with the family of the complainant's husband.

13. The Hon'ble Supreme Court while deciding the case of *Geeta Mehrotra (Supra)* has quashed the entire criminal proceeding initiated against the brother-in-law and sister-in-law on the ground that casual omnibus allegations have been made against the relatives of the husband. The relevant paragraph Nos. 19,20,23 and 24 is quoted here-under:

"19. Coming to the facts of this case, when the contents of the FIR is perused, it is apparent that there are no allegations against Kumari Geeta Mehrotra and Ramji Mehrotra except casual reference of their names who have been included in the FIR but mere casual reference of the names of the family members in a matrimonial dispute without allegation of active involvement in the matter would not justify taking cognizance against them overlooking the fact borne out of experience that there is a tendency to involve the entire family members of the household in the domestic quarrel taking place in a matrimonial dispute specially if it happens soon after the wedding.

20. It would be relevant at this stage to take note of an apt observation of this Court recorded in the matter of G.V. Rao vs. L.H.V. Prasad & Ors. reported in (2000) 3 SCC 693 wherein also in a matrimonial dispute, this Court had held that the High Court should have quashed the complaint arising out of a matrimonial dispute wherein all family members had been roped into the matrimonial litigation which was quashed and set aside. Their Lordships observed therein with which we entirely agree that:

"there has been an outburst of matrimonial dispute in recent times. Marriage is a sacred ceremony, main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate the disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their cases in different courts." The view taken by the judges in this matter was that the courts would not encourage such disputes.

23. ....., yet in the instant matter the factual position remains that the complaint as it stands lacks ingredients constituting the offence under Section 498-A and Section 3/4 Dowry Prohibition Act against the appellants who are sister and brother of the complainant's husband and their involvement in the whole incident appears only by way of a casual inclusion of their names. Hence, it cannot be overlooked that it would be total abuse of the process of law if we were to remand the matter to the High Court to consider whether there were still any material to hold that the trial should proceed against them in spite of absence of prima facie material constituting the offence alleged against them.

*24. However, we deem it appropriate to add by way of caution that we may not be misunderstood so as to infer that even if there are allegation of overt act indicating the complicity of the members of the family named in the FIR in a given case, cognizance would be unjustified but what we wish to emphasize by highlighting is that, if the FIR as it stands does not disclose specific allegation against accused more so against the co-accused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the named accused in the FIR to undergo the trial unless of course the FIR discloses specific allegations which would persuade the court to take cognisance of the offence alleged against the relatives of the main accused who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. It is the well settled principle laid down in cases too numerous to mention, that if the FIR did not disclose the commission of an offence, the court would be justified in quashing the proceedings preventing the abuse of the process of law. Simultaneously, the courts are expected to adopt a cautious approach in matters of quashing specially in cases of matrimonial dispute whether the FIR in fact discloses commission of an offence by the relatives of the principal accused or the FIR prima facie discloses a case of over-implication by involving the entire family of the accused at the instance of the complainant, who is out to settle her scores arising out of the teething problem or skirmi*sh of domestic bickering while settling down in her new matrimonial surrounding.

14. Considering the ratio decided by the Hon'ble Supreme Court, as discussed above, in the given circumstances, I am of the considered view that learned Magistrate has hurriedly issued the process against all the family members of the husband without properly scrutinizing the gravity of omnibus allegations and without recording his satisfaction qua occurrence of cognizable offence against all of them particularly sister of the husband (applicant No.4).

15. Perusal of the complaint evince the omnibus allegations made against all the applicants herein by referring their names in a casual manner with an allegation of demanding four wheeler and Rs.1 lakh cash in the nature of dowry. However, in her statement recorded under Section 200 Cr.P.C., she has simply stated that she has been harassed for demand of dowry. No specific allegation has been made for demand of four wheeler and case amounting Rs.1 lakh. She has made specific allegation against her husband that he has threatened the complainant to solemnize second marriage. P.W.-1 and P.W.-2 in their statements under Section 202 Cr.P.C. have supported the case of the complainant wherein complainant has allegdly been harassed for demand of four wheeler and cash amounting Rs. 1 lakh. Both the witnesses have made general allegation against all family members of the husband (applicants herein) including Rubi Kushwaha (another sister-in-law) taking their names casually without citing any particular instance attributing to their overt act in furtherance of the general allegations made against them. Rubi Kushwaha has been exempted in the summoning order on the ground that her name has not specifically been taken by the

complainant in her statement under Section 200 Cr.P.C.

16. Applicant no.4 (sister of husband) is doing her job being Nurse in Noida and hardly resides with her family members including respondent no.2. In paragraph no.12 of the affidavit filed in support of the instant application, it has clearly been mentioned that applicant no.4 (Priya Kushwaha), who is sister-in-law of the complainant, is a Nurse by profession and she was continuously discharging her duties at J.P. Hospital, Noida since 14.09.2020. In support of this averments, relevant documents relating to presence of the applicant no.4 at her work place being a Nurse have been filed, obtained from J.P. Hospital. Respondent no.2 has made a evasive denial in paragraph no.8 of the counter affidavit with simple averments of 'not admitted'. Unmarried status of applicant no.4 and her professional carrier being a Nurse has not been denied in the counter affidavit. Copy of the nursing certificate dated 14.12.2018 and copy of the attendance report showing presence of the applicant no.4 in the hospital have collectively being filed as annexure no.5 to the affidavit filed in support of the instant application. Registration certificate dated 14.12.2018 of diploma in General Nursing and Midwifery, reveals that she had conducted three years training course since September, 2015 to September, 2018. The official concerned of the J.P. Hospital has issued a certificate dated 5.4.2022 to the effect that she was continuously working in the hospital since September 14, 2020. In paragraph no.8 of the complaint dated 24.3.2021 allegation has been levelled against all the family members including the applicant no.4 that on 16.1.2021, they had thrashed the respondent no.2 and kicked her out from the matrimonial house. Photostat copy of the attendance report (Page Nos. 50 and 51 of the paper book) reveals that on the alleged incident dated 16.1.2021 she was present at her work place i.e. J.P. Hospital, Noida. In light of the certificate dated April 5, 2022 issued by the authority concerned by the J.P. Hospital and the attendance report, the complicity of the applicant No.4 in the commission of crime allegedly took place on 16.1.2022 appears to be improbale. Even otherwise, it would be difficult to believe for a prudent person that a professional lady working in a hospital was involved in harassing the respondent no.2 for demand of four wheeler and cash amounting Rs. 1 lakh in nature of dowry. Applicant no. 4 has been inculpated in a general way along with other family members.

17. Complaint filed by respondent no.2 and the statements made under Section 200 Cr.P.C. and 202 Cr.P.C., prima facie, reveals that name of the applicant no.4 has casually been referred along with other co-accused in a matter arising out of matrimonial bickering sans citing any specific instance attributing to her. Complaint, prima facie, discloses a case of over implication by involving the entire family of the husband at the instance of the complainant. Forcing the applicant no.4 (sister-in-law) mechanically to face trial would not be befitting in the eyes of law and would amount a clear abuse of legal and judicial process inasmuch in the complaint as it stands, in my opinion, no cognizable offence is made out against applicant no.4 under Sections- 498-A, 323 IPC and Section 3/4 of D.P. Act. She has been named casually based on omnibus allegations without showing her active involvement in the matter to make out a

case of cognizable offence under the sections, in which process has been issued by the court competent against her.

18. In this conspectus, as above, I am of the considered opinion, that justifiable ground is made to allow the instant application in part in exercise of inherent power under Section 482 Cr.P.C. to prevent the abuse of process of court and to secure the ends of justice, so far as it relates to the applicant no.4 (sister-in-law).

19. Accordingly, instant application is **partly allowed** and impugned summoning order dated 14.9.2021 is hereby quashed, in part, so far as it relates to the applicant no.4 Priya Kushwaha (sister-in-law).

20. So far as remaining applicants are concerned, they will face trial in pursuance of the order impugned dated 14.9.2021.

21. It is made clear that any observations made by the Court, while deciding the instant application in the order of the date, shall not affect the merits of the case which will be decided on its own merits against the remaining applicants.

(2024) 1 ILRA 910
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 10364 of 2023

Mohit Kumar & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Anil Kumar Awasthi

Counsel for the Opposite Parties:
G.A., Ankit Tripathi. Bhupendra Singh Bisht

Criminal Law - Indian Penal Code, 1860 - Sections 302 & 120-B - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 - Section 3(2) (v) - Opposite party no.2 lodged FIR against four persons, including applicant no.1 (excluding applicant no.2), alleging that her daughter killed by accused by hanging her from tree while she & anr. girl returning from fields - After investigation, charge sheet filed against co-accused persons, noting that investigation was continuing - Subsequently, second charge sheet submitted against same co-accused, stating that involvement of other co-accused could not be established during investigation - By impugned order, trial court took cognizance of offences under aforesaid Sections against applicants along with co-accused named in charge sheet - St.ments of other girl who accompanied deceased at time of incident under Sections 161 and 164 Cr.P.C. implicating applicants ignored by Investigating Officer - Court held that plea of false implication of applicant's family cannot be examined at this stage and shall be decided by trial court after giving opportunity to parties to lead their evidence. (Para 4, 5, 6, 15)

Application Dismissed. (E-13)

List of Cases cited:

1. Nahar Singh Vs St. of U.P., (2022) 5 SCC 295 : 2022 SCC OnLine SC 332, (Paras 29, 30)

2. Dharam Pal Vs St. of Har., (2014) 3 SCC 306, (Paras 34, 35)

3. C.B.I. Vs Aryan Singh, 2023 SCC Online SC 379

4. Manik B Vs Kadapala Sreyes Reddy & ors. SLP (Crl.) No. 2924 of 2023 decided on 07.08.2023, (Paras 6 to 8)

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

1. Heard Sri Anil Kumar Awasthi, the learned counsel for the applicants, Sri

Anurag Verma, the learned A.G.A.-I appearing on behalf of the State and Sri Ankit Tripathi, the learned counsel for the informant/opposite party no.2.

2. In compliance of the order dated 20.12.2023 Sri Udai Raj Singh, Circle Officer, Biswan, District Sitapur/Investigating Officer of the case is present in person. He has filed a supplementary counter affidavit annexing therewith copy of the relevant extracts of general diary. The State had already filed a counter affidavit and the applicant has filed a rejoinder affidavit in response to the same.

3. By means of the instant application under Section 482 Cr.P.C. the applicants have challenged the order dated 21.09.2023, passed by the learned Special Judge (POCSO Act)/Additional Sessions Judge, Court no.14, Sitapur in Case Crime No.215 of 2023: State Vs. Abhijeet Mishra @ Chotakke, under Sections 302, 120-B I.P.C. and Section 3 (2) 5 SC/ST Act, Police Station Mishrikh, District Sitapur, whereby the learned trial court has taken cognizance of offences under Section 302, 376 I.P.C. and Section 3 (2) (v) of SC/ST Act and Section 3/4 POCSO Act by co-accused Abhijit Mishra and commission of offences under Sections 302 & 120-B I.P.C. and Section 3 (2) 5 SC/ST Act by the co-accused Ashok Mishra and cognizance of Sections 302 & 120-B I.P.C. and Section 3 (2) 5 SC/ST Act has been taken against the applicants also although their names were not included in the charge sheet.

4. Briefly stated the facts of the case are that the opposite party no.2 had lodged an F.I.R. dated 26.05.2023 against four persons including the applicant no.1 and not including the applicant no.2 stating that her daughter had gone along with another girl to a fields to attend the call of nature and while she was returning, the accused persons killed her by hanging her from a tree. After investigation a charge-sheet was submitted on 25.07.2023 against the co-accused Ashok Mishra and Abhijit Mishra only and it was mentioned in it that the investigation was still continuing. Thereafter, another charge sheet was submitted on 17.09.2023 against those co-accused persons only and it was stated in the second charge sheet that the implication of the other co-accused persons could not be established during investigation.

5. By means of the impugned order dated 21.09.2023, the learned trial court has taken cognizance the of offences committed by the two co-accused persons against whom a charge sheet has been submitted and at the same time the cognizance of the offences under Sections 302 & 120-B I.P.C. & Section 3 (2) 5 SC/ST Act committed by the applicants has also been taken.

6. The learned trial court has mentioned in the impugned order that the other girl who was accompanying the deceased at the time of the incident had implicated the applicants in her statement recorded by the Investigating Officer under 161 Cr.P.C., as also in her statement recorded by the Magistrate under Section 164 Cr.P.C. and the Investigating Officer has ignored the aforesaid material evidence.

7. The learned trial court has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Nahar Singh Vs. State of U.P.,** (2022) 5 SCC 295, wherein the Hon'ble Supreme Court has

held that the trial court may summon any person, even if he is not named in the police report, in case it appears that on the basis of material available on record, the involvement of that person in commission of offence is prima facie established.

8. In **Dharam Pal v. State of Haryana,** (2014) 3 SCC 306, a Constitution Bench of the Hon'ble Supreme Court held that

"34. The view expressed in Kishun Singh versus State of Bihar, (1993)2 SCC 16, in our view, is more acceptable since, as has been held by this Court in the cases referred to hereinbefore, the Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report, which power the Sessions Court does not have till the Section 319 stage is reached. The upshot of the said situation would be that even though the Magistrate had powers to disagree with the police report filed under Section 173(2) of the Code, he was helpless in taking recourse to such a course of action while the Sessions Judge was also unable to proceed against any person, other than the accused sent up for trial, till such time evidence had been adduced and the witnesses had been cross-examined on behalf of the accused.

35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) CrPC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter."

9. The Constitution Bench Judgment in the case of Dharam Pal (Supra) has been followed in **Nahar Singh v. State of U.P.,** (2022) 5 SCC 295 : 2022 SCC OnLine SC 332, wherein the Hon'ble Supreme Court held that: -

"29. *In Raghubans Dubey v. State of Bihar, AIR 1967 SC 1167, SWIL Ltd. v. State of Delhi, (2001) 6 SCC 670 and Dharam Pal v. State of Haryana, (2014) 3 SCC 306, the power or jurisdiction of the court or Magistrate taking cognizance of an offence on the basis of a police report to summon an accused not named in the police report, before commitment has been analysed. The uniform view on this point, irrespective of the fact as to whether cognizance is taken by the Magistrate under Section 190 of the Code or jurisdiction exercised by the Court of Session under Section 193 thereof is that the aforesaid judicial authorities would not have to wait till the case reaches the stage when jurisdiction under Section 319 of the Code is capable of being exercised for summoning a person as accused but not named as such in police report. We have already expressed our opinion that such jurisdiction to issue summons can be exercised even in respect of a person whose name may not feature at all in the police report, whether as accused or in Column (2) thereof if the Magistrate is satisfied that*

there are materials on record which would reveal prima facie his involvement in the offence. None of the authorities limit or restrict the power or jurisdiction of the Magistrate or Court of Session in summoning an accused upon taking cognizance, whose name may not feature in the FIR or police report."

10. The Hon'ble Supreme Court further held that: -

"*30... For summoning persons upon taking cognizance of an offence, the Magistrate has to examine the materials available before him for coming to the conclusion that apart from those sent up by the police some other persons are involved in the offence. These materials need not remain confined to the police report, charge-sheet or the FIR. A statement made under Section 164 of the Code could also be considered for such purpose."*

11. Therefore, I am of the considered view that the learned Magistrate has not committed any illegality in summoning the applicants to face the trial on the basis of the statements of a witness recorded under Section 161 and 164 Cr.P.C.

12. The learned counsel for the applicant has submitted that the entire family of the applicant has been falsely implicated in the present case due to animosity between the parties.

13. In **C.B.I. v. Aryan Singh**, 2023 SCC Online SC 379, the Hon'ble Supreme Court has held that while exercising the powers under Section 482 Cr.P.C., the Court is not required to conduct a mini trial. It does not require the prosecution/investigating agency to prove the allegations. While exercising the powers under Section 482 of the CrPC the Court has very limited jurisdiction and is required to consider "whether any sufficient material available to proceed further against the accused for which the accused is required to be tried or not".

14. In **Manik B Vs. Kadapala Sreyes Reddy and others**, SLP (Crl.) No. 2924 of 2023 decided on 07.08.2023, the Hon'ble Supreme Court has held that: -

"6. Whether the testimony of the witnesses is trustworthy or not has to be found out from the examination-in-chief and the cross-examination of the witnesses when they stand in the box at the stage of such trial.

7. Such an exercise, in our considered view, is not permissible while exercising the jurisdiction under Section 482 Cr.P.C.

8. The scope of interference, while quashing the proceedings under Section 482 Cr.P.C. and that too for a serious offence like Section 302 of Indian Penal Code is very limited. The Court would exercise its power to quash the proceedings only if it finds that taking the case at its face value, no case is made out at all."

15. Therefore, while deciding the application under Section 482 Cr.P.C., this Court cannot examine the contention of the learned Counsel for the applicant that the entire family of the applicant has been implicated falsely and that will be decided by the trial Court after the parties have availed the opportunity to lead their respective evidence.

16. In view of the aforesaid facts and circumstances of the case, I find no merit in the application and the same is accordingly **dismissed.**

17. It is made clear that the learned trial court shall proceed to decide the case expeditiously in accordance with law without being influenced by any observations made in this order.

(2024) 1 ILRA 914
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 10730 of 2023

Prashant Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Lalta Prasad Misra, Prafulla Tiwari

Counsel for the Opposite Parties:
G.A., Aditya Vikram Singh, Nadeem Murtaza

Criminal Law - Companies Act, 2013 - Sections 56(1), 179 - Indian Penal Code, 1860 - Sections 409 & 420 - Code of Criminal Procedure, 1973 - Section 482 - Applicant challenged charge-sheet and cognizance order for offences under Sections 409, 420 I.P.C., alleging unauthorized transfer of 98% shares of subsidiary company (JBTCPL) held by PPTPL. Court held: (1) Transfer without Board resolution under Section 179 or transfer deed under Section 56(1) of Companies Act violated statutory requirements, prima facie constituting criminal breach of trust and cheating (Rathish Babu Unnikrishnan Vs St. of NCT of Delhi, 2022 SCC OnLine SC 513). (2) Applicant's claim of adjustment for prior proprietorship interest was a factual dispute for trial, not quashment under Section 482 (Harshendra Kumar D. Vs Rebatilata Koley, (2011) 3 SCC 351). (3) Dispute not purely civil; allegations of forgery and unauthorized transfer as company director established cognizable offences (Pratibha Vs Rameshwari Devi, (2007) 12 SCC 369). (4) Delay in FIR (three years) did not vitiate proceedings, as investigation substantiated allegations (Mahesh Chaudhary Vs St. of Raj., (2009) 4 SCC 439). (5) No material beyond suspicion disproved allegations; quashing unwarranted. Charge-sheet and cognizance order upheld; application dismissed. (Paras 18-40)

Application Dismissed.

List of Cases cited:

1. Rathish Babu Unnikrishnan Vs St. of NCT of Delhi, 2022 SCC OnLine SC 513 (Para 23)

2. Harshendra Kumar D. Vs Rebatilata Koley, (2011) 3 SCC 351 (Para 31)

3. Anita Malhotra Vs Apparel Export Promotion Council, (2012) 1 SCC 520 (Para 32)

4. Rajiv Thapar Vs Madan Lal Kapoor, (2013) 3 SCC 330 (Para 34)

5. Anand Kumar Mohatta Vs St. (NCT of Delhi), (2019) 11 SCC 706 (Para 36)

6. Pratibha Vs Rameshwari Devi, (2007) 12 SCC 369 (Para 35)

7. Mahesh Chaudhary Vs St. of Raj., (2009) 4 SCC 439 (Para 36)

8. Priti Saraf Vs St. (NCT of Delhi), (2021) 16 SCC 142 (Para 37)

9. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335 (Para 18)

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

1. Heard Dr. L. P. Mishra, and Sri Prafulla Tiwari Advocates, the learned counsel for the applicant, Smt. Parul Kant,

the learned A.G.A. for the State and Sri Vikas Tiwari and Sri Aditya Vikram Singh Advocates, the learned counsel for the opposite party No.2.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of the charge-sheet dated 04.02.2023 for commission of offences under Section 409 and 420 I.P.C., filed in furtherance of F.I.R. No. 572 dated 26.10.2021 under Sections 406, 420 IPC, Police Station Vibhuti Khand, District Lucknow and the order dated 13.02.2023 passed by the Additional Chief Judicial Magistrate-II, Lucknow in Criminal Case No.18415 of 2023, whereby the Court has taken cognizance of the offences and summoned the applicant to face the trial.

3. Opposite party No.2 had lodged the FIR alleging that he is a major shareholder of M/S Piscesia Power Transmission Private Limited (hereinafter referred to as 'PPTPL') and he holds 24% shares of the aforesaid company. A firm - M/s Bigha Infraventures Private Ltd., controlled by the informant holds 26% shares of PPTPL. Thus, the informant has 50% shares in PPTPL. PPTPL holds 98% shareholdings in a company called J. B. Test and Commissioning Private Limited (hereinafter referred to as 'JBTCPL'), which is a subsidiary company of PPTPL. The applicant - Prashant Singh misused his position as a Director of JBTCPL and fraudulently transferred 98% of its shares in his favour without giving any information of the share transfer to the Board of Directors of PPTPL and without execution of any transfer deed against the provisions of the Companies Act, 2013.The applicant forged signatures of the share holders of PPTPL, committed forgery, criminal breach of trust and he committed theft of the shares.

4. Although the FIR was registered for offences under Sections 406 and 420 IPC, after investigation, a charge-sheet was submitted for offences under Sections 409, 420 IPC on 26.10.2021 and on 13.02.2023, learned Additional Chief Judicial Magistrate passed an order taking cognizance of the offences and summoning the applicant to face trial.

5. The case set up by the applicant in the application under Section 482 Cr.P.C. is being briefly stated in the following paragraphs: -

5.1 The applicant had formed JBTCPL in the year 2002 as a proprietorship concern. PPTPL was formed in the year 2012. The applicant and one Vandana Yadav had 50% shares each in the said company and they were the Directors of the Company.

5.2 On 06.11.2015, proprietorship concern JBTCPL was converted to a private limited company with Vandana Yadav holding 25% shares and her husband Vikas Yadav holding 25% shares and the applicant Prashant Singh holding 50% shares and all of them were Directors of the Company.

5.3 On 01.03.2016, 98% shares of JBTCPL were transferred to PPTCL and merely 1% shares remained with the applicant and 1% shares remained with Vandana Yadav. However, no transfer deed was executed for transfer of 98% shares of JBTCPL.

5.4 The first informant, Manoj Kumar Singh was inducted as General

Manager (Finance) in PPTPL in the year 2016. He was the head of the Finance Department of the company and he was responsible to facilitate the accounts and finance related transactions of the company. Being the General Manager of PPTPL, the informant was equally responsible for any transaction of the company like the Directors, Chartered Accountant and the Company Secretary of the Company.

5.5 At the time of lodging of the FIR, the informant was holding 24% shares in PPTPL in his individual capacity whereas M/S Bigha Infraventure Private Ltd., a company owned and managed by the informant, had 26% shares, which it had acquired in March, 2020.

5.6. Vivek Yadav was arrested in the year 2017 in Case Crime No. 639 of 2015 under Sections 364, 384 and 506 IPC, Police Station Kalyanpur, District Kanpur Nagar and his bail application was rejected by means of an order dated 10.04.2017 passed by this Court sitting at Allahabad in Criminal Misc Bail Application No.11587 of 2017 and he remained in jail for a period of one year. From the aforesaid judgment and order dated 10.04.2017, the applicant came to know that Vivek Yadav had been falsely using the bank statement of JBTCPL by claiming that JBTCPL had given a loan of Rs.50,00,000/- to Neharpit Construction and Vivek Yadav and his brother-in-law, Shailendra Yadav had been implicated in the false case due to the aforesaid reason. The applicant claims that the loan had been repaid in the year 2012 itself.

5.7 Upon coming to know about the aforesaid facts, the applicant decided to severe his business relations with Vivek Yadav and he instructed the company's Chartered Accountant Tushar Nagar to prepare the necessary documents for share transfer and change in Directorship of PPTPL and JBTCPL. CA Tushar Nagar and his team had prepared a draft document including a share transfer agreement and had sent the same to the applicant through e-mails dated 25.11.2017 and 27.11.2017 and the same were also forwarded to Vivek Yadav for transferring 98% shares of JBTCPL held by PPTPL to the applicant. Draft documents were modified in February, 2018 when Vivek Yadav was released from custody and thereafter the same were signed and handed over to the company's CA Tushar Nagar for further compliance on the web portal of the Ministry of Corporate Affairs. After February, 2018, shareholdings of PPTPL and JBTCPL were altered and the following changes were incorporated on the portal of the Ministry of Corporate Affairs, balance sheet of both the companies and other relevant e-forms by the Chartered Accountant Tushar Nagar and the Company Secretaries of PPTPL and JBTCPL:-

Changes in PPTPL: -

i. Vivek Yadav was appointed as Director of PPTPL on 15.02.2018.

ii. 98% shares of JBTCPL held by PPTPL were transferred to the applicant on 16.02.2018 and JBTCPL seized ceased to be a subsidiary of PPTPL.

iii. Vandana Yadav resigned from Directorship of PPTPL on 16.02.2018 as she has sold away her shareholdings in PPTPL to Vivek Yadav.

iv. Vandana Yadav's shares were transferred to Vivek Yadav on 16.02.2018,

without execution of any share transfer deed.

Changes in JBTCPL: -

i. Vivek Shankar Singh was appointed as Director of the Company.

ii. 98% shares of PPTPL were transferred to the applicant on 16.02.2018 and JBTCPL ceased to be subsidiary of PPTPL.

iii. Vandana Yadav resigned as a Director of the company on 16.02.2018 as he had sold away her 1% shareholding in JBTCPL to Vivek Shankar Singh for a consideration of Rs.70,000/- paid though cheque.

5.8 In the annual return of PPTPL submitted for the financial year 2017-18 under Section 92(1) of the Companies Act and sub rule 11(1) of the Companies (Management and Administration) Rules, 2014, as against the particulars of holding subsidiary and associate companies, the number zero is mentioned.

5.9 Thus, with effect from 16.02.2018, the applicant held 99% shares of JBTCPL and Vivek Shankar Singh held 1% shares of the company and since then no company remained a subsidiary of any other company. All the documents uploaded on the portal of the Ministry of Corporate Affairs are public documents.

6. Dr L.P. Mishra, the learned counsel for the applicant has submitted that the investigating officer had sent a letter to the Ministry of Corporate Affairs seeking some documents and it is recorded in CD Parcha No.17 that the Registrar of Companies had informed the investigating officer that e-forms, namely MGT-7 and AOC-4 filed by PPTPL and JBTCPL are available on the web portal of the Ministry of Corporate Affairs and the same can be looked into by any person. However, the investigating officer did not consider the aforesaid documents available on the portal of the Ministry of Corporate Affairs and he conducted the investigation defectively.

7 . It has also been submitted by the learned Counsel for the applicant that the investigating officer had issued a notice under Section 41 Cr.P.C., and the applicant had sent replies dated 24.09.2022 and 27.09.2022 stating that the documents had been prepared by the C.A./C.S. of JBTCPL and PPTPL, but the same were not considered by the Investigating Officer. It is recorded in CD-28 that a registered envelop was received in the police station containing some documents without any applications submitted by the applicant and without attestation of the documents by the applicant. The documents were attached to the case diary and it was recorded that the same will be verified/perused when the applicant appears and gives his statement, but it was not done.

8. Further submission of the learned counsel for the applicant is that the dispute between the parties is a purely commercial dispute regarding transfer of shareholdings of the Company and the only allegation that can be established against the applicant is that shares were transferred in his favour without execution of share transfer deed. Consequence whereof is directed under Section 56 (6) of the Companies Act and the institution of criminal proceedings is abuse of the process of criminal law and

the criminal proceedings are liable to be quashed.

9. The learned counsel for the applicant has submitted that the applicant had dully filled up form SH-4 and handed it over to the company's CA Tushar Nagar and thereafter it was the responsibility of the CA to upload the documents on the web portal of the Ministry of Corporate Affairs. Failure of the Company's Chartered Accountant to upload the share transfer deed on the web portal of the Ministry of Corporate Affairs would not make the applicant liable for commission of any offence.

10. Dr. L.P. Mishra has further submitted that the shares were transferred on 18.02.2018 whereas the FIR has been lodged on 26.10.2021 and the delay in lodging the FIR clearly indicates that the FIR has been lodged maliciously.

11. In support of his submissions, the learned Counsel for the applicant has relied upon the judgments in the cases of **State of Haryana and others versus Bhajan Lal and others,** (1992) Supp. (1) SCC 335, **Harshendra Kumar D. versus Rebatilata Koley and others,** (2011) 3 SCC 351, **Anita Malhotra versus Apparel Export Promotion Council and another,** (2012) 1 SCC 521, **Rajiv Thapar and others versus Madan Lal Kapoor,** (2130) 3 SCC 330 and **Anand Kumar Mohatta and another versus State (NCT of Delhi), Department of Home and another,** (2019) 11 SCC 706.

12. *Per contra,* Sri. Vikas Tiwari, the learned counsel for opposite party No. 2 has submitted that the opposite party No.2 had effectively 50% shares in PPTPL. 98% shares of JBTCPL were held by PPTPL and thus JBTCPL was subsidiary of PPTPL. In this manner, opposite party No.2 indirectly held 49% of JBTCPL. The company's CA 'Tushar Nagar & Co.' had sent an e-mail dated 25.11.2017 to the applicant, attaching therewith some documents regarding share transfer and stating that the holding and subsidiary papers will be provided on Monday. On 27.11.2017, the CA had sent another e-mail to the applicant annexing therewith draft of minutes of Board Meeting of JBTCPL to be held on 27.11.2017 for giving consent of the Board of Directors of the company for transfer of 6,86,000 shares of PPTPL to the applicant. However, the draft resolution was never approved by the Board of Directors of the Company and yet shares were transferred illegally on 18.02.2018, without any transfer deed having been executed and without any consideration having been paid for the alleged transfer.

13. The learned counsel for opposite party No. 2 has further submitted that Form No. SH4, which is the Form for transfer of securities under Section 56 of the Companies Act, 2013 and Rule 11(1) of the Companies (Share Capital and Debentures) Rules, 2014 was also prepared, which mentions consideration payable for the transfer to be Rs.68,60,000/-, at the rate of Rs.10/- per share. The aforesaid documents have been annexed by the applicant himself alongwith the application under Section 482 Cr.P.C., which indicates that the applicant was fully aware about the legal position, that the shares could have been transferred only after a resolution of the board of Directors of the company, execution of a transfer deed and payment of consideration amounting to Rs.68,60,000/-, yet the shares were transferred surreptitiously without any of the aforesaid acts having been done.

14. The learned Counsel for the opposite party No.2 has also submitted that the applicant, being a director of the company, was the custodian of its assets, including the shares of the company and he surreptitiously transferred the shares to himself, which makes out the commission of offences under Section 409 and 420 IPC.

15. The learned counsel for the opposite party No.2 has submitted that when Vandana Yadav had transferred 10,00,000 shares of PPTPL to her husband, Vivek Yadav, it was done only after a resolution to this effect was passed by the Board of Directors of Company in its meeting held on 16.02.2018, and a copy of the Board resolution dated 16.02.2018 has been annexed with the application. However, the applicant transferred the company's shares in his own favour without any resolution having been passed authorising the transfer.

16. In reply to the submission of the learned Counsel for the opposite arty no. 2 regarding non payment of consideration, the learned counsel for the applicant has submitted that the payment of consideration is required only in case of sale of shares. Consideration can be in many a form and it should not necessarily be in the form of payment of money. JBTCPL was a proprietorship concern of the applicant prior to 16.11.2013 and its 98% shares had been transferred to PPTPL on 01.03.2016 without execution of any document and by transferring shares, the applicant has merely adjusted the value of JBTCPL which belonged to the applicant.

17. Before proceeding to examine the submissions made by the learned Counsel for the parties, it would be appropriate to mention the law regarding the scope of interference in exercise of jurisdiction under Section 482 of the Cr.P.C. as explained by the Hon'ble Supreme Court in its various judgments.

18. In **State of Haryana v. Bhajan Lal,** 1992 Supp (1) SCC 335, the Hon'ble Supreme Court held that: -

*"**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.

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."

(Emphasis supplied)

27. The expression "rarest of rare cases" used by the Hon'ble Supreme Court in **Bhajan Lal** (Supra) has been explained in **Som Mittal (2) v. State of Karnataka** (2008) 3 SCC 574 in the following words: -

"9. When the words "rarest of rare cases" are used after the words "sparingly and with circumspection" while describing the scope of Section 482, those words merely emphasise and reiterate what is intended to be conveyed by the words "sparingly and with circumspection". They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice. The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section 302 IPC, but to emphasise that the power under Section 482 CrPC to quash the FIR or criminal proceedings should be used sparingly and with circumspection."

28. In **Dineshbhai Chandubhai Patel v. State of Gujrat**, (2018) 3 SCC 104, it was held that in order to examine as

to whether factual contents of FIR disclose any cognizable offence or not, the High Court cannot act like the Investigating agency nor can exercise the powers like an Appellate Court. That question is required to be examined keeping in view the contents of FIR and prima facie material, if any, requiring no proof. At such stage, the High Court cannot appreciate evidence nor can it draw its own inferences from contents of FIR and material relied on. It is more so, when the material relied on is disputed. In such a situation, it becomes the job of the Investigating Authority at such stage to probe and then of the Court to examine questions once the charge-sheet is filed along with such material as to how far and to what extent reliance can be placed on such material.

29. In the case of **Dhruvram Murlidhar Sonar versus State of Maharashtra,** (2019) 18 SCC 191 the Hon'ble Supreme Court held that exercise of powers under Section 482 Cr. P.C. to quash the proceedings is an exception and not a rule. The inherent jurisdiction under Section 482 Cr. P.C., though wide, is to be exercised sparingly, carefully and with caution, only when such exercise is justified by tests specifically laid down in the section itself. Appreciation of evidence is not permissible at the stage of quashing of proceedings in exercise of powers under Section 482 Cr. P.C.

30. In **Kaptan Singh v. State of Uttar Pradesh**, (2021) 9 SCC 35, the Hon'ble Supreme Court was pleased to hold that while deciding an application under Section 482 Cr. P.C., the High Court is not required to go into the merits of the allegations and/or enter into the merits of the case as if the High Court is exercising the appellate jurisdiction and/or conducing the trial. The Hon'ble Supreme Court referred to its earlier pronouncements

31. In **CBI v. Aryan Singh,** 2023 SCC OnLine SC 379, the Hon'ble Supreme Court held that: -

"10. *...As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Section 482 Cr. P.C., the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. This is not the stage where the prosecution/investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution/investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under Section 482 Cr. P.C., the Court has a very limited jurisdiction and is required to consider "whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not."*

19. When we examine the facts of the present case in light of the law regarding the scope of interference under Section 482 Cr.P.C., it appears that the applicant claims that he had formed JBTCPL as a proprietorship concern in the year 2002 and it was converted to a company on 06.11.2015 with the applicant holding 50% shares in it and he was a Director of the Company. PPTPL was formed in the year

2012 and the applicant and Vandana Yadav each had 50% shares in the company. On 01.03.2016, 98% shares of JBTCPL were transferred to PPTCL without execution of any transfer deed and merely 1% shares remained with the applicant and 1% shares remained with Vandana Yadav.

20. The informant was holding 24% shares in PPTPL in his individual capacity whereas M/S Bigha Infraventure Private Ltd., a company owned and managed by the informant, had 26% shares. Thus the informant had effective control over 50% shares of PPTPL, and PPTPL had 98% shares of JBTCPL.

21. A draft resolution of the Board of Directors of the Company for transfer of shares and a draft deed for transfer of 98% shares of JBTCPL held by PPTPL to the applicant were prepared by the company's CA and those had been sent to the applicant through e-mails dated 25.11.2017 and 27.11.2017. Neither any resolution to this effect was passed by the Board of Directors of the company, nor any transfer deed was executed, yet the 98% shares of JBTCPL held by PPTPL were transferred to the applicant on 18.02.2018.

22. Section 56 (1) of the Companies Act, 2013 provides that a company shall not register a transfer of securities of the company unless a proper instrument of transfer, in such form as may be prescribed, duly stamped, dated and executed by or on behalf of the transferor and the transferee has been delivered to the company by the transferor or the transferee within a period of sixty days from the date of execution. The shares were transferred in violation of this statutory mandate. The submission of the learned Counsel for the applicant is that the consequence of non-execution of a transfer deed is provided in Sub-section (6) of Section 56, which provides that where any default is made in complying with the provisions of sub-section (1), the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees. In the past also, the company had transferred shares without execution of any transfer deed. Therefore, the submission of Dr. Mishra is that no criminal proceedings can be drawn against the applicant for the alleged violation of the provisions of Section 56 (1) of the Companies Act.

23. In **Rathish Babu Unnikrishnan v. State (NCT of Delhi),** 2022 SCC OnLine SC 513, the Hon'ble Supreme Court explained the steps for share transfer as follows: -

"A bare perusal of Section 56(1) of the Companies Act, 2013 indicates that a transfer of securities of a company can take place only when a proper instrument of transfer is effectuated. The operation of legally transferring shares involves several distinct steps. At first, a contract of sale needs to be entered upon. The nature of transaction in this contract logically then requires payment of the price by the prospective transferee to fulfil their promise first. In exchange, transferor would move to fill Form SH-4 and thus, effectuate a valid instrument. Depending on the nature of the company and its Articles of Association, then upon the presentation of the instrument of transfer to the board of the company and its acceptance by the board, the entry of the transferee in the

register of the company in place of the transferor, takes place. Thus, the transfer of share is complete."

24. Therefore, it is clear that the shares could not have been legally transferred without execution of a transfer deed and all other steps mentioned by the Hon'ble Supreme Court in **Rathish Babu Unnikrishnan** (Supra). The mere fact that shares had been transferred at a previous occasion without execution of a transfer deed, will not cure the illegality of the offending act.

25. While dismissing the appeal and upholding the High Court's order rejecting the application under Section 482 Cr.P.C., the Hon'ble Supreme Court held in **Rathish Babu Unnikrishnan** (Supra) that: -

"the Court should be slow to grant the relief of quashing a complaint at a pre-trial stage, when the factual controversy is in the realm of possibility particularly because of the legal presumption, as in this matter. What is also of note is that the factual defence without having to adduce any evidence need to be of an unimpeachable quality, so as to altogether disprove the allegations made in the complaint."

26. It is to be noted that non-execution of a transfer deed is not the sole ground of prosecution of the applicant. As per the provision contained in Section 179 of the Companies Act, 2013, the power to act on behalf of the company vests in the Board of Directors and, therefore, the decision to transfer 98% shares of JBTCPL held by PPTPL could be taken by the Board of Directors of PPTPL. The documents filed by the applicant himself reveal that on 24.08.2021, the company's CA had sent an email to the applicant annexing therewith a draft resolution to be passed in a meeting of Board of Directors of the company. A draft transfer deed on Form SH-4 was also prepared and it has been annexed with the application under Section 482 Cr.P.C. It mentions that: -

"FOR THE CONSIDERATION stated below the "Transferor(s)" named do hereby transfer to the "Transferee(s)" the named the securities specified below subject to the conditions on which the said securities are now held by the Transferor(s) and the Transferee(s) do here by agree to accept and hold the said securities subject to the conditions aforesaid."

27. The consideration for transfer of 68,000 shares of JBTCPL mentioned in Form SH-4 is Rs.6,86,000/-, at the nominal value of Rs.10/- per share. The transferor is Piscesia Power Transmission Private Limited and the transferee is Prashant Singh (the applicant).

28. The allegation against the applicant is that acting as a Director of the company PPTPL, he got 68,000 shares of JBTCPL held by PPTPL transferred to himself without any resolution to this effect having been passed by the Board of Directors of PPTPL, although a draft resolution was prepared and sent through email, and without payment of consideration of Rs.6,86,000/- mentioned in the draft resolution of the Board of Directors and in the draft transfer deed.

29. No material has been annexed with the application or the affidavit filed in support thereof to rebut the allegations. The contention of the learned Counsel for the

applicant is that being a Director of the company, the applicant was authorised to act on behalf of the company. However, Section 179 of the Companies Act, 2013 provides that the power to act on behalf of the company vests in the Board of Directors. Therefore, in absence of a resolution having been passed, the applicant had no authority to transfer the shares held by the company to himself and the aforesaid contention of the learned Counsel for the applicant is without any force.

30. The next contention of the learned Counsel for the applicant is that JBTCPL was a proprietorship concern of the applicant prior to 16.11.2013 and its 98% shares had been transferred to PPTPL on 01.03.2016 without payment of any consideration that that the applicant has merely adjusted the value of JBTCPL which belonged to the applicant. This factual contention raised by the accused – applicant cannot be examined by this Court by holding a mini trial while deciding the application under Section 482 Cr.P.C. It can only be decided by the trial Court after the parties have the opportunity to lead evidence.

31. In **Harshendra Kumar D. v. Rebatilata Koley**, (2011) 3 SCC 351 placed by the learned Counsel for the applicant, the Hon'ble Supreme Court held that: -

"25…It is fairly settled now that ***while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations.*** *However, in an appropriate case, if on the face of the documents — which are beyond suspicion or doubt — placed by the accused, the accusations against him cannot stand, it would be travesty of justice if the accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage."*

32. In **Anita Malhotra v. Apparel Export Promotion Council,** (2012) 1 SCC 520 also, the Hon'ble supreme Court held that: -

"20. As rightly stated so, though it is not proper for the High Court to consider the defence of the accused or conduct a roving enquiry in respect of merits of the accusation, but if on the face of the document which is beyond suspicion or doubt, placed by the accused and if it is considered that the accusation against her cannot stand, in such a matter, in order to prevent injustice or abuse of process, it is incumbent on the High Court to look into those document/documents which have a bearing on the matter even at the initial stage and grant relief to the person concerned by exercising jurisdiction under Section 482 of the Code."

33. In the present case, the applicant could not produce any document which may establish his defence beyond suspicion or doubt and, therefore, the proceedings cannot be quashed in the present case.

34. In **Rajiv Thapar v. Madan Lal Kapoor**, (2013) 3 SCC 330, the Hon'ble Supreme Court has delineated 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."*

35. In the present case it cannot be said that the material relied upon by the applicant is sound and indubitable or that it would rule out the assertions contained in the charges levelled against him. It cannot be said that the material is such as cannot be justifiably refuted by the prosecution/complainant. Therefore, it cannot be said that the applicant's case fulfils all the conditions mentioned in Rajiv Thapar (Supra) for quashing the proceedings.

36. In **Anand Kumar Mohatta v. State (NCT of Delhi),** (2019) 11 SCC 706

"16. There is nothing in the words of this section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the 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 allegations have materialised into 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 power of any court."

37. There can be no dispute against the aforesaid proposition, but it is of no help to the applicant in the present case.

32. Prima facie it appears that transfer of 98% shares of JBTCPL held by PPTPL, made by the applicant acting as a director of the company, in his own favour, without any resolution to this effect having been passed by the Board of Directors of the company, makes out a case for trial of the applicant for the alleged offences.

33. The contention that the investigating officer has failed to take some material into consideration also does not make out a case for quashing of the proceedings when the material placed before this Court prima facie makes out commission of cognizable offences by the applicant.

34. So far as the next submission of the earned Counsel for the applicant, that the dispute between the parties is purely civil in nature, the investigation has established that the applicant has committed criminal breach of trust the cheating against the informant. From the aforesaid discussion, it appears that the dispute between the parties cannot be said to be purely commercial dispute regarding transfer of shareholdings of the Company. Where the commercial dispute also involves the allegation of cognizable offences and it has been established during investigation, the criminal proceedings cannot be quashed for the reason that a commercial dispute is also made out by the allegations.

35. In **Pratibha v. Rameshwari Devi,** (2007) 12 SCC 369, the Hon'ble Supreme Court held that "it is well settled that criminal and civil proceedings are separate and independent and the pendency of a civil proceeding cannot bring to an end a criminal proceeding even if they arise out of the same set of facts."

36. In **Mahesh Chaudhary v. State of Rajasthan**, (2009) 4 SCC 439, the Hon'ble Supreme Court held that: -

"11. The principle providing for exercise of the power by a High Court under Section 482 of the Code of Criminal Procedure to quash a criminal proceeding is well known. The Court shall ordinarily exercise the said jurisdiction, inter alia, in the event the allegations contained in the FIR or the complaint petition even if on face value are taken to be correct in their entirety, does not disclose commission of an offence.

12. It is also well settled that save and except in very exceptional circumstances, the Court would not look to any document relied upon by the accused in support of his defence. ***Although allegations contained in the complaint petition may disclose a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue****. For the purpose of exercising its jurisdiction, the superior courts are also required to consider as to whether the allegations made in the FIR or the complaint petition fulfil the ingredients of the offences alleged against the accused."*

(Emphasis supplied)

37. In **Priti Saraf v. State (NCT of Delhi)**, (2021) 16 SCC 142, it was held that: -

"31. In the instant case, on a careful reading of the complaint/ FIR/ charge-sheet, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 406 and 420IPC

cannot be said to be absent on the basis of the allegations in the complaint/ FIR/ charge-sheet. We would like to add that whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial. Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482CrPC for quashing such proceedings."

38. As besides the civil dispute between the parties, the allegations in the FIR make out commission of cognizable offences of criminal breach of trust and cheating by the applicant, which allegations have been established by the material collected during investigation and, accordingly, a charge-sheet has been filed against the applicant, I am of the considered view that as per the law laid down by the Hon'ble Supreme Court in **Pratibha, Mahesh Chaudhary** and **Priti Saraf** (Supra), the charge-sheet and the criminal proceedings against the applicant cannot be quashed merely because the allegations may also disclose a civil dispute between the parties.

39. So far as the question of delay in lodging the FIR is concerned, the charge sheet and the summoning order cannot be quashed on the sole ground of delay in lodging the FIR where the allegations levelled in the FIR have been established during investigation.

40. In view of the foregoing discussion, I am of the considered view that the allegations make out a prima facie case for trial of the applicant for commission of the offences of cheating and criminal breach of trust while acting as an agent of the company. The allegations have been found to have been established by the material collected during investigation and thereafter a charge-sheet has been filed against the applicant and the trial Court has taken cognizance of the offence. There appears to be no illegality in the charge-sheet or in the impugned order dated 13.02.2023 passed by the Additional Chief Judicial Magistrate-II, Lucknow in Criminal Case No.18415 of 2023, whereby the trial Court has taken cognizance of the offences and summoned the applicant to face the trial.

38. The application under Section 482 Cr.P.C. filed by the applicant lacks merit and the same is **dismissed.**

39. The trial Court shall decide the trial in accordance with the law, without being influenced by any observation made in this order.

(2024) 1 ILRA 927
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 11379 of 2023

Keshav Ugan Jha ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Ravindra Kumar Yadav, Ajeet Singh

Counsel for the Opposite Parties:
G.A., Mrs. Suniti Sachan

Criminal Law - Indian Penal Code, 1860 - Sections 409, 420, 504 & 506 - Opposite party no.2 lodged FIR against applicant and co-accused alleging that informant's company placed order for TMT bars with applicant's company through co-accused - Fifty percent advance of ₹40,00,000/- was paid with delivery due in four days - Upon non-delivery, applicant demanded balance amount, leading to further payment of ₹18,00,000/- by Informant - FIR alleges that only ₹20,00,000/- was refunded and remaining ₹38,00,000/- was not returned, accused persons cheated Informant - As besides civil dispute between the parties, FIR discloses cognizable offences of criminal breach of trust and cheating by applicant, supported by material collected during investigation and charge-sheet has been filed, thus criminal proceedings cannot be quashed merely on ground of existence of civil dispute, as held by Supreme Court in Pratibha, Mahesh Chaudhary and Priti Saraf (infra) - No illegality in charge-sheet or impugned summoning order. (Para 3, 16, 17)

Application dismissed. (E-13)

List of Cases cited:

1. St. of Har. Vs Bhajan Lal, (1992) Supp 1 SCC 335

2. CBI Vs Aryan Singh, 2023 SCC OnLine SC 379, (Para 10)

3. Pratibha Vs Rameshwari Devi, (2007) 12 SCC 369

4. Mahesh Chaudhary Vs St. of Raj., (2009) 4 SCC 439, (Paras 11, 12)

5. Priti Saraf Vs State (NCT of Delhi), (2021) 16 SCC 142, (Para 31)

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

1. Heard Sri Ravindra Kumar Yadav, the learned counsel for the applicant, Sri Akhilesh Kumar Vyas, the learned A.G.A. appearing on behalf of the State and Ms. Suniti Sachan, the learned counsel for the opposite party no.2/informant.

2. The instant application under Section 482 Cr.P.C. has been filed by the applicant seeking quashing of the impugned charge sheet no.1/2023 dated 16.05.2023, summoning order dated 25.05.2023 including the entire proceedings of Case No.59497 of 2023: State Vs. Keshav Ugan Jha, arising out of Case Crime No.0047 of 2023, under Sections 409, 420, 504, 506 I.P.C. Police Station Vibhuti Khand, District Lucknow pending in the Court of District & Sessions Judge, Lucknow.

3. The opposite party no.2 had lodged an F.I.R. on 24.01.2023 against the applicant and one Desh Dipak Azad, alleging that the informant's company Fuzenite Infratel Pvt. Ltd. had received an order to supply TMT bars (iron bars) to a construction company and he had in turn placed order upon Keshav Enterprises, a company based at Pune and owned by the applicant, through the co-accused Desh Dipak Azad. The informant had paid fifty percent of the sale consideration amounting to Rs.40,00,000/- on 28.12.2022 and the material was to be delivered within four days, but when the material was not delivered and the informant repetitively contacted the supplier, he insisted for payment of balance amount also, whereupon the informant paid Rs.18,00,000/- more through RTGS on 07.01.2023. The F.I.R. alleges that when the informant repetitively asked for refund of the amount merely Rs.20,00,000/- were repaid and the balance amount of Rs.38,00,000/- has not been repaid and therefore it appears that the accused persons had cheated the informant.

4. After investigation a charge sheet was submitted on 16.05.2023 alleging commission of offences under Sections 409, 420, 504, 506 I.P.C and the learned trial court has taken cognizance of the offence by means of an order dated 25.05.2023.

5. The applicant has sought quashing of the proceedings on the ground that the allegations levelled in the F.I.R. are false and the learned counsel for the applicant has submitted that the dispute between the parties is regarding non-payment of money paid under a contract, which is purely a civil dispute.

6. Per contra, the learned A.G.A. and learned counsel for the informant have submitted that although the allegations give rise to a civil dispute but it is not that the allegations do not make out commission of a cognizable offence by the applicant.

7. The allegations levelled in the F.I.R. clearly make out a case of cognizable offences by the applicant. The mere fact that the allegations also make out existence of civil dispute would not be a ground to quash the criminal proceedings when the allegations clearly make out commission of cognizable offences by the applicant. The correctness of allegations will be examined by the learned trial court after giving an opportunity to the parties to lead evidence.

8. In **State of Haryana versus Bhajan Lal,** (1992) Supp 1 SCC 335, the Hon'ble Supreme Court discussed the law relating to exercise of exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code, and gave 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 was clarified that 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.

9. After mentioning the aforesaid categories, the Hon'ble Supreme Court added 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."

10. In **CBI versus Aryan Singh**, 2023 SCC OnLine SC 379, the Hon'ble Supreme Court held that: -

"10. From the impugned common judgment and order passed by the High Court, it appears that the High Court has dealt with the proceedings before it, as if, the High Court was conducting a mini trial and/or the High Court was considering the applications against the judgment and order passed by the learned Trial Court on conclusion of trial. As per the cardinal principle of law, at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Section 482 Cr. P.C., the Court is not required to conduct the mini trial. The High Court in the common impugned judgment and order has observed that the charges against the accused are not proved. This is not the stage where the prosecution/investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution/investigating agency. Therefore, the High Court has materially erred in going in detail in the allegations and the material collected during the course of the investigation against the accused, at this stage. At the stage of discharge and/or while exercising the powers under Section 482 Cr. P.C., the Court has a very limited jurisdiction and is required to consider "whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not".

11. Therefore, the submission of the learned Counsel for the applicant that the allegations leveled in the FIR are false, cannot be examined by this Court while deciding an application under Section 482 Cr.P.C.

12. So far as the next submission of the earned Counsel for the applicant, that the dispute between the parties is purely civil in nature, the allegations in the FIR

are that the applicant has committed the offences of criminal breach of trust and cheating against the informant.

13. In **Pratibha v. Rameshwari Devi,** (2007) 12 SCC 369, the Hon'ble Supreme Court held that "*it is well settled that criminal and civil proceedings are separate and independent and the pendency of a civil proceeding cannot bring to an end a criminal proceeding even if they arise out of the same set of facts.*"

14. In **Mahesh Chaudhary v. State of Rajasthan,** (2009) 4 SCC 439, the Hon'ble Supreme Court held that: -

11. The principle providing for exercise of the power by a High Court under Section 482 of the Code of Criminal Procedure to quash a criminal proceeding is well known. The Court shall ordinarily exercise the said jurisdiction, inter alia, in the event the allegations contained in the FIR or the complaint petition even if on face value are taken to be correct in their entirety, does not disclose commission of an offence.

12. It is also well settled that save and except in very exceptional circumstances, the Court would not look to any document relied upon by the accused in support of his defence. ***Although allegations contained in the complaint petition may disclose a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue.*** *For the purpose of exercising its jurisdiction, the superior courts are also required to consider as to whether the allegations made in the FIR or the complaint petition fulfil the ingredients of the offences alleged against the accused.*

(Emphasis supplied)

15. In **Priti Saraf v. State (NCT of Delhi)**, (2021) 16 SCC 142, it was held that: -

31. *In the instant case, on a careful reading of the complaint/ FIR/ charge-sheet, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 406 and 420 IPC cannot be said to be absent on the basis of the allegations in the complaint/FIR/charge-sheet. We would like to add that whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial. Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482CrPC for quashing such proceedings.*"

16. As besides the civil dispute between the parties, the allegations in the FIR make out commission of cognizable offences of criminal breach of trust and cheating by the applicant, which allegations have been established by the material collected during investigation and, accordingly, a charge-sheet has been filed against the applicant, I am of the considered view that as per the law laid down by the Hon'ble Supreme Court in **Pratibha, Mahesh Chaudhary** and **Priti Saraf** (Supra), the charge-sheet and the criminal proceedings against the applicant cannot be quashed merely because the

allegations may also disclose a civil dispute between the parties.

17. In view of the aforesaid discussion, there appears to be no illegality in the charge-sheet or the impugned summoning order dated 25.05.2023.

18. The application under Section 482 Cr.P.C. lacks merit and the same is **dismissed**

(2024) 1 ILRA 932
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2022

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Application U/S 482. No. 12417 of 2005

Ram Komal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Neeraj Singh

Counsel for the Opposite Parties:
G.A., Sri K.N. Mishra, Sri R.K. Shahi

Criminal Law – Criminal Procedure Code, 1973 - Sections – 173(8), 216, 228, 240 & 482 – Indian Penal Code, 1860 - Sections 147, 149, 323, 452, 435, 504 & 506 - Application u/s 482 – for quashing the criminal proceedings – a dispute originated from a land-related altercation where eight individuals allegedly assaulted the family of informant - FIR - Investigation - charge-sheet - against five accused, with three others were cleared without court permission and allegedly without new evidence – order of S.P. transferred the investigation to a different police station, resulting in a second charge-sheet implicating all eight - the applicants claimed procedural irregularities and sought to quash the entire case - the court examined the legality of transferring the investigation without judicial sanction by citing Section 173(8) Cr.P.C. and distinguishing the facts from a referenced Supreme Court ruling and held that, no formal permission of the concerned court was necessary for S.P. before transferring the investigation to another I.O. of another Police Station - hence, the second charge-sheet was upheld as legally sound and accordingly, application is dismissed – with direction to the Judicial Magistrate to proceed promptly with the trial and conclude it as early as possible as the matter become very old. (Para – 20, 21, 23)

Application Dismissed. (E-11)

List of Cases cited:

1. Hasanbhai Valibhai Qureshi Vs St. of Guj., (2004) 5 SCC 347,

2. Om Prakash Narang Vs St. (Delhi Administration) AIR 1979 SCC 1791,

3. Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj Vs St. of A.P., AIR 1999 SC 2332,

4. N.P. Jharia Vs St. of M.P., AIR 2007 SC 2677.

(Delivered by Hon'bleUmesh Chandra Sharma, J.)

1. Heard Sri Neeraj Singh, learned counsel for the applicants, learned A.G.A for the State and perused the record.

2. This application under Section 482 Cr.P.C. has been filed to quash the proceeding of Criminal Case No. 1278 of 2005, under Sections 147, 149, 323, 452, 435, 504, and 506 I.P.C., registered at Police Station Bankata, District Deoria, pending in the Court of Judicial Magistrate, Court No. 11, Deoria.

3. The brief facts of the case are that on 08.01.2005 at about 3:00 p.m., eight persons including the applicants came to

the house of informant-opposite party no. 2 – Uma Shankar Kushwaha with an intention of taking possession of Sahen land, which was situated at the door of the informant. During the said action, all the accused abused the family members of the informant, entered into the house and beaten them. In this connection an F.I.R was lodged by opposite party no 2 on the same day at 03:00 p.m, which was registered as Case Crime No. 03/2005 under Sections 147, 148, 323, 504, 506, 452, 435 I.P.C at P.S. Bankata, District Deoria. A copy of the same is annexed as Annexure No. 1 to the affidavit. The Station Officer of P.S. Bankata investigated the matter and after completing the investigation, a cherge-sheet was submitted by him on 13th January, 2005 against five persons namely Daroga, Rakesh @ Lal Babu, Chandrika, Manoj and Pramod, under Sections 147, 323, 504, 506 I.P.C and found that the applicants namely Ram Komal, Rajesh and Bhuwar were falsely implicated and as such final report has been submitted in respect of the applicants. A copy of the charge-sheet/final report has been annexed as annexure no. 2 to the application.

4. On the said charge-sheet, the learned Magistrate took cognizance and issued process on 29.03.2005 against the aforesaid five accused persons in Case Crime No. 846 of 2005. The aforesaid order has been annexed as Annexure 03 to the application. In pursuance of the aforesaid order dated 29.03.2005, all the aforesaid five accused persons appeared before the concerned Magistrate and they were released on bail .

5. On 22.01.2005, the informant filed an application before S.P. Deoria for the transfer of the aforesaid case from Police Station Bankata to Police Station Kotwali, Salempur, District Deoria, to reinvestigate the matter. A copy of the same is annexed as Annexure no. 4 to the application. Thereafter, S.P Deoria transferred the aforesaid case from Police Station Bankata to Police Station Kotwali, Salempur, *vide* its order dated 10.02.2005 to reinvestigate the matter without seeking formal permission from the concerned court. The aforesaid order is annexed as annexure no. 5 to the application. The S.P. transferred the case without assigning any reason for investigation after the submission of the charge-sheet. Thereafter, S.I. Ram Ashray Yadav of P.S Kotwali Salempur, Deoria reinvestigated the matter and submitted a charge-sheet against all eight persons, including the applicants under Sections 147, 149, 452, 435, 323, 504 and 506, I.P.C on 14.4.2005, who were already exonerated by the first I.O. of P.S. Bankata. A copy of the charge-sheet has been annexed as Annexure No. 6 to the affidavit.

6. On the aforesaid second charge-sheet applicants have been summoned by Judicial Magistrate Court No. 11, Deoria in Criminal Case No. 1278 of 2005 - *(State Vs. Ram Komal & Ors.)*, under the aforesaid Sections. A copy of the order dated 15.06.2005 has has been annexed as Annexure No. 7, to the affidavit.

7. It is relevant to mention here that no permission was sought by S.P. Deoria from the concerned court before transferring the aforesaid investigation. The applicants have falsely been implicated in the said case, which was also found by the Ist I.O of the case and relying on the first charge-sheet, the Judicial Magistrate had summoned only five persons as accused. It is relevant to mention that no new fact came in light as a ground, even though a

second charge-sheet has been submitted against the applicants.

8. In ***Hasanbhai Valibhai Qureshi Vs. State of Gujarat, (2004) 5 SCC 347***, the Apex Court has held that the Police has to inform the Court and shall seek formal permission to make further investigation when fresh facts come to the light.

9. In view of the above, the proceedings of Criminal Case No. 1278 of 2005-(State Vs. Ram Komal and others), pending in the Court of Judicial Magistrate-II, Deoria, be quashed.

Copies of the referred papers have been annexed to the affidavit.

10. The informant opposite party no. 2, filed a counter affidavit and denied the allegations of the applicants. He further contended that the First I.O. of the case had not investigated the case properly, he was under the influence of the accused persons, he recorded the statements of the persons, who were enimical to complainant/opposite party no. 2 to save the real culprits. The complainant and the injured persons had clearly stated in their statement before the First I.O that all the accused persons had caused injury to them and put their hut on fire. The statements of the witnesses have been appended to the counter affidavit in Criminal Misc. Application No. 13695 of 2005. The I.O. of P.S. Bankata did not investigate the matter properly. A complaint was moved before S.P. Deoria for transferring the investigation to another Police Station. The said request was considered and S.P. Deoria, vide an order dated 10th Feb. 2005 and in the interest of justice transferred the investigation from P.S. Bankata to P.S. Kotwali, Salempur, Deoria. There is no need of formal permission of the concerned Court and the order dated 10th February, 2005 passed by S.P. Deoria is just and legal. The investigation had been transferred by S.P. Deoria when he found that P.S. Bankata was not investigating the case properly, hence for the proper investigation he had transferred the investigation. After proper investigation, the I.O. S.I. Ram Ashray Yadav submitted the charge-sheet against the applicants under the aforesaid Sections, which is legal, just and proper and in accordance with law and does not require any interference by this Court at this stage.

11. The Court below has legally summoned the accused persons in accordance with the law. The Second I.O. has submitted the subsequent charge-sheet on the basis of new material facts. The Apex Court has clearly held that further investigation is no bar under Section 173 (8) of the Cr.P.C while the Police Report has been submitted earlier. From the bare perusal of the judgment of the Apex Court as stated by the applicant, it is borne out that further investigation can be conducted, without the direction of the concerned court and the formal permission is not necessary if the head of police thinks it is proper. He has the right to direct the police for reinvestigation or transfer of investigation to some other Police Station. Hence, the judgment cited by the applicants is not applicable in the present case.

12. During the pendency of the present application, the applicants further attacked upon the complainant and his family members on 14.12.2005. In this regard, another F.I.R has also been lodged as Case Crime No. 556 of 2005, under Sections 147, 148, 149, 323, 324, 504 and 506 I.P.C at P.S. Bankata, district Deoria and the complainant and the injured family

members were medically examined same day.

13. Therefore, the application under Section 482 Cr.P.C be dismissed.

14. No rejoinder has been filed by the applicants against the counter affidavit of O.P. No.2.

15. Heard and perused the record.

16. The applicants have taken only one ground that before passing an order to reinvestigate the case, the S.P. Deoria was duty-bound to take permission from the concerned Magistrate. In this regard, the applicants have relied on ***Hasanbhai Valibhai Qureshi Vs. State of Gujarat (supra),*** in which an application was moved to get the case investigated by an independent Agency other than the Police as the Local Police was under the pressure of the local M.L.A and the investigation was not carried out in a straight-forward manner. In the aforesaid case, initially an F.I.R had been lodged under Sections 395 and 120-B of the I.P.C and Section 135 of the Bombay Police Act, but after a few hours of registration of the F.I.R, Sections 395 and 120-B I.P.C were deleted by the prosecuting agency and as a result of such deletion the accused persons managed to get bail.

17. The facts of both the cases are quite different. In this case no prayer was made to S.P. Deoria to transfer the investigation to another agency, rather a request was made to transfer the investigation from one Police Station to another and after being satisfied, S.P. Deoria transferred the investigation to Police Station Kotwali, Salempur, Deoria. Thereafter, the case was investigated by another I.O, who submitted a charge-sheet against all eight accused persons named in the F.I.R including the applicants.

18. In the cited case, an aspect of amendment of charge was also involved and Sections 228, 240 and 216 Cr.P.C. were also dealt with. The Apex Court had considered Section 173(8) of the Cr.P.C and has held that it is open to the Police to conduct a proper investigation, even after the court took cognizance of any offence on the strength of a police report earlier submitted.

19. In this case, the S.P. Deoria, was not satisfied with the investigation done by the I.O. of P.S Bankata. The Apex Court relying on ***Om Prakash Narang Vs. State (Delhi Administration) AIR 1979 SCC 1791***, held that, further investigation is not altogether ruled out. If cognizance has been taken by the Court when defective investigation comes to light during the course of trial, it may be cleared by further investigation, if circumstances so permitted. Though it has also been said that the Court should be informed and formal permission may be taken when fresh facts come to light. In this case, according to the F.I.R, the whole facts were before the I.O that all the accused persons had committed the offence and the first I.O. of P.S. Bankata, being influenced by the applicants exonerated him and submitted a charge-sheet only in respect of the rest of the five accused persons. In short, the Apex Court held that if there is a necessity for further investigation, the same can certainly be done as prescribed by Law. The Court further held that the mere fact that there may be further delay in concluding the trial, does not stand on the way of further investigation, if that would help the Court

in arriving at truth and do real substantial as well as effective justice.

Section 173 (8) of the Code of Criminal Procedure is as under:-

"(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2)."

20. In Sri ***Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v. State of A.P., AIR 1999 SC 2332*** and in ***N.P. Jharia v. State of M.P., AIR 2007 SC 2677,*** it has been held that even after the Court took cognizance of any offence, on strength of police report first submitted, it is open to Police to conduct further investigation. In such a situation power of Court to direct the Police to conduct further investigation can not 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 Court would only result in encumbering it with burden of searching for all potential accused to be afforded with opportunity of being heard.

21. On the basis of above discussion, this Court is of the considered view that in the facts and circumstances of this case no formal permission of the concerned court was necessary for S.P. Deoria before transferring the investigation to another I.O of another Police Station. Thus, the present application has no force and is liable to be dismissed.

O R D E R

22. This application under Section 482 Cr.P.C is rejected accordingly and the stay order stands vacated.

23. Let a copy of this order be sent to the Judicial Magistrate II, Deoria, to proceed with the Criminal Case No. 1278 of 2005, under Sections 147, 149, 323, 452, 435, 504, 506 I.P.C, registered at Police Station Bankata, District Deoria, in accordance with the law and to conclude its trial as early as possible, as the matter has become very old.

(2024) 1 ILRA 936
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 12771 of 2023

Brij Mohan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Puneet Saxena, Sanjeev Kumar Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 323, 504 & 506 - Criminal Law Amendment Act, 1932 - Section 10 - Charge-sheet - Validity - Applicant submits that

as all offences are non-cognizable, neither FIR could be lodged nor charge-sheet could have been submitted, nor cognizance could be taken in St. case, only complaint could have been entertained by Court in respect of non-cognizable offences - Validity of notification dated 31st July 1989 issued under Section 10 of Criminal Law Amendment Act, 1932 by St. of U.P having been upheld by Full Bench of High Court in Mata Sewak Upadhyay (infra) and Full Bench decision having been approved by Supreme Court in Aires Rodrigues (infra), thus there is no doubt that offence under Section 506 IPC, if committed in St. of U.P. is cognizable offence - Submission of applicant is devoid of merit and accordingly, rejected - No illegality found in charge-sheet or in order taking cognizance of offences. (Para 3, 15, 16)

Application Dismissed. (E-13)

List of Cases cited:

1. Mata Sewak Upadhyay Vs St. of U.P., 1995 JIC 1168, (Para 12)

2. Virednra Singh & ors. Vs St. of U.P. & ors. 2002, Cri.L.J. 4265, (Paras 7, 8)

3. Hakim Singh Vs St. of U.P. & anr., Application u/s 482 Cr.P.C. No. 7147 of 2006

4. Aires Rodrigues Vs Vishwajeet P. Rane, (2017) 11 SCC 62

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

1. Heard Sri Puneet Saxena, the learned counsel for the applicant and Sri Anurag Verma, the learned A.G.A-I for the State.

2. By means of the instant applicant filed under Section 482 Cr.P.C, the applicant Brij Mohan has challenged the validity of the charge sheet no. 1 of 2023 dated 05.06.2023 under Sections 323, 504, 506 I.P.C. arising out of Case Crime No. 272/2023, Police Station Lalganj, District Raebareli, and the order dated 13.12.2023 passed by the Additional Chief Judicial Magistrate, Court No. 4, Raebareli in Case No. 24381 of 2023, taking cognizance of the aforesaid offences.

3. The submission of the learned counsel for the applicant is that all the offences are non-cognizable and, therefore, neither an F.I.R could be lodged regarding the offence under Section 323, 504, 506 nor could a charge sheet have been submitted nor could the court have taken cognizance of the offence and have summoned the applicant to face the trial of a State Case and only a complaint could have been entertained by the Court in respect of non-cognizable offences.

4. The Offence under Section 323, 504 I.P.C are undisputedly non-cognizable offence. The first Schedule appended to the Criminal Procedure Code, 1973 mentions the offence under Section 506 also to be a non-cognizable offence. However, the Uttar Pradesh Government has issued a Notification No. 777/VIII-9 4(2)-87, dated July 31, 1989, which was published in U.P. Gazette, Extra Part-4, Section (Kha), on 02.08.1989, which provides as follows: -

"In exercise of the powers conferred by Section 10 of the Criminal Law Amendment Act, 1932 (Act No. XXIII of 1932) read with Section 21 of the General Clauses Act, 1897 (Act No. 10 of 1897) and in supersession of the notifications issued in this behalf, the Governor is pleased to declare that any offence punishable under Section 506 of the Penal Code, 1860 when committed in any district of Uttar Pradesh, shall notwithstanding anything contained in the Criminal Procedure Code, 1973 (Act No. 2 of 1974) be cognizable and non-bailable."

5. The aforesaid notification has been issued under Section 10 of the Criminal Law Amendment Act, 1932 (Act No. 23 of 1932), which provides as follows:—

"10. Power of State Government to make certain offences cognizable and non-bailable.—

(1) The State Government may, by notification in the Official Gazette, declare that any offence punishable under section 186, 188, 189, 190, 228, 295A, 298, 505, 506 or 507 of the Penal Code, 1860, when committed. in any area specified in the notification shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898), be cognizable, and thereupon the Code of Criminal Procedure, 1898, shall, while such notification remains in force, be deemed to be amended accordingly.

(2) The State Government may, in like manner and subject to the like conditions and with the like effect, declare that an offence punishable under section 188 or section 506 of the Penal Code, 1860, shall be non-bailable."

6. In **Mata Sewak Upadhyay v. State of U.P.**, 1995 JIC 1168, the question of validity of the aforesaid provision of was assailed before a Full Bench of this Court on the following grounds: -

7. Section 10 of the Criminal Law Amendment Act, 1932 authorised the State Government to make certain non-cognizable offences under Code of Criminal Procedure, 1898 (5 of 1898), cognizable by notification, but this power could be exercised in respect of the Code of Criminal Procedure, 1898 only and after its repeal by virtue of Section 484 of Criminal Procedure Code, 1973, the power ceased to exist.

8. Section 10 of the Act of 1932 is violative of Article 14 of the Constitution, inasmuch as it is bereft of any guideline in respect of an area to be specified in the notification.

9. The Full Bench rejected both the contentions and held that Section 10 of the Act of 1932 and Notification No. 777/VIII-9-4 (2) (87) dated July 31, 1989 are valid.

10. The learned Counsel for the applicant has placed reliance upon a subsequent Division Bench judgment of this Court in the case of **Virednra Singh and others Vs. State of U.P. and others,** 2002, Cri.L.J. 4265, wherein it was held that:-

"7. Section 10 of the Criminal Law Amendment Act, 1932 does not give power to the State Government to amend by a notification any part of the Criminal Procedure Code 1973. Since the Cr.P.C. of 1898 has been repealed by Section 484 of the Cr.P.C. Act, 1973 we are of the opinion that Section 10 of the Criminal Law Amendment Act, 1932 has become redundant and otiose. Hence in our opinion no notification can now be made under Section 10 of the Criminal Law Amendment Act, 1932. Any such notification is illegal for the reason given above. Hence we declare notification No. 777/VIII-9 4(2)-87, dated July 31, 1989, published in the U.P. Gazette, Extra Part 4, Section (kha), dated 2nd August, 1989 by which Section 506, I.P.C. was made cognizable and non bailable to be illegal. Section 506, I.P.C. has to be treated as bailable and non - cognizable offence.

8. There is another reason also why the aforesaid notification of 1989 is illegal. The Cr.P.C. of 1973 is a Parliamentary enactment. An act can only be amended by another Act or by an Ordinance, not by a simple notification. Moreover, a Central Act cannot be amended even by a U.P. Act unless the assent of the President is taken vide Article 254(2) of the Constitution. The notification of 1989 purports to amend a Central Act (the Cr.P.C. of 1973) even without the assent of the President."

11. The learned counsel for the applicant has submitted that the judgment of the Division Bench in **Virendra Singh** (supra) has been followed in the order dated 05.07.2019 passed by a coordinate Bench of this Court in **Hakim Singh Vs. State of U.P. and another,** Application under Section 482 Cr.P.C. No. 7147 of 2006.

12. The judgment in the case of Virendra Singh (Supra) was passed a Division Bench without taking into consideration the earlier Full Bench judgment in the case of **Mata Sewak Upadhyay,** which was binding on the Division Bench.

13. Moreover, the aforesaid decision of the Full Bench in **Mata Sewak Upadhyay** (Supra) has been approved by the Hon'ble Supreme Court in **Aires Rodrigues v. Vishwajeet P. Rane**, (2017) 11 SCC 62. The question in that case was regarding validity of a similar Notification issued under Section 10 of the Criminal Law Amendment Act, 1932, declaring Sections 186, 188, 189, 228, 295-A, 298, 505 or 507 of the Penal Code, 1860 when committed in the Union Territory of Goa (now State), Daman and Diu, to be cognizable and Sections 188 or 506 IPC to be non-bailable when committed, in the said territory. The contention, in support of the challenge, was that such a Notification would be repugnant to the provisions of the Code of Criminal Procedure and the State could not issue a notification in conflict with the Central legislation. The Hon'ble Supreme Court held that: -

"*merely because the 1898 Code has been repealed and replaced by the 1973 CrPC, could not affect the situation. Section 484 CrPC, 1973 as well as Section 8(1) of the General Clauses Act, 1897 saved a notification which may have been issued under CrPC of 1898. Section 8 of the General Clauses Act is as follows:*

***"8. Construction of references to repealed enactments.**—(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.*

(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted, with or without modification, any provision of a former enactment, then reference in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

In these circumstances, we are unable to sustain the view taken in the impugned orders.

10. It is pointed out by the learned counsel for the appellant that a contra view has been taken by the High Courts of Gujarat, Delhi, Allahabad and Madras in Vinod Rao v. State of Gujarat, Sant Ram v. Delhi State, Mata Sewak Upadhyay v. State of U.P., P. Ramakrishnan v. State respectively. He also pointed out that a different view has been taken by the High Court of Allahabad in Pankaj Shukla v. Anirudh Singh without noticing the Full Bench decision of the High Court of Allahabad in Mata Sewak Upadhyay."

14. The Hon'ble Supreme Court specifically approved the view taken in **Mata Sewak Upadhyay** (Supra) by stating that: -

"12. We approve the view taken by the High Courts of Gujarat, Delhi, Allahabad and Madras in Vinod Rao, Sant Ram, Mata Sewak Upadhya and P. Ramakrishnan and disapprove the view taken by the High Court of Allahabad in Pankaj Shukla"

15. The validity of the aforesaid notification dated 31st July 1989 having been upheld by a Full Bench of this Court in **Mata Sewak Upadhya**y (Supra) and the Full Bench de**cision having been approved by the Hon'ble Supreme Court in** Aires Rodrigues (Supra), there is no doubt that an offence under Section 506 IPC, if committed in the State of U.P. is a cognizable offence.

16. Therefore, the submission of the learned Counsel for the applicant lacks merits and the same is accordingly rejected. There is no illegality in the charge sheet no. 1 of 2023 dated 05.06.2023 under Sections 323, 504, 506 I.P.C. arising out of Case Crime No. 272/2023, Police Station Lalganj, District Raebareli, and the order dated 13.12.2023 passed by the Additional Chief Judicial Magistrate, Court No. 4, Raebareli in Case No. 24381 of 2023, taking cognizance of the aforesaid offences.

17. The application under Section 482 Cr.P.C. lacks merit and the same is **dismissed.**

(2024) 1 ILRA 940
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482. No. 12797 of 2023

Anshu Gaur ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Amit Kumar Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure,1973 – Section 482 - The applicant sought to expunge remarks made against him in paragraphs 105 and 106 of the trial court's judgment dated 10.11.2021 in Session Trial No. 460/2017, alleging they cast aspersions on his conduct as a witness – Held, the remarks were not sweeping or generalized but based on a detailed analysis of the applicant's St.ments and conduct, and thus did not warrant expungement under Section 482 Code of Criminal Procedure,1973. (Paras 14, 24, 26, 28)

Judicial Restraint and Remarks Against Witnesses – The applicant argued that adverse remarks violated principles of fairness and judicial restraint, citing *St. of U.P. Vs Mohammad*

Naim and other cases – Held, the cited precedents were distinguishable as they involved sweeping remarks against authorities or advocates without opportunity for explanation, whereas here, the remarks were specific, evidence-based, and made after the applicant's examination as PW-17, negating the need for a separate hearing. (Paras 11-14, 15-21, 24)

Conduct of Witness and Abuse of Process – The trial court observed that the applicant, as PW-17, concealed documents since 2017, delayed his testimony despite 17 summons, and filed a writ petition to record his evidence, suggesting he acted as a "director" of the litigation – Held, these actions, including withholding documents and causing delays, justified the trial court's finding of abuse of judicial process, and the direction to register a case for investigation was not illegal. (Paras 7, 9, 24, 26)

Principles of Audi Alteram Partem – The applicant contended that no opportunity was given to address the remarks – Held, the remarks were made post-examination and cross-examination, and the trial court's direction for investigation rather than a conclusive finding did not violate principles of natural justice, as the applicant had ample opportunity to present his case during testimony. (Paras 10, 21, 26)

Precedential Value and Factual Context – The applicant relied on *Mohammad Naim*, *A.M. Mathur*, and *Neeraj Garg* to argue against the remarks – Held, these cases were inapplicable due to differing factual contexts, as per *Bhavnagar University Vs Palitana Sugar Mill* and *Escorts Lt Vs Commissioner of Central Excise*, since the remarks here were specific to the applicant's conduct as a witness and not generalized or unrelated to the cas(Paras 22, 23, 24)

Exercise of Inherent Powers under Section 482 Code of Criminal Procedure,1973 – The court found the trial court's observations aimed to prevent abuse of process and secure justice, aligning with the objectives of Section 482 Code of Criminal Procedure,1973 – Held, no interference was warranted as the remarks were based on exceptional circumstances indicating the applicant's misuse of judicial process, and the application was dismissed for lack of merit. (Paras 25, 27, 28)

Application Rejected.

List of Cases cited:

1. St. of U.P. Vs Mohammad Naim, AIR 1964 SC 703

2. A.M. Mathur Vs Promod Kumar Gupta & Ors., (1990) 2 SCC 533

3. Neeraj Garg Vs Sarita Rani & Ors., (2021) 9 SCC 92

4. Bhavnagar University Vs Palitana Sugar Mill (P) Lt, (2003) 2 SCC 111

5. Escorts Lt Vs Commissioner of Central Excise, New Delhi, (2004) 8 SCC 335

6. Bharat Petroleum Corporation Lt Vs N.R. Vairamani, (2004) 8 SCC 579

7. Vira Wali Manga Vs Sarita Rani, 2017 SCC OnLine Utt 1946

8. Landour Community Hospital Vs Sandeep Bishnoi, Second Appeal No. 190 of 2019, decided on 22-11-2019

9. Vinod Kumar Vs Mandir Laxmi Narayan, 2020 SCC OnLine Utt 1199

10. Parul Prakash Vs Anil Prakash, 2021 SCC OnLine Utt 924

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

1. Heard Sri Amit Kumar Singh, the learned counsel for the applicant, Sri Anant Pratap Singh, the learned AGA for the State and perused the records.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has prayed to expunge the remarks/ observation made against him in

paras 105 & 106 of the judgment and order dated 10.11.2021 passed by the learned Special Judge, M.P., M.L.A./ Additional Sessions Judge, Court No. 19, Lucknow in Session Trial No. 460/2017 arising out of Case Crime No. 29/2017, under Sections 376D, 354A-1, 504, 506, 509 IPC & Section 5g/6 POCSO Act, Police Station Gautam Palli, District Lucknow, casting aspersions on the conduct of the applicant.

3. The aforesaid case alleged commission of offences by 7 accused persons, including a minister. It was alleged that the Minister and another accused person had administered some intoxicating substance to the informant and had raped her. They had prepared obscene photographs of the informant and by misusing those photos, all the accused persons repetitively raped the informant. However, when they tried to rape her 17 years old daughter, the informant resisted them and she filed the F.I.R.

4. A perusal of the judgment indicates that after completion of the prosecution evidence and recording of statements of the accused persons under Section 313 Cr.P.C. and also after recording of their statements under Section 313(5) Cr.P.C., the applicant had filed Crl. Misc. Writ Petition No. 21263 of 2020 for recording of his evidence and thereafter he was examined on 16.09.2021 as PW-17. He stated that in October, 2016, the informant, whom he referred to as her 'Muh Boli Bahan' had told her that she was being harassed by persons of the minister and soon she would call the applicant for her help. Thereafter the informant had called the applicant and he came to Lucknow and while the applicant was sitting in a car with the informant and the later was telling him about the offences committed against her, the applicant was attacked, but somehow he remained unhurt. The applicant further stated that for getting justice for the informant and her daughter, he had talked to an advocate of the Hon'ble Supreme Court and thereafter the advocate had filed a writ petition and the applicant was personally present in the Court at the time of hearing of the writ petition. The informant did not have money and, therefore, the applicant and some other persons had contributed money and had given the same to the informant. During that period, the informant came to know that the Investigating Officer wanted to record statement of the informant and she stated that she would give statement at New Delhi in presence of her advocate. Thereafter, statement of the informant's daughter was recorded under Section 164 Cr.P.C. in Tees Hazari Court.

5. It is also mentioned in the trial court's judgment that the Investigating Officer had made repetitive phone calls to the advocate for recording statement of the informant under Section 164 Cr.P.C., whereupon the applicant and the informant came to Lucknow through a flight and got her statement recorded under Section 164 Cr.P.C. in the Court and thereafter they returned to Delhi through flight on the same day.

6. After recording of statement of the applicant as PW-17, the additional statement of the accused person were recorded wherein the accused Minister stated that the applicant had taken the informant under his influence and has given false evidence due to political animosity. Another accused person stated that the applicant is a criminal who had been externed from the district and he had

levelled false allegations with the object of extracting money.

7. In paragraphs 105 and 106 of the judgment, the trial court has stated that the applicant and another person Ram Singh Rajpoot have acted as directors in the matter. After taking note of the facts stated in the preceding paragraphs of this order, the trial court noted that the applicant had got a writ petition filed before the Hon'ble Supreme Court after concealing the fact that the informant had already filed an FIR with the same allegations in October, 2016. The trial court has observed that the applicant and Ram Singh Rajpoot had documents regarding the case available with them since the year 2017 but they did not make the same available to the Investigating Officer in spite of attempts made by him and they concealed the documents, from which it appears that they were waiting for some deal to be struck out which might benefit them. Summons were issued to the applicant on as many as 17 occasions but still he did not appear and when the opportunity of his evidence was closed, he filed a writ petition for getting his statement recorded. Even after passing of the order by this Court, he caused undue delay in recording of the statement and dragged the statement for several dates. After conclusion of the cross-examination, the applicant filed several documentary evidences regarding which he admitted that those were available with him since the year 2017 but he did not give the same to the Investigating Officer.

8. The Court observed that the person who can go to the Supreme Court and file a writ petition, could certainly have brought the documents on record. When an order was passed on 27.10.2021 that the documents were not admissible for want of a certificate under Section 65B of the Indian Evidence Act, the applicant filed another application for proving the documents. The explanation for delay in producing the documents given by the applicant was that he was afraid of the Minister whereas the minister was lodged in district jail since the year 2017 and he was not related to the ruling party.

9. After noting the aforesaid facts, the court observed that the aforesaid acts of the applicant and the two other persons shake the conscience of the court and it amounts to an abuse of the process of law and that the persons who misuse the judicial process and keep on changing their stand to achieve their objects, need to be punished after proper investigation. Accordingly, the court ordered registration of a case against the applicant and some other persons, and investigate the same.

10. The learned counsel for the applicant has submitted that no opportunity of hearing has been accorded to the applicant before making the aforesaid observations.

11. In support of the aforesaid submissions, the learned court has relied upon the judgment of the Hon'ble Supreme Court in the cases of **State of U.P. v. Mohammad Naim:** AIR 1964 SC 703, **A. M. Mathur v. Promod Kumar Gupta & Ors.**: (1990) 2 SCC 533, **Neeraj Garg v. Sarita Rani & Ors.**: (2021) 9 SCC 92.

12. In the case of **Mohammad Naim** (supra) the Judge had made the following remarks against the entire police force:-

"(a) If I had felt that with my lone efforts I could have cleaned this augean stable, which is the police force, I would

not have hesitated to wage this war single handed."

(b) That there is not a single lawless group in the whole of the country whose record of crime comes anywhere near the record of that organised unit which is known as the Indian Police Force.

(c) Where every fish barring perhaps a few stinks, it is idle to pick out one or two and say that it stinks."

13. In the aforesaid context, the Hon'ble Supreme Court held that: -

"*If there is one principle of cardinal importance in the administration of justice, it is this : the proper freedom and independence of Judges and Magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by any body, even by this Court. At the same time it is equally necessary that in expressing their opinions Judges and Magistrates must be guided by considerations of justice, fair-play and restraint. It is not infrequent that sweeping generalisations defeat the very purpose for which they are made. It has been judicially recognised that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct, justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct. It has also been recognised that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve."*

14. In the present case, no sweeping remarks have been made against any officer or authority or the system. The observations have been made against the conduct of a witness, after taking into note in detail the witness's statement and his conduct. Therefore, the ratio of **Mohammad Naim** (supra) will not apply with the facts of the present case.

15. In **A. M. Mathur** (Supra), Writ Petitions filed challenging a policy decision of the State Government of Madhya Pradesh with regard to construction of new distilleries, were allowed by a Division Bench. The appellant A. M. Mathur had appeared in those Writ Petitions on behalf of the State Government as the Advocate General of the State. The learned Acting Chief Justice had delivered the main judgment in the writ petitions invalidating the decision of the government on the ground that it violated Article 14 of the Constitution. The other Judge, Justice B.M. Lal had delivered a separate concurring opinion in which he had made highly disparaging remarks attributing mala fides and underhand dealing to the State Government. The Hon'ble Supreme Court had allowed appeal preferred by the State and the judgment of the High Court was set aside and the strictures made by Justice B. M. Lal had been disapproved strongly by stating that *"the observations made and strictures passed by B.M. Lal, J. were totally unjustified and unwarranted and they ought not to have been made."*

16. An advocate who had no connection whatsoever with the earlier

litigation, filed a review petition before the High Court after a delay of 738 days, inter alia alleging that the State Government had procured the judgment from the Supreme Court by committing fraud. The matter was listed for admission before a bench consisting of Hon'ble Mr. Justice C.P. Sen and Hon'ble Mr. Justice B.M. Lal on 29.20.1988. After arguments, C. P. Sen, J. seems to have dictated his order in the open court dismissing the review petition. He expressed the view that the petitioner had no locus standi to file the review petition and the economically well-to-do parties to the writ petitions who lost their case before this Court did not choose to file any review petition. He also held that the petition for review was not maintainable before the High Court since the decision of the High Court had been reversed by the Hon'ble Supreme Court. The petition was also held to be hopelessly barred by limitation and there was no sufficient cause for condoning the inordinate delay.

17. However, B.M. Lal, J. did not pass any order on 29.10.1988 and he pronounced his order on 06.02.1989. Mr Mathur had tendered his resignation as Advocate General on 25.01.1989. Mr Gupta filed an application dated 25.01.1989 requesting the court to take judicial notice of some extract of the Vidhan Sabha proceedings and to pass appropriate strictures against the appellant. That application was not served on the appellant nor did the court give him any opportunity to file his counter. On 06.02.1989, the said application was taken on record and on the same day B.M. Lal, J. pronounced his order dismissing the review petition and he made disparaging remarks against the appellant, who by then was a former Advocate General. Allowing the appeal, the Hon'ble Supreme Court held that: -

"15. Learned Judge having held that the High Court has no jurisdiction to entertain the review petition ought not to have commented on the professional conduct of the appellant and that too without an opportunity for him. We regret to note that the observations made and aspersions cast on the professional conduct of the appellant are not only without jurisdiction, but also they are wholly and utterly unjustified and unwarranted."

18. In the aforesaid factual background, the Hon'ble Supreme Court had further observed that: -

"13. Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other co-ordinate branches of the State, the executive and the legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process.

14. The Judge's Bench is a seat of power. Not only do judges have power to make binding decision, their decisions legitimate the use of power by other officials. The judges have the absolute and unchallengeable control of the court domain. But they cannot misuse their authority by intemperate comments,

undignified banter or scathing criticism of counsel, parties or witnesses. We concede that the court has the inherent power to act freely upon its own conviction on any matter coming before it for adjudication, but it is a general principle of the highest importance to the proper administration of justice that derogatory remarks ought not to be made against persons or authorities whose conduct comes into consideration unless it is absolutely necessary for the decision of the case to animadvert on their conduct."

19. The aforesaid observations made in light of the peculiar facts of the case where the appellant had appeared in the Writ Petitions as Advocate General of the State, the Acting Chief Justice had delivered the main judgment allowing the writ petitions but the other Judge, Justice B.M. Lal had delivered a separate concurring judgment in which he had made highly disparaging remarks against the State Government, the Hon'ble Supreme Court had allowed appeal preferred by the State, set aside the judgment and had strongly disapproved the strictures made by Justice B. M. Lal, thereafter an advocate who had no connection with the earlier litigation, had filed a highly belated review petition before the High Court and the presiding Judge of the Bench had dismissed the review in open Court on 29.20.1988 on the grounds that the petitioner has no locus standi and the review petition was not maintainable since the decision of the High Court had been reversed by the Supreme Court and the petition was hopelessly barred by limitation and there was no sufficient cause for condoning the inordinate delay. Justice B. M. Lal did not pronounce his order. The appellant had resigned from the office of Advocate General on 25.01.1989. On 16.02.1989 the petitioner filed an application requesting the court to pass strictures against the appellant, without serving its copy on the appellant and B. M. Lal, J. passed an order on the same day dismissing the review petition and he made disparaging remarks against the appellant.

20. Lastly in **Neeraj Garg v. Sarita Rani**, (2021) 9 SCC 92, severe adverse remarks were made against the Appellant Counsel in four orders passed by an Hon'ble Judge in four different cases, i.e. W.P. (M/S) No. 2216 of 2017 and W.P. (M/S) No. 2208 of 2017 titled Vira Wali Manga v. Sarita Rani 2017 SCC OnLine Utt 1946, Second Appeal No. 190 of 2019 titled Landour Community Hospital v. Sandeep Bishnoi, Second Appeal No. 190 of 2019, decided on 22-11-2019, Second Appeal No. 182 of 2019 titled Vinod Kumar v. Mandir Laxmi Narayan, 2020 SCC OnLine Utt 1199, WP (M/S) No. 519 of 2019 titled Parul Prakash v. Anil Prakash , 2021 SCC OnLine Utt 924. It was inter alia submitted before the Hon'ble Supreme Court that the appellant, with an otherwise unblemished professional record, had no occasion to suffer such adverse remarks from any other Judge of the High Court. Before his elevation to the Bench on 19-5-2017, the Judge concerned was a member of the same Bar as the appellant and both were rival counsel in several contested matters and the comments may have emanated from personal prejudice and may not be otherwise warranted. It is argued that the appellant should not be made to suffer adverse comments on his conduct as a lawyer only because the Judge concerned may not appreciate the efforts made by the counsel, on behalf of his client.

21. Allowing the appeal of the Advocate, the Hon'ble Supreme Court held that: -

*"**16.** Having perused the offending comments recorded in the High Court judgments, we feel that those could have been avoided as they were unnecessary for deciding the disputes. Moreover, they appear to be based on the personal perception of the learned Judge. It is also apparent that the learned Judge did not, before recording the adverse comments, give any opportunity to the appellant to put forth his explanation. The remarks so recorded have cast aspersion on the professional integrity of the appellant. Such condemnation of the counsel, without giving him an opportunity of being heard would be a negation of the principles of audi alteram partem. The requisite degree of restraint and sobriety expected in such situations is also found to be missing in the offending comments.*

17. The tenor of the remarks recorded against the appellant will not only demean him amongst his professional colleagues but may also adversely impact his professional career. If the comments remain unexpunged in the Court judgments, it will be a cross that the appellant will have to bear, all his life. To allow him to suffer thus, would in our view be prejudicial and unjust."

22. While considering the applicability of the observations made in the precedents cited by the learned Counsel for the applicant, this Court has to take into consideration the following well established principle of the law of precedents reiterated in **Bhavnagar University v. Palitana Sugar Mill (P) Ltd.,** (2003) 2 SCC 111:-

"A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

23. Again, in **Escorts Ltd. v. Commissioner of Central Excise, New Delhi,** (2004) 8 SCC 335 and in **Bharat Petroleum Corporation Ltd. v. N. R. Vairamani,** (2004) 8 SCC 579, the Hon'ble Supreme Court held that:-

"8. 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 neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes."

24. Therefore, the observations made in the judgments cited by the learned Counsel for the applicant will have to be read in the context of the peculiar factual background in those cases, which are in no way similar to the facts of the present case. In the present case, the observations have been made against a witness after recording of his statement in his examination-in-chief and the cross-examination and after discussing the applicant's statements and the other circumstances showing his conduct in detail. After noting the aforesaid facts, the court observed that the acts of the applicant and the two other persons shake the conscience of the court and it amounts to an abuse of the process of law. The

persons who misuse the judicial process and keep on changing their stand to achieve their objects, need to be punished after proper investigation. Accordingly, the court ordered registration of a case against the applicant and some other persons, and investigate the same.

25. It is correct that the Courts should not normally make observations against Judges, parties to litigation, advocates and witnesses which may have an adverse impact on their reputation or their future prospects, but it is not that the Court cannot make observations about the conduct of a litigant or a witness even in an exceptional case where the witness appears to have acted as a director of the litigation and to have abused the process of law. From the facts of the case narrated above, the present case appears to be an exceptional cases and it appears that the trial Court has made the observations keeping in view the exceptional circumstances of the case arising out of the conduct of the applicant.

26. Moreover, while making the observations, the trial Court has not recorded by conclusive finding and the Court has merely directed that a case should be registered against the applicant and it should be investigated. Therefore, the mere order of registration of a case and investigation passed after detailed analysis of the statements of the applicant and of his conduct, appears not to be suffering from any illegality warranting interference in exercise of power of this Court under Section 482 Cr.P.C.

27. Section 482 Cr.P.C. recognizes the inherent powers of this Court to pass orders necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice. It appears that the learned trial Court has made the observations under challenge to prevent abuse of the process of the Court and to secure the ends of justice and no interference is warranted in the observations in exercise of this Court's jurisdiction under Section 482 Cr.P.C.

28. Accordingly, the application lacks merit and the same is ***rejected***.

(2024) 1 ILRA 948
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 17997 of 2009

Dullu @ Mahoob & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Diwakar Shukla, Sri Abhishek Tripathi

Counsel for the Opposite Parties:
G.A., Sri Mohd. Asim Zulfikar

Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 482 – Indian Penal Code, 1860 - Sections 363, 366, 376 & 506 - Application u/s 482 – for quashing the further criminal proceedings – FIR – offence of rape – charge-sheet – compromise – compromise was verified by the trial court - applicant urged that, applicant no. 1 and daughter of opposite party No. 2 both are major and willingly got married – victim also in her Statement willingly accompanied to applicant no. 1 and also married without nay coercion, therefore case u/s 376 IPC is not made out – court finds that, both applicant no.1 and victim are living as husband and wife and out of their wedlock four children have borne and fact of entering in compromise which was duly verified by the trial court are not

disputed – held, even it the offence like rape, cannot be quashed on the basis of compromise but if from perusal of record, no case is made out under section 376 IPC, even if the charge-sheet is filed, - proceedings, on the basis of compromise can be quashed – hence, in view of the fact and legal position as well as law laid down by the Apex court, the impugned proceedings is hereby quashed - accordingly, present Application is allowed. (Para – 8, 12)

Application Allowed. (E-11)

List of Cases cited:

1. Application U/S 482 No.41580 of 2022 (Fakre Alam @ Shozil Alam Vs St. of U.P. and 3 others),

2. Gian Singh Vs St. of Punj. & anr.(2012) 10 SCC 303,

3. Narinder Singh & ors. Vs St. of Punj. & anr.(2014) 6 SCC 477,

4. St. of M.P. Vs Laxmi Narayan, AIR 2019 SC 1296,

5. St. of M.P. Vs Dhruv Gurjar, AIR 2017 SC 1106.

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

1. Heard Sri Abhishek Tripathi, learned counsel for the applicants, learned A.G.A. for the State and Sri Mohd. Asim Zulfikar, learned counsel for opposite party no.2.

2. The instant application has been moved on behalf of the applicants to quash the further proceedings of Case No.3503 of 2006 (State Vs. Dullu @ Mahboob and others), arising out of Case Crime No.94 of 2006, under Sections 363, 366, 506, 376 IPC, Police Station Saini, District Kaushambi, pending in the court of Chief Judicial Magistrate, Kaushambi.

3. Contention of learned counsel for the applicants is that as the applicant no.1 - Dullu @ Mahboob and daughter of opposite party no.2, both are major and willingly got married. Victim - Farida has stated in her statement under Section 161 Cr.P.C. that she willingly accompanied to applicant no.1 and also got married without any coercion, therefore, case under Section 376 I.P.C. is not made out.

4. Further contention of learned counsel for the applicants is that now the applicant no.1 and the daughter of opposite party no.2 are living as husband and wife and out of their wedlock four children have borne. Both the parties have entered into compromise and they have also produced written compromise.

5. This Court vide order dated 04.04.2023 directed to the parties to file compromise deed before the court below with further direction to the court below to verify the same after summoning the parties and send his report to this Court.

6. In pursuance of order dated 04.04.2023 of this Court, learned Chief Judicial Magistrate, Kaushambi has verified the compromise and submitted its report dated 08.05.2023 along with copy of verified compromise.

7. The facts of entering into compromise and applicant no.1 and opposite party no.2 are living as husband and wife, are not disputed by learned counsel for opposite party no.2.

8. Considering the fact that applicant no.1 and daughter of opposite party no.2, both are major and willingly married and also on perusal of statement of victim Farida, case under Section 376 I.P.C. is not

made out. This Court in the case of ***Application U/S 482 No.41580 of 2022 (Fakre Alam @ Shozil Alam Vs. State of U.P. and 3 others)*** observed that even if the offence like rape, cannot be quashed on the basis of compromise but if from perusal of record, no case is made out under Section 376 I.P.C. even if the charge sheet is filed under Section 376 I.P.C., the proceedings, on the basis of compromise can be quashed.

9. The Apex Court in the case of ***Gian Singh Vs. State of Punjab & Another (2012) 10 SCC 303*** observed in paragraph no.61 as under:-

"The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its

jurisdiction to quash the criminal proceeding."

10. Similarly, Hon'ble Apex Court in the case of ***State of M.P. Vs. Laxmi Narayan*** observed in paragraph no.13.4 as under:-

"iv) offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;"

11. Therefore, in such peculiar facts and circumstances, it would be unfair and contrary to interest of justice to continue with impugned criminal proceeding.

12. In view of the above facts and legal position as well as law laid down by the Apex Court in the judgment of G***ian Singh Vs. State of Punjab & Another (2012) 10 SCC 303, Narinder Singh & Others Vs. State of Punjab & Another (2014) 6 SCC 477 and State of M.P. Vs. Laxmi Narayan, AIR 2019 SC 1296 and State of M.P. Vs. Dhruv Gurjar, AIR 2017 SC 1106,*** the proceedings of Case No.3503 of 2006 (State Vs. Dullu @ Mahboob and others), arising out of Case Crime No.94 of 2006, under Sections 363, 366, 506, 376 IPC, Police Station Saini, District Kaushambi, pending in the court of Chief Judicial Magistrate, Kaushambi, is hereby **quashed.**

13. In view of the aforesaid observations, the application is **allowed.**

(2024) 1 ILRA 951
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 20686 of 2023

Virat Pachauri & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Ms. Tanisha Jahangir Monir, Sri Nipun Singh, Sri Rishi Upadhya, Sri Ajay Gautam, Sri Abhijeet Mishra

Counsel for the Opposite Parties:
G.A., Sri Vibhu Rai

Criminal Law – Criminal Procedure Code, 1973 - Sections 157-, 311-A & 482 – Indian Penal Code, 1860 - Sections 379, 420, 467, 471 & 505 - Indian Evidence Act, 1872 - Section - 73 - Application u/s 482 – for quashing the charge sheet and summoning order – FIR – charge sheet – impugned summoning order – applicant taken plea that, the matter is purely civil and should be decided by a civil court, the criminal court has no jurisdiction to decide the genuineness or validity of the document – as well as the FSL report used to support the charge of forgery was inadmissible as it was obtained without permission from the court concern - the Court finds that – no suit is pending for cancellation of the alleged forged deed and even the FSL report obtained by the investigating officer clearly shows that the signature of the father of the opposite party no. 2 was forged – court held that, it cannot be said that no case is made out and the case is purely Civil in nature – further, forgery is a criminal offence and can be tried even if a civil suit is pending - The Court also held that, the applicants had concealed material facts by not disclosing the rejection of their discharge and revision applications - Since charges have already been framed and no challenge to those orders was made in the present application, therefore, the court does not find any merit in the case – consequently, application is rejected – without prejudice rights of the applicants to challenge the rejecting the discharge applicant and revisional court order before the appropriate forum – directions issued, accordingly.
(Para – 21, 22, 23, 24, 25)

Application Rejected. (E-11)

List of Cases cited:

1. St. of Uttar Pradesh Vs Ram Babu Misra; (1980) 2 Supreme Court Cases 343,

2. Sukhvinder Singh & ors. Vs St. of Punj.; (1994) 5 Supreme Court Cases 152,

3. Criminal Appeal No. 804 of 2001 in Sapan Haldar & anr. Vs St. decided on 25.05.2012,

4. Crl. M. A. No. 14076 of 2012 in Criminal Appeal No.582 of 2012 (Raj Kumar Vs St.) decided on 18.10.2012,

5. Criminal Appeal Nos.575 and 576 of 2011 Santosh Vs St. (G.N.C.T.) of Delhi decided on 28.04.2023 – (Manu/SC0499/2023),

6. Civil Appeal No. 4270 of 2018 (K.D. Sharma Vs Steel Authority of India Ltd. & ors. decided on 09.07.2008,

7. Civil Appeal No. 3827 of 2007 (Prestige Light Ltd. Vs St. Bank of India) decided on 20.08.2007,

8. Sant Lal Gupta & ors. Vs Modern Cooperative Group Housing Society Ltd. & ors. - (2010) 13 SCC 336,

9. S. Kasi Vs St. through Inspector of Police, Samaynallur Polie Station, Madurai District - (2021) 12 SCC 1,

10. Criminal Appeal No. 1793 of 2023 (Pratibha Manchanda & ors. Vs St. of Har. & ors. decided on 07.07.2023.

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

1. Heard Sri Nipun Singh along with Sri Rishi Upadhya, Ajay Gautam and Abhijeet Mishra, learned counsel for the applicants, Sri Vibhu Rai, learned counsel for the opposite party no.2 and learned AGA for the State.

2. Present application under Section 482 Cr.P.C. has been filed for quashing the charge sheet dated 07.07.2022 as well as summoning order dated 12.07.2022 giving rise to Case No. 25474 of 2022 arising out of Case Crime No.0544 of 2021, under

Sections 406, 420, 467, 468, 471, 379, 505 IPC, Police Station- Bannadevi, District Aligarh.

3. The contention of counsel for the applicants is that it is an undisputed fact that Munna Lal has been residing in the factory in question as a security guard. It was also submitted that the sole basis for submitting the charge sheet is the FSL report regarding the signature of Surendra Kumar (father of opposite party no.2) as the same was sent to FSL without permission of the court concerned but the same was obtained only with the permission of civil court where the suit for injunction filed by the applicant no.1 was pending, therefore, the said FSL report is inadmissible and cannot be relied upon in view of Section 311 A Cr.P.C. as well as Section 73 of the Indian Evidence Act.

4. In support his contention, learned counsel for the applicants has relied upon the judgements of the Supreme Court **(i) State of Uttar Pradesh vs Ram Babu Misra; (1980) 2 Supreme Court Cases 343, (ii) Sukhvinder Singh and others vs State of Punjab; (1994) 5 Supreme Court Cases 152, (**iii) judgement of Delhi High Court in **Criminal Appeal No. 804 of 2001 in Sapan Haldar & Another vs State decided on 25.05.2012,** (iv) another judgement of the Delhi High Court in **Crl. M. A. No. 14076 of 2012 in Criminal Appeal No.582 of 2012 (Raj Kumar vs State) decided on 18.10.2012, (v) Criminal Appeal Nos.575 and 576 of 2011 Santosh vs. State (G.N.C.T.) of Delhi decided on 28.04.2023 reported in Manu/SC0499/2023).** In all these judgements the Hon'ble Apex Court and Delhi High Court observed regarding the scope of Section 311-A and Section 73 of Indian Evidence Act.

5. It is further contended by learned counsel for the applicants that the dispute in question is a purely civil dispute and whether forgery committed in preparing the deed in question can be decided by the civil court after examining the evidence and criminal court has no jurisdiction to decide such type of civil dispute.

6. Per contra, learned counsel for the opposite party no.2 submitted that the present 482 Cr.P.C. application itself is an abuse of the process of the court because prior to filing the present application U/S 482 Cr.P.C., a discharge application was filed by the applicants before the court below on 17.04.2023 which was rejected on 18.05.2023 thereafter revision was filed on 12.05.2023 and the same was also rejected on 23.06.2023 but all these facts were not brought on record, therefore there is material concealment on the part of the applicants.

7. In support of his contention, learned counsel for the opposite party no.2 has relied on the judgements of the Hon'ble Apex Court in **Civil Appeal No. 4270 of 2018 (K.D. Sharma vs Steel Authority of India Ltd. And Ors** decided on 09.07.2008 as well as in **Civil Appeal No.3827 of 2007 (Prestige Light Ltd. vs State Bank of India)** decided on 20.08.2007. In both these judgements, the Apex Court observed that if there is suppression of material facts on the part of any parties, then those parties shall not be entitled to any relief from the High Court. It is further contended that co-accused Ashok Kumar had filed 482 Cr.P.C. Application No.17191 of 2023 challenging the same criminal proceeding which was dismissed by this Court vide order dated 09.05.2023. Therefore, once the quashing of criminal proceedings has been refused

by the High Court at the instance of co-accused then another application under Section 482 Cr.P.C. application on behalf of another co-accused cannot be entertained.

8. In support of his contention, learned counsel for the opposite party no.2 has further relied upon the judgment of the Apex Court in the case of **Sant Lal Gupta and others vs Modern Cooperative Group Housing Society Limited and others** reported in **(2010) 13 SCC 336 and in the case of S. Kasi vs State through Inspector of Police, Samaynallur Polie Station, Madurai District** reported in **(2021) 12 SCC 1.** In both judgements, the Hon'ble Apex Court observed that the judgment of the Co-ordinate Bench should be respected, if the Co-ordinate Bench does not agree with the principle of another Bench then the matter may be referred to a larger Bench. It is also observed by the Apex Court that it is neither desirable nor permissible for the co-ordinate Bench to disapprove the earlier judgement and take a contrary view to it.

9. It is also contended by learned counsel for the opposite party no.2 that he has not filed any suit for cancellation of the deed in question till date because forgery in preparing the document is punishable under IPC. If from the report of FSL, it is proved that forgery has been committed then criminal proceeding is not barred. In support of his contention, he has relied upon the judgment of the Apex Court in **Criminal Appeal No. 1793 of 2023 (Pratibha Manchanda and Ors. vs State of Haryana and Ors.** decided on 07.07.2023. In the above judgement, the Hon'ble Apex Court observed that merely the pendency of a civil suit between the parties does not stop the issue of forgery and fabrication being considered in the course of criminal investigation.

10. It is lastly submitted by learned counsel for the opposite no.2 that I.O. in the present case after permission of the civil court, obtained a copy of the deed in question and sent for FSL to examine the geniuses of signature. It is also submitted that after the rejection of the discharge application of the applicants, the charge has already been framed before the court below and they are free to raise all the issues before the court below.

11. Learned AGA also contended that from perusal of the case diary prima facie case of forgery is made out and so far as the geniuses and legality of the report of FSL is concerned, the same can be challenged by the applicants at an appropriate stage.

12. Learned counsel for the applicant, in his reply to the contention of counsel for the opposite party no.2 submitted that judgement passed in Application U/S 482 Cr.P.C. filed by co-accused Ashok Kumar can prohibit him from filing the present application as no issue was decided in that application and order was passed on the consent of the parties for applying discharge application.

13. Considering the aforesaid submission of learned counsel for the parties and after perusal of record, three questions arise for consideration before this Court.

(i) Whether before sending a document to Forensic Science Laboratory to determine the genuineness of signature over this document with the undisputed document, Investigation Officer is required

to seek permission of concerned Magistrate under Section 311-A Cr.P.C. as well as under Section 73 of Evidence Act.

(ii) Whether there is material concealment of fact by the applicant for non-disclosing the parallel proceeding of discharge application filed by the applicant.

(iii) Whether the impugned proceeding is civil in nature which can be decided by the Civil Court.

14. So far as the submission of counsel for the applicants, that FSL report was obtained by the I.O. without permission of the concerned criminal court in view of the bar of Section 311A Cr.P.C. as well as Section 73 of the Indian Evidence Act is concerned, the same is misconceived because, in the judgements cited above by the counsel for the applicants, the Hon'ble Apex Court clearly observed in those judgements that Section 73 of Indian Evidence Act is applicable during trial and not during investigation.

15. Paragraph 20 of the judgement of the Apex Court in the case of **Sukhivinder Singh and others vs State of Punjab (supra)** is quoted hereinbelow;

"20. The second paragraph of Section 73 (supra) enables the court to direct any person present before it to give his specimen writing "for the purpose of enabling the court to compare" such writings with writings alleged to have been written by such person. The obvious implication of the words " for the purpose of enabling the court to compare" is that there is some proceeding pending before the court in which or as a consequence of which it is necessary for the court to compare such writings. The direction is therefore required to be given for the purpose of "enabling the court to compare" and not for the purpose of enabling an investigating or a prosecuting agency to obtain and produce as evidence in the case the specimen writings for their ultimate comparison with the disputed writings. Where the case is still under investigation and no proceedings are pending in any court in which it might be necessary to compare the two writings, the person (accused) cannot be compelled to give his specimen writings. The language of Section 73 does not permit any court to give a direction to an accused to give his specimen writing for comparison in a proceeding which may subsequently be instituted in some other competent court. Section 73 of the Evidence Act in our opinion cannot be made use of for collecting specimen writings during the investigation and recourse to it can be had only when the enquiry or the trial court before which proceedings are pending requires the writing for the purpose of 'enabling it to compare' the same. A court holding an enquiry under the Code of Criminal Procedure is indeed entitled under Section 73 of the Evidence Act to direct an accused person appearing before it to give his specimen handwriting to enable the court by which he may be subsequently tried to compare it with the dispute writings. Therefore, in our opinion, the court that can issue a direction to the person to give his specimen writing can either by the court holding the enquiry under the Code of Criminal Procedure or the court trying the accused person with a view to enable it to compare the specimen writings with the writings alleged to have been written by such a person. A court that is not holding an enquiry under the Code of Criminal Procedure or conducting the trial is not permitted, in the plain language of

Section 73 of the Evidence Act, to issue any direction of the nature contained in the second paragraph of Section 73 of the Evidence Act. The words " any person present in the court" in Section 73 a reference only to such persons who are parties to a case pending before the court and in a given case may even include the witnesses in the said cause but where there is no cause pending before the court for its determination, the question of obtaining for the purposes of comparison of handwriting of a person may not arise at all and therefore, the provisions of Section 73 of the Evidence Act would have no application."

16. Similarly, paragraph 51 of the judgment of the Apex Court in the case of **Santosh Vs. State (G.N.G.T.) of Delhi (supra)** is quoted hereinbelow;

"51 In the instant case, Neeraj's specimens of handwriting and signature were obtained by the investigating agency during investigation when there existed no specific provision in the Code regulating the procedure for obtaining such specimens and there existed no provision proscribing the investigating agency from obtaining specimens of handwriting/signature of an Accused or a suspect. As far as the provisions of Section 73 of the IEA, 1872 are concerned, they apply when a proceeding such as an inquiry or trial is pending in a Court. Since no proceedings were pending before any Court when the specimens in question were obtained, provisions of Section 73 of the IEA, 1872 could not have been invoked. In such a situation, as there existed no legal provision proscribing an investigating agency from obtaining specimens of handwriting/signature of a suspect or an Accused, in our view, the investigating agency had the power to collect such material including specimen handwriting/ signature as to assist the prosecution to introduce a relevant fact or corroborate and piece of evidence on a relevant fact/ fact in issue. For the reasons above, in our considered view, the expert report (i.e. FSL report) obtained during investigation by the investigation agency, predicated on specimens of handwriting/ signature of Neeraj obtained during investigation, could not have been discarded merely because it was obtained during investigation and without an order/permission of the Court as contemplated Under Section 73 of the IEA, 1872."

17. In the above judgement of the Hon'ble Supreme Court, it was clearly observed that Section 73 of Evidence Act is not applicable during investigation.

18. So far as Section 311-A Cr.P.C., the contention of learned counsel for the applicants regarding required permission of Magistrate under Section 311-A Cr.P.C. before sending document to FSL is concerned, it is clear from perusal of Section 311-A Cr.P.C. itself that it is an enabling provision. It empowers the Court to compel any person to give his specimen signature or handwriting during investigation or other proceeding before the Court. Section 311-A Cr.P.C. is reproduced hereinunder;

"311-A. Power of Magistrate to order person to give specimen signatures or handwriting.- If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen signatures or handwriting, he may make an order to that effect and in that

case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding."

19. Perusal of Section 311-A Cr.P.C. itself shows that it does not prescribe any prior permission on the part of Investigating Officer during investigation for sending any document to Forensic Science Laboratory to examine the genuineness of signature. Power of Investigating Officer during investigation is clearly prescribed under Section 157 Cr.P.C. Section 157 Cr.P.C. prescribes procedure for investigation and permits the Investigation Officer to take all measures for discovery. Section 157 Cr.P.C. is being quoted hereinbelow;

"157. Procedure for investigation.- *If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender; Provided that*

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

[Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.]

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub- section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements to that sub- section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated."

20. From the above reasoning as well as from perusal of Section 311-A and 157 Cr.P.C., it is clear that during investigation if undisputed signature in any document is available then Investigating Officer can send the document containing disputed signature to Forensic Science Laboratory to determine the genuineness of signature

over disputed document. **Therefore, this Court holds that Investigating Officer is not required to seek prior permission of concerned Magistrate for sending any document to Forensic Science Laboratory to determine the genuineness of signature over the disputed document and question of seeking direction from the Magistrate under Section 311-A Cr.P.C. arises only when direction is necessary to a particular person to give specimen signature or handwriting for the purpose of examination.**

21. Apart from this, it is also clear from the record that before sending the alleged forged deed for the FSL report, permission to obtain the original deed was received from the concerned civil court and after seeking permission from the civil court where the suit filed by the applicants was pending, same was sent to FSL and report of FSL *prima faice* could be the proof of forgery allegedly committed regarding the signature of the father of opposite party no.2, for filing charge sheet.

22. It appears from the submission of opposite party no.2 as well as on perusal of the record that before filing the present application, applicants have already filed a discharge application which was subsequently rejected on 18.05.2023 during the pendency of the present application and revision against the rejection of discharge application was also rejected on 23.06.2023 during the pendency of the present application but these facts were not brought on record by the applicants till objection raised by the counsel for the opposite party no.2 regarding concealment of facts. The above conduct of applicants shows that they are pursuing a parallel remedy in two different courts and this fact was also cancelled by this Court. **Therefore, there is material concealment on the part of the applicants regarding the rejection of the discharge application.** Even otherwise discharge application was rejected up to revisional court, then the applicants can challenge the order of the revisional court, if they are aggrieved against the rejection of the discharge application.

23. So far as submission of counsel for the applicants that the present dispute is absolutely civil in nature and the alleged deed in question can be quashed by the civil court after taking evidence and the criminal court has no jurisdiction to decide the genuineness or validity of the document, the same is also misconceived because alleged deed being unregistered document does not create any legal right over the property hence no decree of the civil court is required to cancel the same but this document was used in suit filed by the applicant no.1 to obtain injunction as well as to obtain licence to run Banquet Hall over the property of Company belongs to opposite party no.2 though same is allegedly forged and for that forgery criminal court is competent to try the case.

24. In the present case no suit is pending for cancellation of the alleged forged deed and even the FSL report obtained by the investigating officer clearly shows that the signature of the father of opposite party no.2 was forged. **Therefore, at this stage, it cannot be said that no case is made out and the case is purely civil in nature**. Even otherwise, once the discharge application of the applicants has been rejected and revision against that order was also rejected and now charges have been framed and those orders are not under-challenged in the present application and actually these orders were concealed from this Court, therefore this Court does

not find any merit in the present case application.

25. Therefore, the present application is **rejected** without prejudice rights of the applicants to challenge the order rejecting the discharge application and order of the revisional court before the appropriate forum.

(2024) 1 ILRA 959
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.08.2023

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482. No. 30340 of 2023

Head Constable, Kanpur Dehat & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Ganesh Shanker Srivastava, Sri Mahendra Singh

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Section – 482 – Constitution of India, 1950 – Article 227 - Application u/s 482 – for quashing the impugned order as well as summoning order - Preliminary objection – regarding maintainability of the Application u/section 482 against a judicial order – Court while referring the judgments passed by the Apex Court, in case of '*Radhey Shyam Vs St. of U.P.*' & '*Prabhu Chawla Vs St. of Rajasthan & Another*', held that - Judicial orders should be challenged through an alternative remedy or in the supervisory jurisdiction of the High Court under Article 227 of the Constitution, not under Section 482 of the Cr.P.C., - except in exceptional case - accordingly, present Application is dismissed. (Para – 4)

Application Dismissed. (E-11)

List of Cases cited:

1. Radhey Shyam Vs St. of U.P. – (2015) 5 SCC 423,

2. Prabhu Chawla Vs St. of Raj. & anr.– (2015) 17 SCC 562.

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

1. By way of present Application, the applicants have challenged the order dated 15.03.2021 passed by Sessions Judge, Kanpur Dehat as well as summoning order dated 02.04.2022 passed by Civil Judge (Junior Division)/F.T.C. (Crime Against Women), District Kanpur Dehat.

2. A preliminary objection has been raised by learned A.G.A. as per order of the Apex Court passed in the case of **Radhey Shyam Vs. State of U.P.** reported in **(2015) 5 SCC 423,** wherein it is observed that all the judicial orders will be challenged under Article 227 of the Constitution of India.

3. Learned counsel for the applicants submits that there is confusion in Registry of the High Court whether the judicial order passed by the court below can be challenged under Application 482 Cr.P.C. or under Article 227 of the Constitution of India.

4. This Court is of the view that Hon'ble Apex Court clearly observed in the aforesaid judgment that all the judicial orders will be challenged in the supervisory jurisdiction of the High Court under Article 227 of the Constitution of India, therefore, judicial orders should normally be challenged under Article 227 of the

Constitution of India. However, Hon'ble Apex Court in the case of ***Prabhu Chawla Vs. State of Rajasthan and another, (2015) 17 SCC (562)*** observed that alternative remedy is not a bar to exercise jurisdiction u/s 482 Cr.P.C. in exceptional case, therefore, in exceptional case application u/s 482 Cr.P.C. may be entertained against judicial order in the interest of justice.

5. In view of the above legal position, applicants are permitted to file Petition under Article 227 of the Constitution of India for challenging the impugned judicial orders.

6. With the aforesaid observation, the present Application is **dismissed**.

7. Certified copy of the impugned order may be returned to learned counsel for the applicants after obtaining xerox copy of the same.

(2024) 1 ILRA 960
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.09.2022

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Application U/S 482. No. 42148 of 2022

Sanjeev Rawat @ Teetu & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Ms. Shreya Gupta, Shambhavi Sengar

Counsel for the Opposite Parties:
G.A., Sri Rahul Kumar Sharma, Sri Saurabh Agarwal

Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 482 - Indian Penal Code, 1860 - Sections 383, 386, 389, 452, 504, 506 & 507 - Application u/s 482 – for quashing the charge-sheet as well as impugned order by which discharge application filed by the accused-applicant was rejected – FIR – under section 452, 386, 504, 506 & 507 IPC - Investigation – Statement recorded u/section 161 of Cr.P.C. – charge sheet – Discharge Application - rejected – charges are framed u/section 386, 389, 452, 504, 506 & 507 IPC – plea taken that – neither in the FIR nor in the Statement recorded u/section 161 Cr.P.C. there is allegation as defined in section 383 IPC as well as no case is made out u/s 452 IPC and as such no case would also be made u/s 504, 506 & 507 of IPC - Court finds that, charges under Sections 386 and 389 IPC were improperly framed as the FIR and Section 161 Cr.P.C. Statements lacked essential ingredients—no delivery of property or fear of accusation—required under Sections 383 and 389 IPC. – held that, no case is made out u/sections 386 & 389 IPC, but the trial court erred by functioning like a post office accepted the charge-sheet and treating the version true, rejecting the discharge application without judicial scrutiny – however, remaining sections i.e. Sections 452, 504, 506, and 507 IPC, this court found no illegality in rejecting the discharge application and framing charges – consequently, Application is partly allowed – trial Court directed that proceedings continue under valid sections in accordance with law. (Para – 31, 32, 36, 37, 38, 39)

Application Partly Allowed. (E-11)

List of Cases cited:

1. Isaac Isanga Musumba & ors. Vs St. of Mah. & ors. - (2014) 15 SCC 357,

2. Bhupinder Singh & ors. Vs St. of U.P. & anr. - 2022 1 ACR 816,

3. Mohammad Ubaid Vs St. of U.P. passed in Criminal Misc. Bail Application No. 30337 of 2023 on 2.8.2023,

4. Smt. Laxmi Devi & ors. Vs St. of U.P. & ors. passed in Application U/S 482 No.5688 of 2018.

5. Ritaben @ Ramaben Vs St. of Guj. passed in Criminal Misc. Application No. 9885 of 2016.

6. Sanjay Kumar Rai Vs St. of U.P. & anr. Passed in Criminal Appeal No. 472 of 2021,

7. Sidhique Kappan Vs St. of U.P. through Principal Secretary Home Lucknow - 2023 0 Supreme (All) 140.

8. Smt. Shila Devi Vs St. of U.P. & anr. passed in Application U/S 482 No. 16386 of 2021,

9. Captain Manjit Singh Virdi (Retd) Vs Hussain Mohammad Shattaf - 2023 0 AIR (SC) 2480.

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Ms. Shreya Gupta, learned counsel for the applicants, learned AGA for the State and Sri Rahul Kumar Sharma, learned counsel for the opposite party no.2.

2. Pleadings have been exchanged between the parties and with the consent of parties, application is being decided at the admission stage itself.

3. Present application has been filed for quashing the impugned orders dated 23.11.2022 & 22.2.2023 passed by Chief Judicial Magistrate, Hathras in Case No. 714 of 2021 (State vs. Ashok Rawat and Another), arising out of Case Crime No. 358 of 2020, under Sections 389, 386, 452, 504, 506 & 507 IPC, Police Station-Kotwali, District- Hathras.

4. Brief facts of the case are that earlier an FIR has been lodged against the applicants on 22.10.2020, which was registered as Case Crime No. 0358 of 2020 under Sections 452, 386, 504, 506 & 507 IPC. During the course of investigation, Investigating Officer has recorded the statement of informant-opposite party no.2 under Section 161 Cr.P.C. on 24.10.2020. Thereafter, I.O. has submitted the charge sheet against the applicants under Sections 386, 389, 452, 504 & 506 IPC. Before framing of charges, applicants have filed discharge application on 10.8.2022, which was rejected vide order dated 23.11.2022 by C.J.M., Hapur. After rejection of discharge application, learned Court has also framed charges under Sections 386, 389, 452, 504, 506 & 507 vide order dated 22.2.2023, which is also under challenged in the present application by filing amendment application. Amendment application was allowed vide order dated 12.4.2023 and same was also incorporated in the said application.

5. Learned counsel for the applicants submitted that for deciding discharge application, it is required on the part of Magistrate to see FIR, Case Diary, Statement recorded under Section 161 Cr.P.C. and Charge Sheet.

6. She next submitted that for submitting the charge sheet under Section 386 read with Section 383 IPC, it is required to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, but in the present case, neither in the FIR nor in the statement recorded under Section 161 Cr.P.C., there is such allegation about the delivery of any valuable property as defined in Section 383 IPC. Therefore, no case is made out under Section 386 IPC. In support of his contention, she has placed reliance upon the judgment of Apex Court as well as judgments of this Court in the cases of I***saac Isanga Musumba and others vs. State of Maharashtra and others reported in (2014) 15 SCC 357, Bhupinder Singh and others vs. State of U.P. and another reported in 2022 1 ACR 816, Mohammad***

Ubaid vs. State of U.P. passed in Criminal Misc. Bail Application No. 30337 of 2023 on 2.8.2023 and Smt. Laxmi Devi and 3 others vs. State of U.P. and others passed in Application U/S 482 No.5688 of 2018.

7. Learned counsel for the applicants submitted that so far as Section 389 IPC is concerned, there is no allegation of fear of accusation either in the FIR or in the statement recorded under Section 161 Cr.P.C., therefore, no case is also made out under Section 389 IPC.

8. She further submitted that likewise as per FIR as well as statement recorded under Section 161 Cr.P.C., there is no allegation upon the accused-applicant to enter inside the house of the victim, but his presence was only shown at the residence. Therefore, no case is made out under Section 452 IPC.

9. She also submitted that once there is no case is made out under Section 452 IPC certainly no case would also be made out under Section 504, 506 and 507 IPC.

10. She next submitted that Inquiry Officer without properly considering the material available on record has submitted that charge sheet, which is bad and liable to be set aside. In support of his contention he has placed reliance upon the judgment of Gujarat High Court in the matter of ***Ritaben @ Ramaben W/O Karnabhai Solanki vs. State of Gujarat passed in Criminal Misc. Application No.9885 of 2016***

11. Learned counsel for the applicants has also submitted that while deciding the discharge application, learned Magistrate has not properly considered the record of the case, documents and submissions of accused and prosecution. In fact, he fully relied upon the charge sheet submitted by the Investigating Officer and proceeded to reject the discharge application. She reiterated that while deciding discharge application, it is required on the part of the Magistrate not to act as mere post office, but discuss the material available alongwith charge sheet before him. But, in the present case without considering same, rejected the discharge application.

12. She further submitted that after rejecting the discharge application, learned Magistrate proceeded to frame charges vide second impugned order dated 22.2.2023, which is also bad in light of argument made hereinabove as well as law laid down by this Court. In support of his contention he has placed reliance upon the judgment of Apex Court in the cases of ***Sanjay Kumar Rai vs. State of Uttar Pradesh & Anr. Passed in Criminal Appeal No. 472 of 2021, Sidhique Kappan vs. State of U.P. through Principal Secretary Home Lucknow reported in 2023 0 Supreme (All) 140. Smt. Shila Devi vs. State of U.P. and another passed in Application U/S 482 No. 16386 of 2021 and Captain Manjit Singh Virdi (Retd) vs. Hussain Mohammad Shattaf reported in 2023 0 AIR (SC) 2480.***

13. Per Contra, Mr. Rahul Kumar Sharma, learned counsel for the opposite party no.2 has vehemently opposed the submission and submitted that in case any person intentionally puts any person in fear of injury and dishonestly induces the person so put in fear to deliver to any person any property, which amounts to extortion, therefore, charge sheet has rightly been submitted under Section 386

IPC and accordingly charges were also framed therein.

14. Mr. Rahul Kumar Sharma, learned counsel for the opposite party no.2 about Section 452 IPC firmly submitted that at the home or inside the home is having no difference. It is nothing but misinterpretation of words and it is undisputed from the FIR as well as statement recorded under Section 161 Cr.P.C, accused persons have visited the house of informant and they threatened and abused the victim at there, which is sufficient enough for submitting charge sheet under Sections 452, 504, 506 & 507 IPC.

15. Learned counsel for the opposite party no.2 has also opposed the argument made by the learned counsel for the applicants about the Sections 386 & 389 IPC, but from the records, could not demonstrate as to how case is made out under Sections 386 & 389 IPC.

16. Learned AGA for the State has also adopted the argument made by the learned counsel for the opposite party no.2.

17. I have considered the rivals submissions advanced by the learned counsel for the parties and perused the record as well as judgments relied upon.

18. The issue before this Court is to decide as to whether from perusal of FIR as well as statement recorded under Section 161 Cr.P.C., any charge is made out under Sections 386, 389, 452, 504, 506 & 507 IPC or not.

19. First of all, Court has to see about the ingredients of Section 386 read with Section 383 IPC are available in present case or not upon which charge sheet has been submitted and charges have also been framed therein.

20. To appreciate the controversy, Sections 383 and 386 IPC are quoted herebelow:-

"383. Extortion.—Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".

386. Extortion by putting a person in fear of death or grievous hurt.—Whoever commits extortion by putting any person in fear of death or of grievous hurt o that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

21. From perusal of the aforesaid sections, it is apparently clear that for extortion, delivery is necessary part and in the present case, there is no allegation either in the FIR or in the statement recorded under Section 161 Cr.P.C. about delivery of any property or any other things as referred in Section 383 IPC.

22. This issue was before the Apex Court in the matter of ***Isaac Isanga Musumba (Supra)*** wherein Court has held that unless property is delivered to the accused person pursuant to the threat, no offence of extortion is made out. Relevant paragraph of the said judgment is quoted hereinbelow:-

"3. We have read the FIR which has been annexed to the writ petition as Annexure P-7 and we find therefrom that the complainants have alleged that the accused persons have shown copies of international warrants issued against the complainants by the Ugandan Court and letters written by Uganda Ministry of Justice & Constitutional Affairs and the accused have threatened to extort 20 million dollars (equivalent to Rs.110 crores). In the complaint, there is no mention whatsoever that pursuant to the demands made by the accused, any amount was delivered to the accused by the complainants. If that be so, we fail to see as to how an offence of extortion as defined in Section 383, IPC is made out.

Section 383. Extortion- *whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion'.*

Hence, unless property is delivered to the accused person pursuant to the threat, no offence of extortion is made out and an FIR for the offence under Section 384 could not have been registered by the police."

23. Similar matter was also come up before this Court in the matter of ***Bhupinder Singh (Supra)*** wherein Court after considering the provision of Section 389 IPC in detail, held that ingredients of Section 386 IPC is not fulfilled, therefore, no case is made out under Section 386 IPC. Relevant paragraph of the said judgment are quoted hereinbelow:-

"10. He further submits that no offence under Sections 386, 506 IPC is made out against the applicants and learned Magistrate has committed grave error in summoning the applicants to face the trial under the aforesaid sections.

11. The submissions of the learned counsel for the applicants may be summed up as under:

(1) No offence under Sections 386, 506 IPC can be said to be made out from the allegations made under the complaint.

(2) The complainant has prima facie failed to demonstrate that the elements of Section 383 IPC are available to maintain the criminal complaint.

(3) The Courts below i.e. the learned Magistrate as also the Revisional Court failed in its duty to ascertain that all elements provided for in Section 383 IPC were available and attracted in order to maintain the criminal complaint.

12. In order to appreciate the submissions of the learned counsel for the applicants, it would be apt to consider the provisions of Sections 386, 506 I.PC. Section 386 IPC provides for punishment for extortion by putting a person in fear of death or grievous hurt. What would constitute extortion is provided under Section 383 of the Indian Penal Code, which reads as under:

"383. Extortion. - Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything

signed or sealed which may be converted into a valuable security, commits "extortion"."

13. A bare perusal of the aforementioned provision would demonstrate that the following ingredients would constitute the offence.

1. The accused must put any person in fear of injury to that person or any other person.

2. The putting of a person in such fear must be intentional.

3. The accused must thereby induce the person so put in fear to deliver to any person, any property, valuable security or anything signed or sealed which may be converted into a valuable security.

4. Such inducement must be done dishonestly.

Section 386 IPC reads as under:

"386. Extortion by putting a person in fear of death or grievous hurt. - Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person tor to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

14. It would also be appropriate to understand the words "Valuable and Security" appearing in Section 383 IPC.

15. The term "Valuable as defined in Blacks' Law Dictionary means- Worth a good price, having financial as market value. The term "Security" as defined in the Dictionary means:-

1. Collateral given or pledged to guarantee the fulfillment of an obligations; esp. the assurance that a creditor will be repaid (sus. With interest) any money or credit extended to a debtor. 2. A person who is bound by some type of guarantee; SURETY. 3. The stat of being secure, esp. from danger or attack. 4. An instrument that evidences the holder's on an investment in a common enterprise. Under an important statutory definition, a security is any interest or instrument relating to finances, including a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a profit sharing agreement, collateral trust certificate, reorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of these things. A security also includes any put, call, straddle, option, or privilege on any security, certificate of deposit, group or index of securities, or any such device entered into on a national securities exchange, relating to foreign currency. 15 USCA {77b(1) Cf. SHARE(2); stock (4).

16. Now, having regard to the facts and circumstances of the case, the Court is of the opinion that no case under Section 386 IPC can be said to be made out against the applicants from the allegations set out in the criminal complaint lodged against them. The reasons for the same are as under:-

(1) The blank papers allegedly got signed by the applicants from the complainant were never converted into a valuable security. The said blank papers were never used before the Presiding Officer, Labour Court, Ludhiana. There is no allegation in this regard in the complaint or in the statements recorded under Sections 200 and 202 Cr.P.C.

(2) The records reveal that the case before the Labour Court, Ludhiana is Reference No.1396 was got instituted on 27.08.2002 much after the lodging of the complaint on 07.01.2002. On the date of institution of the complainant i.e. on 07.01.2002 there was no proceedings pending before the Labour Court, Ludhiana, where the signed papers could be utilized. Moreover, the proceedings before the Labour Court, Ludhiana were not pressed on the statement of the authorized representative of the workman/ Opposite Party No.2 to the effect that he does not press the reference for the time being on account of technical error i.e. wrong name of the opposite party and he reserved the right to file fresh dispute after rectifying the error. The reference was answered accordingly with observation that the workman will be at liberty to file fresh dispute after rectifying the error if he so desired vide order dated 02.06.2005 which has been filed on record by th386. Extortion by putting a person in fear of death or grievous hurt.—Whoever commits extortion by putting any person in fear of death or of grievous hurt o that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.e applicants.

(3) The Opposite Party No.2/Complainant has miserably failed to demonstrate that ingredients of Section 383 IPC are available in the complaint so instituted so as to warrant criminal prosecution of the applicants under Section 386 IPC.

(4) The factum that after withdrawal of the case before the Labour Court, Ludhiana no fresh claim was instituted despite liberty having been granted to the Opposite Party No.2 goes a long way in establishing the falsity of the case against the applicants. The criminal complaint against the applicants can safely be said to have been instituted maliciously with ulterior motive and as such is frivolous, vexatious or oppressive and is an abuse of the process of the Court.

*(5) The allegations in the complaint regarding criminal intimidation at the instance of the applicants have been made only to add colour to the complaint. The alleged occurrence of the incident appears to be improbable in the wake of the allegations set out in the complaint. No offence under Section 506 IPC can be said to be made out against the applicants. ownership right to firm (e.g. a stock), the holder's creditor relationship with a firm or Government (e.g. a bond). *A security indicates an interest based on an investment in a common enterprise. Under an important statutory definition, a security is any interest or instrument relating to finances, including a note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in a profit sharing agreement, collateral trust certificate, reorganization certificate or subscription, transferable share, investment contract, voting trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or*

certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of these things. A security also includes any put, call, straddle, option, or privilege on any security, certificate of deposit, group or index of securities, or any such device entered into on a national securities exchange, relating to foreign currency. 15 USCA {77b(1) Cf. SHARE(2); stock (4).

16. Now, having regard to the facts and circumstances of the case, the Court is of the opinion that no case under Section 386 IPC can be said to be made out against the applicants from the allegations set out in the criminal complaint lodged against them. The reasons for the same are as under:-

(1) The blank papers allegedly got signed by the applicants from the complainant were never converted into a valuable security. The said blank papers were never used before the Presiding Officer, Labour Court, Ludhiana. There is no allegation in this regard in the complaint or in the statements recorded under Sections 200 and 202 Cr.P.C.

(2) The records reveal that the case before the Labour Court, Ludhiana is Reference No.1396 was got instituted on 27.08.2002 much after the lodging of the complaint on 07.01.2002. On the date of institution of the complainant i.e. on 07.01.2002 there was no proceedings pending before the Labour Court, Ludhiana, where the signed papers could be utilized. Moreover, the proceedings before the Labour Court, Ludhiana were not pressed on the statement of the authorized representative of the workman/ Opposite Party No.2 to the effect that he does not press the reference for the time being on account of technical error i.e. wrong name of the opposite party and he reserved the right to file fresh dispute after rectifying the error. The reference was answered accordingly with observation that the workman will be at liberty to file fresh dispute after rectifying the error if he so desired vide order dated 02.06.2005 which has been filed on record by the applicants.

(3) The Opposite Party No.2/Complainant has miserably failed to demonstrate that ingredients of Section 383 IPC are available in the complaint so instituted so as to warrant criminal prosecution of the applicants under Section 386 IPC.

(4) The factum that after withdrawal of the case before the Labour Court, Ludhiana no fresh claim was instituted despite liberty having been granted to the Opposite Party No.2 goes a long way in establishing the falsity of the case against the applicants. The criminal complaint against the applicants can safely be said to have been instituted maliciously with ulterior motive and as such is frivolous, vexatious or oppressive and is an abuse of the process of the Court.

(5) The allegations in the complaint regarding criminal intimidation at the instance of the applicants have been made only to add colour to the complaint. The alleged occurrence of the incident appears to be improbable in the wake of the allegations set out in the complaint. No offence under Section 506 IPC can be said to be made out against the applicants.

24. This issue was again come before this Court in the matter of ***Mohammad***

Ubaid (Supra) wherein Court has also taken the same view. Relevant paragraph of the said judgments are quoted hereinbelow:-

"15. It is to be seen that in the present case, allegation in the FIR are with regard to demand of money by way of extortion for sum of Rs.2 crore from a Village Pradhan. The applicant also contested the election of Village Pradhan against informant and after election were over, present FIR has been lodged for demand of Rs.2 crore, which is alleged by the prosecution to be extortion. The extortion has been defined in Section 383 IPC, which is reproduced hereinbelow:

"383. Extortion.—Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion"."

16. Under Section 383 IPC, one of the essential ingredient is that to deliver to any person any property or valuable security or anything signed or sealed, which may be converted into valuable security.

17. The Apex Court in Isaac Isanga Musumba and others Vs. State of Maharashtra, 2014 (15) SCC 357 has held that "

"3. We have read the FIR which has been annexed to the writ petition as Annexure P-7 and we find therefrom that the complainants have alleged that the accused persons have shown copies of international warrants issued against the complainants by the Ugandan Court and letters written by Uganda Ministry of Justice & Constitutional Affairs and the accused have threatened to extort 20 million dollars (equivalent to Rs.110 crores). In the complaint, there is no mention whatsoever that pursuant to the demands made by the accused, any amount was delivered to the accused by the complainants. If that be so, we fail to see as to how an offence of extortion as defined in Section 383 IPC is made out. Section 383 IPC states that

"383. Extortion.- Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property, or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion'. "

Hence, unless property is delivered to the accused person pursuant to the threat, no offence of extortion is made out and an FIR for the offence under Section 384 could not have been registered by the police."

25. Similar matter was also come before this Court in the matter of Laxmi Devi (Supra). Relevant paragraph of the said judgments are quoted hereinbelow:-

8. अब न्यायालय को यह निर्धारित करना है कि अवर न्यायालय द्वारा आवेदकगण के विरुद्ध आदेशिका पारित करने में कोई वैधानिक त्रुटि हुई है या नहीं। इसके लिए सर्वप्रथम धारा 383, 384, 385 व 506 भा0 दं0 सं0 का उल्लेख करना आवश्यक है जो निम्न है।

"383. उद्दापन- जो कोई किसी व्यक्ति को स्वयं उस व्यक्ति को या किसी अन्य

व्यक्ति को कोई क्षति करने के भय में साशय डालता है, और तद्द्वारा इस प्रकार भय में डाले गए व्यक्ति को, कोई सम्पत्ति या मूल्यवान प्रतिभूति या हस्ताक्षरित या मुद्रांकित कोई चीज जिसे मूल्यवान प्रतिभूति में परिवर्तित किया जा सके, किसी व्यक्ति को परिदत्त करने के लिए बेईमानी से उत्प्रेरित करता है, वह "उद्दापन" करता है।

384. उद्दापन के लिए दण्ड- जो कोई उद्दापन करेगा वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि तीन वर्ष तक की हो सकेगी, या जुर्माने से, या दोनों से, दण्डित किया जायेगा।

385. उद्दापन करने के लिए किसी व्यक्ति को क्षति के भय में डालना- जो कोई उद्दापन करने के लिए किसी व्यक्ति को किसी क्षति के पहुँचाने के भय में डालेगा या भय में डालने का प्रयत्न करेगा, वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि दो वर्ष तक की हो सकेगी, या जुर्माने से, या दोनों से, दण्डित किया जायेगा।

506. आपराधिक अभित्रास के लिए दण्ड- जो कोई आपराधिक अभित्रास का अपराध करेगा, वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि दो वर्ष तक की हो सकेगी, या जुर्माने से, या दोनों से, दण्डित किया जाएगा।

यदि धमकी मृत्यु या घोर उपहति इत्यादि कारित करने की हो- तथा यदि धमकी मृत्यु या घोर उपहति कारित करने की, या अग्नि द्वारा किसी सम्पत्ति का नाश कारित करने की या मृत्यु दण्ड से या आजीवन कारावास से, या सात वर्ष की अवधि तक के कारावास से दण्डनीय अपराध कारित करने की, या किसी स्त्री पर अस्तित्व का लांछन लगाने की हो, तो वह दोनों में से किसी भांति के कारावास से, जिसकी अवधि सात वर्ष तक की हो सकेगी, या जुर्माने से, या दोनों से, दण्डित किया जायेगा।"

9. धारा 383 भा0 दं0 सं0 में उद्दापन के अपराध का विवरण दिया गया है, जिसके अनुसार इस अपराध के आवश्यक अवयव हैं:- (I) अपराधी, किसी व्यक्ति को स्वयं उस व्यक्ति को या अन्य व्यक्ति को कोई क्षति करने के भय में डालता है। (ii) क्षति करने का भय साशय हो, (iii) अपराधी उस भय में डाले गये व्यक्ति को कोई संपत्ति या मूल्यवान या हस्ताक्षरित या मुद्रांकित कोई चीज जिसे मूल्यवान प्रतिभूति में परिवर्तित किया जा सके, किसी व्यक्ति को परिदत्त करने के लिए बेइमानी से उत्प्रेरित करे।

10. उच्चतम न्यायालय ने इसाक इसांगा मुसुम्बा व अन्य प्रति महाराष्ट्र शासन व अन्य : (2014) 15 एस.सी.सी. 357 के मामले में उद्दापन के अवयव पर विचार किया और यह अवधारित किया कि जब तक अपराधी द्वारा उसको या अन्य व्यक्ति को साशय क्षति पहुँचाने के भय के कारण व उसके द्वारा बेइमानी से उत्प्रेरित होकर कोई संपत्ति या मूल्यवान या हस्ताक्षरित या मुद्रांकित कोई चीज, जिसे मूल्यवान प्रतिभूति में परिवर्तित किया जा सके, किसी व्यक्ति को प्रदान न हो गयी हो, तब तक उद्दापन का अपराध पूर्ण नहीं हो सकता है।

11. वर्तमान प्रकरण में अविवादित रुप से मृतका ने अपनी माता (आवेदक सं0 1) से क्रय की गयी भूमि को वापस नहीं किया है, जो आपराधिक परिवाद व धारा 200 व 202 दं0 प्र0 सं0 के अंतर्गत दर्ज ब्यानों के परिशीलन से भी पूर्ण रुप से परिलक्षित होता है। अतः वर्तमान प्रकरण में उद्दापन के समस्त अवयव, प्रथम दृष्टया भी पूर्ण नहीं होते हैं। अतः वर्तमान प्रकरण में उद्दापन (धारा 383 भा0 दं0 सं0) का कोई अपराध प्रथम दृष्टया भी नहीं प्रकट होता है।

अतः उसे धारा 384 भा0 दं0 सं0 के अन्तर्गत सजा होने के भी प्रथम दृष्ट्या मामला नहीं बनता है।

12. अब न्यायालय को यह देखना है क्या धारा 385 भा0 दं0 सं0 (उद्दापन करने के लिए किसी व्यक्ति को क्षति के भय में डालना) का अपराध क्या पत्रावली पर उपस्थित आपराधिक परिवाद, धारा 200 व 202 दं0 प्र0 सं0 के ब्यान के मद्देनजर प्रथम दृष्टया बनता है या नहीं। आपराधिक परिवाद व वादी व गवाहों के ब्यानों में यह कथन किया गया है कि आवेदकगण वादी की पत्नी पर जमीन पुनः उनके नाम करने का दबाव देने लगे और मानसिक व शारीरिक रुप से उसको प्रताड़ित करने लगे।

13. धारा 385 के अवयव उद्दापन का प्रयास करते हुए किसी व्यक्ति को किसी क्षति के भय में डालने या डालने का प्रयत्न करने का अपराध को वर्णित करते हैं। वर्तमान प्रकरण में आपराधिक परिवाद, धारा 200 व 202 दं0 प्र0 सं0 के ब्यानों से प्रथम दृष्टया वादी की पत्नी को उद्दापन करने का प्रयास करते हुए उसको मानसिक व शारीरिक प्रताड़ना पहुँचाना कहा गया है। परन्तु इस नाते कैसे उसको भय में डालने या डालने का प्रयत्न करने का कोई विनिष्ठ साक्ष्य या कथन पत्रावली पर उपस्थित नहीं है और न ही यह कथन किया गया है कि क्या मानसिक या क्या शारीरिक प्रताड़ना पहुंचायी गई थी। अतः वर्तमान प्रकरण में धारा 385 भा0 दं0 सं0 के अवयव प्रथम दृष्टया उपस्थित न होने के कारण इस अपराध के कारित होने का मामला भी नहीं बनता है। इसी प्रकार धारा 506 भा0 दं0 सं0 के भी अवयव भी उपस्थित न होने के कारण भी उस अपराध के घटित होने का प्रथम दृष्टया मामला नहीं बनता है।

26. In the present case too, there is no allegation either in the FIR or in the statement recorded under Section 161 Cr.P.C. about the delivery of any property as referred in Section 383 IPC. Undisputedly no delivery has ever taken place under fear or threat, which is necessary requirement for Section 383 read with Section 386 IPC. The very same interpretation has been made by the Apex Court in the matter of ***Isaac Isanga Musumba (Supra)*** as well as other judgments referred hereinabove. Therefore, in light of facts of the case, provisions of Section 383 read with Section 386 IPC, this Court is of the firm view that no case is made out for submission of charge sheet and framing charges under Section 386 IPC.

27. Now coming to submission of charge sheet under Section 389 IPC as well as framing of charges under Section 389 IPC.

28. Section 389 IPC is relevant to appreciate the controversy and same is being quoted hereinbelow:-

389. Putting person in fear of accusation of offence, in order to commit extortion.—Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit an offence punishable with death or with 1[imprisonment for life], or with imprisonment for a term which may extend to ten years, 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, if the offence be punishable under section 377 of this Code, may be punished with [imprisonment of life].

29. From perusal of Section 389 IPC, it is apparently clear that there must have

been fear of accusation of offence to commit extortion, but from perusal of FIR as well as statement recorded under Section 161 Cr.P.C., there is no allegation like this in the present case.

30. This matter was very well considered by the Gujarat High Court in the case of ***Ritaben @ Ramaben W/O Karnabhai Solanki (Supra).*** Relevant paragraphs of the said judgment are quoted hereinbelow:-

9.3 Now, I shall make an endeavor to examine whether the offence under section 389 of IPC has been made out against the applicants.

SECTION 389 : Putting person in fear of accusation of offence, in order to commit extortion:

Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit an offence punishable with death or with imprisonment for life, or with imprisonment for a term which may extend to ten years, 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, if the offence be punishable under section 377 of this Code, may be punished with imprisonment for life.

The reading of the provisions of section 389 reveals the following ingredients:

a) In order to commit extortion, a person is put or an attempt is made to put him in fear of an accusation.

b) Such fear is due to an accusation of an offence or attempt to commit such offence.

c) The offence being punishable with death, imprisonment for life or for a term extending to ten years.

9.4 In the present case, there is no accusation alleged to have been made by the petitioners to the first informant accusing him an offence being punishable with death, imprisonment for life or for a term extending to ten years. The contents of the FIR are blissfully silent on any of the offences which attract the aforenoted punishments. Hence, no offence can be said to have been established under section 389 of IPC.

31. From perusal of FIR as well as statement recorded under Section 161 Cr.P.C., there is no allegation of accusation of offence. Therefore, considering the facts of the case, provision of Section 389 IPC as well as interpretation made by the Gujarat High Court, this Court is of firm view that in lack of fear of accusation of offence, neither charge sheet can be submitted under Section 389 IPC nor charges can be framed therein.

32. Now coming to the point about the submission of charge sheet under Sections 452, 504, 506 & 507 IPC and framing of charges therein. From perusal of FIR as well as statement recorded under Section 161 Cr.P.C., there is direct allegation of presence of accused at the residence of opposite party no.2 alongwith threat and abuse. Defence of accused cannot be seen at this stage, therefore, I found no illegality in submission of charge sheet under Sections 452, 504 & 506 IPC as well as framing of charges therein.

33. The another aspect was about the approach of Court while dealing discharge application. This issue was very well settled by the Apex Court in the matter of ***Sanjay Kumar Rai (Supra).*** Relevant paragraph of the said judgment are quoted hereinbelow:-

15. The correct position of law as laid down in Madhu Limaye (supra), thus, is that orders framing charges or refusing discharge are neither interlocutory nor final in nature and are therefore not affected by the bar of Section 397 (2) of CrPC. That apart, this Court in the abovecited cases has unequivocally acknowledged that the High Court is imbued with inherent jurisdiction to prevent abuse of process or to secure ends of justice having regard to the facts and circumstance of individual cases. As a caveat it may be stated that the High Court, while exercising its aforestated jurisdiction ought to be circumspect. The discretion vested in the High Court is to be invoked carefully and judiciously for effective and timely administration of criminal justice system. This Court, nonetheless, does not recommend a complete hands off approach. Albeit, there should be interference, may be, in exceptional cases, failing which there is likelihood of serious prejudice to the rights of a citizen. For example, when the contents of a complaint or the other purported material on record is a brazen attempt to persecute an innocent person, it becomes imperative upon the Court to prevent the abuse of process of law.

16. Further, it is well settled that the trial court while considering the discharge application is not to act as a mere post office. The Court has to sift through the evidence in order to find out whether there are sufficient grounds to try the suspect. The court has to consider the broad probabilities, total effect of evidence and documents produced and the basic infirmities appearing in the case and so on. [Union of India v. Prafulla Kumar Samal5]. Likewise, the Court has sufficient discretion to order further investigation in appropriate cases, if need be.

17. This brings us to the present case wherein the High Court has not gone into the merits of the case and did not analyze the case in light of the settled law referred to above.

18. The High Court has committed jurisdictional error by not entertaining the revision petition on merits and overlooking the fact that 'discharge' is a valuable right provided to the accused. In line with the fact that the High Court and the court below have not examined the fairness of criminal investigation in this case and other related aspects concerning improvement of witness statements, it is necessary for the High Court to reconsider the entire matter and decide the revision petition afresh. Accordingly, we set aside the impugned order dated 28.11.2018 and remand the case back to the High Court for its reconsideration in accordance with law.

34. The similar view is taken by this Court in the matter of ***Sidhique Kappan (Supra).*** Relevant paragraph of the said judgment are quoted hereinbelow:-

14. Since, the provision of Section 227 of Cr.P.C. itself mandates that the trial court shall consider that whether there is sufficient ground for proceeding against the accused or not and if trial court reaches to the conclusion that there is no

sufficient ground, the accused shall be discharged. Section 227 of Cr.P.C. is extracted hereinunder :-

"227.If, upon consideration of the record of the case and the documents submitted therewith, and after hearing submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

15. Having at a glace of the aforesaid provisions, it is crystal clear that while passing an order in abovesaid provisions, the trial court shall consider ;-

First, the record of the case and documents submitted therewith;

Secondly submissions of the accused and thirdly the submisisons of the prosecution.

16. It is settled law that even after such considerations, two view are possible and if one of them gives rise to the suspicion, which is distinguished from grave suspicion, the trial Judge is empowered to discharge the accused without going into the question as to whether a case for trial has been made out by the prosecution or not.

17. This court is of considered opinion that after the application of judicial mind on discharge, the trial Judge shall enter into the next proceeding i.e. framing of the Charge. It is prima-facie overt from the wordings of Section 228 of Cr.P.C. i.e. "Framing of Charge" and "if, after such consideration and hearing, as aforesaid", the procedure of Section 227 of Cr.P.C. is of much importance and that cannot be skipped by the trial court. The intent of the legislature is very clear that the procedure prescribed in Section 227 of Cr.P.C. for discharge of the accused is in fact safeguard and rider so that a person who has been alleged to commit an offence, may not be harassed for facing trial proceedings. Therefore, the application of mind as well as assigning reasons for passing the order under section 227 of Cr.P.C. is of much importance, which has to care of by the trial court.

18. Further it is also not incumbent upon the accused that he must have moved an application for discharge. Even in a situation that there was no application for discharge moved, then it is incumbent upon the trial court to decide it that whether there is sufficient material available against the accused so as to frame charges,but opportunity of hearing to the accused at this stage is an essential condition.

35. This Court has again taken the same view in the matter of ***Smt. Shila Devi (Supra).*** Relevant paragraph of the said judgment are quoted hereinbelow:-

12. In view of the aforesaid discussion, now I have to see whether the order passed by the court below is against law or whether the court below discussed merit of the case by applying its mind. I have gone through the judgment of lower court and there is no discussion of the evidences on record and material which are placed before the court below are not discussed. Once the court below is forming opinion for deciding the discharge application, it has to discuss the material of the charge sheet available before him but bare perusal of the order of the court below

would indicate that case laws has been discussed and the facts narrated by the parties have been recorded but while taking the decision courts below have not taken note of the facts and material available on record. The said aspect is dealt in various judgment of Hon'ble Supreme Court. The Supreme Court has held in State of Karanataka Vs. Muniswamy and others (1997) 2 SCC 699 that court while deciding discharge application has to record its reasons while rejecting the discharge application perusal of record and reasons to be recorded are must. Para 7 of the aforesaid judgment is herein under :

"The second limb of Mr. Mookerjee's argument is that I any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is sme material on the record to connect the accused with the crime, says the learned counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not lively to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that :

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the judge considers that there is not sufficient ground for proceeding against the accused, the shall discharge the accused and record his reasons for so doing.

This section is contained in Chapter XVII called "Trial Before a Court of Session". It is clear from the provision that the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. Section 482 of New Code, which corresponds to Section 561-A of the Code of 1898, provides that :

Nothing in this Code shall be deemed to limit or affect the inherent powers 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.

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."

13. Hon'ble Supreme Court has again discussed the scope of 227 and 228 Cr.P.C. in Sunil Kumar Jha and Others Vs. State of Bihar in Crl. Misc. Case No. 22050 of 1996 decided on 5.2.1997. Para 6 is herein under :

"From bare perusal and comparison of the aforesaid two provisions it appears that while in the case of discharge of an accused under Section 227 of the Code it is obligatory for the Judge to record his reasons for doing so. But while framing charge under Section 228 of the Code the provision does not say in a very specific word that the Court msut record reasons. Nevertheless Section 228 provides that while framing charge, the Court must be of the opinion that there is ground for presuming that the accused has committed an offence. In other words, there must be valid reasons and foundation for framing an opinion that the accused has committed an offence."

14. The case decided by Allahabad High Court in Smt. Kalawati Vs. State of U.P. decided on 11.7.1990 passed in Crl. Revision No. 1012 of 1990 wherein it has been held that though the full statements of the witnesses need not be discussed but prima facie case should be briefly indicated. Para 3 is herein under :

"It is true that for determining prima facie case court need not weigh or sift the evidence or make roving enquiry. It need not give full statements of the witnesses. Evidently for a judicial speaking order it is necessary that the evidence constituting prima facie case should be briefly indicated and should not be substituted by vague words or by conclusion alone."

15. The court has to see whether the material placed before the court have been properly explained. If there are two views emerging then the court has to examine discharge application filed under Section 227 Cr.P.C. by discussing the evidences on record and then forming the opinion to pass order on the application. Both courts below have not discussed the evidences and material available before them and reasons have not been recorded. The order passed by the Sessions Court dated 16.3.2021 in Crl. Case No. 340 of 2019 (State Vs. Asha Rani and others) in Crl. Revision No. 27 of 2020 and the judgment and order dated 21.9.2019 passed by Judicial Magistrate, Chakia, District- Chandauli are set-aside.

36. Again, Apex Court in the matter of Captain Manjit Singh (Supra) reiterated the same view and relevant paragraph of the same is quoted hereinbelow;

11. The law on issue as to what is to be considered at the time of discharge of an accused is well settled. It is a case in which the Trial Court had not yet framed

the charges. Immediately after filing of charge sheet, application for discharge was filed. The settled proposition of law is that at the stage of hearing on the charges entire evidence produced by the prosecution is to be believed. In case no offence is made out then only an accused can be discharged. Truthfulness, sufficiency and acceptability of the material produced can be done only at the stage of trial. At the stage of charge, the Court has to satisfy that a prima facie case is made out against the accused person. Interference of this Court at that stage is required only if there is strong reason to hold that in case the trial is allowed to proceed, the same would amount to abuse of process of the Court.

37. Now coming to this case. It is apparently clear that while deciding the discharge application trial Court has not followed the settled ratio of law laid down by the Apex Court as well as this Court. In fact, Court blindly relying upon the charge sheet submitted by I.O. rejected the discharge application and framed charges thereafter. As discussed hereinabove, treating the allegation in FIR as well as statement recorded under Section 161 Cr.P.C. is correct, no case is made out under Sections 386 & 389 IPC, but trial Court functioning like a post office accepted the charge sheet and treating the version true, rejected the discharge application. Thereafter proceeded to frame charges also in the same sections. In fact, approach of trial Court suffers non application of judicial view settled by the Apex Court as well as different Courts. In a very casual manner vide impugned orders dated 23.11.2022 & 22.2.2023 discharge application has been rejected and charges have been framed, which cannot be sustained.

38. Therefore, in light of factual and legal discussions made hereinabove, application is partly **allowed**. Impugned orders dated 23.11.2022 & 22.2.2023 passed by Chief Judicial Magistrate, Hathras so far it relates to rejection of discharge application for Section 386 & 389 IPC as well as framing charges under Section 386 & 389 IPC are hereby quashed.

39. For remaining sections i.e., Sections 452, 504, 506 & 507 IPC, this Court found no illegality in rejecting the discharge application and framing charges. Further, court is directed to proceed to decide the case strictly in accordance with law.

40. No order as to costs.

(2024) 1 ILRA 976
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Matters U/A 227 No. 1718 of 2023 (Criminal)

Nitin & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Sunil Kumar Saroj, Sri Vishal Ohri

Counsel for the Respondents:
G.A., Sri Ashok Kumar Mishra, Sri Krishna Kant Tiwari

A. Constitution of India, 1950-Article 227-Indian Penal Code, 1860- Dowry & Prohibition act,1961 - Sections 406 & 6 - Challenge to-summoning order-complainant version in present complaint

as well as in her previous FIR are substantially same-no specific averment in the complaint with regard to section 6 of D.P. Act-filing of complaint on similar allegations is not tenable- if section 406 IPC or any other penal section of any criminal statute are lacking in FIR, the informant has every right to move an application for addition of charge, during course of trial in case it proceeds, but fresh complaint on similar version already taken in FIR lodged at the instance of complainant will amount to misuse of process of law-Hence, summoning order passed by the court below is set aside.(Para 5 to 7)

The writ petition is allowed. (E-6)

(Delivered by Ram Manohar Narayan Mishra, J.)

1. The instant petition under Article 227 of the Constitution of India has been filed by the petitioners against the order dated 5.9.2018 passed by learned Additional Sessions Judge/ F.T.C., court no. 1, Bijnor in Criminal Revision no. 499 of 2022 whereby summoning order passed by learned A.C.J.M. dated 15.9.2018 in Complaint Case no. 839 of 2018 (Pooja Rani @ Himanshi vs. Ashwani Kumar and others) has been affirmed. The petitioners by means of present petition have assailed both orders of the courts below.

2. Heard learned counsel for the petitioners, learned AGA and learned counsel for respondent no. 2.

3. Learned counsel for the petitioners submitted that there is matrimonial disputes between the petitioners and respondent no. 2. The petitioners are parents-in-law, brother and sister-in-law of the respondent no. 2. Complaint filed before the court of Magistrate against the petitioners, her husband, with averment that her marriage with opposite party Ashwani Kumar was solemnized on 5.3.2016 according to Hindu rites and rituals in which her father had given sufficient dowry and gifts but the opposite parties were not satisfied with the same and demanded additional dowry. They used to harass her and subjected her to physical and matrimonial cruelty for non fulfillment of demand of dowry. Her husband was having illicit relation with some other lady. She was turned out from her matrimonial home on 26.6.2016 and the opposite parties withheld her stridhan and are using her articles in their own use without any authority. They are also damaging her articles. The petitioner no. 1 Nitin used to tease her. Learned court below summoned the petitioners and husband of the complainant to face trial under section 406 IPC and Section 6 of D.P. Act vide order dated 15.9.2018. The summoning order was assailed by filing revision before the court of sessions by present petitioners, however, learned court below dismissed the revision and affirmed the summoning order passed by the learned Magistrate vide order dated 4.2.2023 without considering the grounds taken in the revision. Long before filing of present complaint, the petitioner no. 1 lodged an F.I.R. bearing Crime no. 52 of 2017, under Sections 452, 323, 506 IPC against father and family members of the complainant on 17.3.2017. The petitioner no. 1 is informant and injured in the said F.I.R. and received as many as seven injuries including one incised wound on his person. The instant complaint was filed only to harass the petitioners who are in-laws of the complainant. Another F.I.R. was also got registered by the complainant on 19.3.2017 bearing Crime no. 142 of 2017, under Sections 147, 354-B, 427, 498-A IPC and 3/4 of D.P. Act against her husband and present petitioners with similar allegation

which was challenged by the petitioners before this Court by way of application u/s 482 No. 33834 of 2018 wherein matter was referred to mediation centre of this Court and an interim order was passed on 22.11.2018 to the effect that till the next date of listing, no coercive action shall be taken against the applicants in said criminal case arising out of Case Crime no. 142 of 2017. Mediation got unsuccessful. The said petition u/s 482 Cr.P.C. is still pending before this Court. Complaint case filed by respondent no. 2 under section 12 of Protection of Women from Domestic Violence Act has been dismissed by the Delhi court vide order dated 8.3.2022 for want of prosecution and a copy of order is filed on record. The present complaint has been filed by respondent no. 2 with a view to misuse process of law and harass the petitioners. Moreover, the petitioners cannot be beneficiary of any alleged demand of dowry.

4. Per contra, learned counsel for respondent no. 2 submitted that no cogent ground has been disclosed by the petitioners before this Court which would warrant interference in concurrent findings of the court below. There is no infirmity, illegality or irregularity in the impugned order passed by the courts below. The instant petition is devoid of merit and is liable to be dismissed. He further submitted that mediation directed by this Court in petition u/s 482 Cr.P.C. filed by the petitioners with regard to previous FIR, has failed.

5. This Court is not oblivious of the fact that there are concurrent findings of the court below with regard to matter in issue in present petition. The court of first instance summoned the petitioners alongwith co-accused Ashwani Kumar, husband of the victim, for facing trial of charge under Section 406 IPC and Section 6 of D.P. Act on complaint filed by the respondent no. 2, Pooja Rani @ Himanshi. The said complaint was filed on 19.2.2018. Learned court below after recording statement of the complainant and her witnesses Narendra Singh and Karan Singh, who are uncle and father of the complainant, under section 200 and 202 Cr.P.C., summoned the petitioners alongwith co-accused Ashwani Kumar for charge under Section 406 IPC and section 6 of D.P. Act. Prior to filing of present complaint, an F.I.R. was lodged at the instance of complainant at P.S. Noorpur, District Bijnor on 19.3.2017 bearing Crime no. 142 of 2017, under Sections 147, 354-B, 427, 498-A IPC and 3/4 of D.P. Act against her husband Ashwani Kumar and present petitioners in which all allegations of present complaint were substantially included. In said FIR also it is stated that on being harassed and coerced by accused persons, informant was compelled to shift to her parental place on 20.6.2016. Her ornaments were snatched by her in-laws. The informant/ complainant has also levelled allegation of teasing (molestation) against the petitioner no. 1 Nitin, who is her brother-in-law (dever) in said F.I.R. However, some interim order was passed by this Court on 12.11.2018 on application of Ashwani Kumar and six others under Section 482 Cr.P.C. No. 33834 of 2018. The applicant therein included present petitioners. Matter was referred to mediation centre and till the next date of listing it was directed that no coercive action shall be taken against the applicants in criminal case arising out of Crime no. 142 of 2017, under Sections 147, 354-B, 427, 498-A IPC and 3/4 of D.P. Act. Prior to lodging of this F.I.R. on 19.3.2017, the petitioner no. 1 had lodged an F.I.R. on

15.3.2017 at 1:30 pm against father and family members of the informant/ complainant under Sections 452, 323, 506 IPC, thus, present complaint as well as previous F.I.R. lodged at the instance of respondent no. 2 is proceeded by F.I.R. lodged by petitioner no. 1 against the father and family members of complainant as from the perusal of F.I.R. version of the complainant in Case Crime no. 142 of 2017 and present complaint on which petitioner has been summoned to face trial, it appears that version in both documents are substantially same, although section 6 of D.P. Act and Section 406 IPC are not added in the F.I.R. but there are allegations with that regard to that in F.I.R. itself, therefore, court below has summoned the accused persons/ petitioners inter-alia for charge under section 6 of D.P. Act, which provides as under:-

"6. Dowry to be for the benefit of the wife or her heirs.?

(1) Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman (1) Where any dowry is received by any person other than the woman in connection with whose marriage it is given, that person shall transfer it to the woman"

(a) if the dowry was received before marriage, within [three months] after the date of marriage; or

(b) if the dowry was received at the time of or after the marriage, within [three months] after the date of its receipt; or

(c) if the dowry was received when the woman was a minor, within 1[three months] after she has attained the age of eighteen years, and pending such transfer, shall hold it in trust for the benefit of the woman. [(2) If any person fails to transfer any property as required by sub-section (1) within the time limit specified therefor, [or as required by sub-section (3),] he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years or with fine [which shall not be less than five thousand rupees, but which may extend to ten thousand rupees] or with both.] [(2) If any person fails to transfer any property as required by sub-section (1) within the time limit specified therefor, [or as required by sub-section (3),] he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years or with fine [which shall not be less than five thousand rupees, but which may extend to ten thousand rupees] or with both.]"

(3) Where the woman entitled to any property under sub-section (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being: [Provided that where such woman dies within seven years of her marriage, otherwise than due to natural causes, such property shall, [Provided that where such woman dies within seven years of her marriage, otherwise than due to natural causes, such property shall,"

(a) if she has no children, be transferred to her parents; or

(b) if she has children, be transferred to such children and pending such transfer, be held in trust for such children.]

[(3A) Where a person convicted under sub-section (2) for failure to transfer any property as required by sub-section (1) [or sub-section (3)] has not, before his conviction under that sub-section, transferred such property to the woman entitled thereto or, as the case may be, [her heirs, parents or children] the Court shall, in addition to awarding punishment under that sub-section, direct, by order in writing, that such person shall transfer the property to such woman or, as the case may be, [her heirs, parents or children] within such period as may be specified in the order, and if such person fails to comply with the direction within the period so specified, an amount equal to the value of the property may be recovered from him as if it were a fine imposed by such Court and paid to such woman or, as the case may be, [her heirs, parents or children]."

(4) Nothing contained in this section shall affect the provisions of section 3 or section 4."

6. From perusal of above provision it appears that there is no specific averment in the complaint with regard to section 6 of D.P. Act, however, it is stated therein that accused persons failed to return her stridhan given by her parents on demand made by her which comes within the purview of section 406 IPC itself. If section 406 IPC or any other penal section of any criminal statute are lacking in FIR, the informant has every right to move an application for addition of charge, during course of trial in case it proceeds, but fresh complaint on similar version already taken in F.I.R. lodged at the instance of complainant will amount to misuse of process of law. Even learned court below has not considered this point in true prospective and dismissed the revision filed by the petitioners against the summoning order. The points raised in present petition were raised before the revisional court but same was not duly considered by the revisional court and revision was dismissed in summary manner after citing certain case laws. Article 227 of the Constitution of India confers on High Courts power of superintendence over all courts, tribunals throughout jurisdiction of concerned High Court.

7. In the light of foregoing discussions and for the reason that complainant version in present complaint as well as in her previous F.I.R. are substantially same, filing of complaint on similar allegations taken in F.I.R. already lodged is not tenable and summoning order issued by the court of first instance pursuant to said complaint and judgement of revisional court affirming said summoning order in criminal revision preferred by present petitioners are not sustainable and orders of both court below are liable to be set aside.

8. The impugned orders passed by the courts below are set aside. However, it is clarified that observations made herein above will not affect the proceedings initiated pursuant to F.I.R. lodged bearing Case Crime no. 142 of 2017, P.S. Noorpur, District Bijnor against the petitioners and co-accused at the instance of the present complaint/ respondent no. 2.

9. The instant petition stands **allowed** with above observations.

(2024) 1 ILRA 980
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters U/A 227 No. 5804 of 2023 (Criminal)

Sri Ramesh @ Mehandi Hasan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shrikant Srivastava, Archana Srivastava

Counsel for the Respondents:
G.A.

A. Constitution of India, 1950-Article 227-Indian Penal Code, 1860-Sections 363, 376 & 376 (2)(cha)-Criminal Procedure Code, 1973-Sections 357 & 357-A-accused was convicted- victim claimed compensation-accused filed an appeal and no fine was deposited-learned trial court while considering the application was not aware of the scheme i.e. Uttar Pradesh Victim Compensation Scheme 2014 and this fund is operated by Secretary, State Legal Service Authority- the provisions of section 357-A were not considered by the court concerned in right perspective and the application was dismissed on the basis of report of Probation Officer only-In fact, it falls within the jurisdiction of District Legal Service Authority to decide whether the claim falls within the parameter of the scheme of 2014 or not.(Para 3 to 12)

B. Section 357 CrPC provides that when a court imposes a sentence of fine while judgment, whole or any part of the fine recovered, may be applied for payment of compensation for any loss or injury caused to any person, however no such payment shall be made before the period allowed for presenting the appeal has elapsed or if an appeal be presented, before the decision of the appeal.(Para 5)

The petition is disposed of. (E-6)

(Delivered by Mrs. Jyotsna Sharma, J.)

1. Sri Srikant Srivastava, learned counsel for the petitioner and Sri S.C. Mishra, learned A.G.A. for the State are present.

2. This petition has been filed challenging the order dated 09.02.2023, passed in a case arising out of Case Crime No. 793 of 2010 under sections 363, 376 I.P.C. by which, the application moved by the victim in the light of order passed in Writ No. 41664 of 2018 for grant of compensation, was dismissed.

3. The relevant facts of the case are as below.

(i) In a criminal case tried by Second Additional Sessions Judge, i.e. S.T. No. 629 of 2010 under sections 363 and 376, the petitioner was a victim of rape. The accused was put to trial and was convicted and sentenced to life imprisonment along with fine of Rs. 25,000/- for the offence of 376 (2) (cha).

(ii) The learned Second Additional Sessions Judge also ordered that half of the fine shall be payable to the victim as compensation.

(iii) It is submitted by the petitioner that the convict is in judicial custody and he has filed an appeal challenging the above judgment and order. The convict is lodged in jail and the appeal is pending and that till now, no fine has been deposited, therefore, no compensation could be obtained by her.

(iv) The victim filed a Writ No. 41664 of 2018 with a prayer for grant of compensation under section 357, 357-A Cr.P.C. which was decided by the order passed by the High Court 18.12.2018 as below:

"Heard Sri Shailesh Kumar Srivastava, learned counsel for the petitioners and the learned Standing

Counsel for the State-respondent nos.1 to 3.

By means of this writ petition, the petitioner no.1 through her mother, the petitioner no.2 is claiming compensation being victim of rape. The accused has been convicted.

Learned Standing Counsel submits that corpus has been created in pursuance to the provisions of Section 357 & 357 (A) of Cr.P.C. for that petitioners have to approach the same court.

In case, such an application is filed, the same be considered and decided, in accordance with law.

With the aforesaid observation, the writ petition stands disposed of."

(v) In pursuance of the aforesaid order, the victim moved an application dated 21.02.2019 before the trial court concerned. The District Probation Officer, Gautam Buddh Nagar, submitted a report stating therein that the scheme "Uttar Pradesh Rani Laxmi Bai Mahila Evam Bal Samman Kosh" was promulgated in the year 2015, whereas the incident of the instant case occurred in 2010, therefore, it shall not be possible to grant any compensation to the victim under that scheme.

(vi) The learned Sessions Judge, on the basis of aforesaid report, dismissed the application by passing an order on 09.02.2023. Now, this order is under challenge in this petition.

4. The way, the matter of compensation has been handled by the court concerned, gives an impression that the court was unaware of the scheme and the formalities required for grant of compensation as provided in **U.P. Victim Compensation Scheme, 2014**. Before I proceed further, I find it appropriate to go through the relevant provisions of law.

5. Section 357 Cr.P.C. provides that when a court imposes a sentence of fine while passing a final judgment, whole or any part of the fine recovered, may be applied for payment of compensation for any loss or injury caused to any person, however, no such payment shall be made before the period allowed for presenting the appeal has elapsed or if an appeal be presented, before the decision of the appeal.

6. Section 357-A, which has been introduced in Cr.P.C. by Act V of 2009 w.e.f. 31.12.2009, empowers the State Government, in coordination of the Central Government, to prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who suffered loss or injury as a result of a crime.

7. The provisions of Section 357-A Cr.P.C. are as below:

"[357A. Victim compensation scheme.-- *(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.*

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case

may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

8. Under the powers as available under section 357-A, the Uttar Pradesh Victim Compensation Scheme 2014, has come into force.

9. Schedule-1 annexed with the scheme provides for the maximum limit of compensation which can be paid to a rape victim. A victim compensation fund, from which the compensation can be defrayed under the scheme, has already been established. This fund is operated by **Secretary, State Legal Services Authority.**

10. Para-5 of the scheme provides that the recommendation for grant of compensation can be made by the court. This recommendation can be made on the application moved by the victim or by the court suo moto. Whenever, such recommendation is received by District Legal Services Authority, it shall examine the case and verify the contents of the claim and after observing other formalities, as provided under the scheme and after due inquiry, award compensation within two months from the date of receipt of the recommendation in accordance with the provisions of the scheme. This may also be noted that the **'eligibility'** of the victim for grant of compensation and **quantum** thereof can only be decided by the D.L.S.A. The court concerned can only make a 'recommendation'. It falls within the jurisdiction of D.L.S.A. to decide whether the 'claim' falls within the parameter of the scheme of 2014 or not. The role of the court, in such circumstances is formal and no more.

11. It appears that the learned trial court while considering the application given by the victim, was not aware of such scheme. It also appears that the provisions of section 357-A were not considered by the court concerned in right perspective and the application was dismissed on the basis of report of Probation Officer only.

12. This fact has been brought to my knowledge that an appeal filed against the judgment and order passed by the trial

court is pending. Undisputably, the matter for grant of compensation can be considered by the court whether it is trial court or the court of appeal and accordingly, the District Legal Services Authority may be asked to verify the claim and to proceed as per provisions of the scheme.

13. In view of the above legal position, this petition is finally disposed of, with liberty to the petitioner to move suitable application either before the Court considering the matter of appeal or before the concerned District Legal Services Authority, within a month. In case, the matter comes before the District Legal Services Authority, it shall be considered by the authority, as per law.

(2024) 1 ILRA 984
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters U/A 227 No. 8979 of 20223 (Criminal)

Rajkumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Vinod Kumar Tripathi, Sri Kunj Bihari Pandey

Counsel for the Respondents:
G.A.

A. Constitution of India,1950-Article 227-Indian Penal Code, 1860-Sections 147, 148, 149, 323, 324, 325, 504, 506 & 326-Criminal Procedure Code, 1973-Section 216-challenge to-addition of charge –Petitioner argued that no material was there on the basis of which addition of section was made by the court-While at the framing of the charge, application moved through the APO was heard and the medical reports showed grievous injuries-Hence, this is not the case where once charged had been framed and an addition of some section was made subsequently.(Para 16)

B. The power to add or alter a charge is comprehensive enough for remedying defects, whether they arise out of the framing of a charge or non-framing of charge and whether they are discovered at the inception of the trial or at subsequent stages till prior to the pronouncement of the judgment. Court's power to alter or add any charge is unrestrained provided such addition or alteration is made before the judgment pronounced. An erroneous and improper charge may be corrected under section 216 Cr.PC by re-framing it properly or by addition or altering it for an offence provable by the evidence. It is discretionary power and of course the discretion should be exercised judicially and not arbitrarily.(Para 6 to 9)

The writ petition is dismissed. (E-6)

List of cases cited:

1. Vikul Vs St. of U.P. & anr. {Matters U/A 227 No. 2014 of 2023}

2. Anant Prakash Misra @ Anant Sinha Vs St. of Har. & anr. (2016) 6 SCC 105

3. Dr Nallapareddy Sridhar Reddy Vs the St. of A.P. & ors., CRLA No. 1934 of 2019

4. P. Kartikalakshmi Vs Sri Ganesh (2017) 3 SCC 347

5. CBI Vs Karimullah Osan Khan (2014) 11 SCC 538

(Delivered by Mrs. Jyotsna Sharma, J.)

1. Heard Sri Vinod Kumar Tirpathi, learned counsel for the petitioner and Sri S.C. Mishra, learned AGA for the State.

2. This petition under Article 227 of the Constitution has been filed with the following reliefs:-

"I. Set aside the impugned Judgment and Order dated 26.07.2023 passed by Additional Sessions Judge, Court No. 3, Muzaffar Nagar in Criminal Revision No. 284 of 2022 (Jaipal and others Vs. State of U.P. and Another) as well as impugned order dated 03.11.2022 passed by Additional Civil Judge (Junior Division), Court No. 4, Muzaffar Nagar in Criminal Case No. 694/9 of 2019 (State Vs. Jaipal and others) arising out of Case Crime No. 374 of 2017 under section 147, 148, 149, 323, 324, 325, 504, 506 I.P.C. Police Station Kakrauli, District Muzaffar Nagar. (Annexure No. 5 and 7 of the writ petition).

II. Direct the learned court below to delete the section 326 IPC which is imposed upon the petitioner and other co-accused persons which is not made out against them."

3. Submissions of the petitioner are as below:-

On the basis of an FIR case crime no. 374 of 2017 was registered and investigated upon. The accused persons were chargesheeted and cognizance was taken by the concerned Magistrate. During the course of the proceeding, an application dated 07.06.2018 was moved before the Magistrate with the contention that besides offences mentioned in the chargesheet, an offence under section 326 IPC is prima facie disclosed from prosecution papers, therefore a charge under section 326 IPC may also be framed. The court concerned heard on the application and allowed the same. Aggrieved by the order passed by the Magistrate on 03.11.2022, the accused persons preferred a criminal revision no. 284 of 2022 (Jaipal and others vs. State of UP and another). This criminal revision was decided by the District and Sessions Judge, Muzaffar Nagar on 03.11.2022, whereby the revision was rejected and the order of the Magistrate was affirmed.

4. The contentions of the petitioner are that false FIR in this case has been lodged in collusion with the police, as a counter blast to an FIR, case crime no. 373 pf 2017, lodged from his side. Further that the injury reports of the injured in the instant case are doubtful documents. Another contention is that from the papers, no offence under section 326 IPC is made out and that the Judicial Magistrate passed an arbitrary order. The revisional court also did not consider the factual and legal position and wrongly passed the order affirming the order of the Magistrate.

5. One of the most vehement legal arguments of the petitioner is that after taking of cognizance, the Magistrate is not empowered to add or alter any sections. It is further argued that once charge has been framed, the court cannot change or add any section before any evidence has been led by the prosecution. In support of this argument, the judgment given by learned Single Bench of Allahabad High Court in **Matters under Article 227 No. 2014 of 2023 (Vikul vs. State of U.P. and Another)** has been placed before me.

6. Before I take up the legal issue raised by the petitioner, it shall be useful to refer to some more relevant facts as below:-

• After investigation, the police filed charge-sheet under sections 147, 148, 149, 323, 324, 325, 504 and 506 IPC. The court concerned took cognizance on 09.10.2017 and proceeded.

• The first informant moved an application dated 07.06.2018 with the submission that on the basis of the medical report of injured-Yashveer prima facie, besides other offence, offence under section 326 IPC is clearly made out. The investigating officer ignored the above evidence and deliberately filed a charge-sheet excluding the offence under section 326 IPC. The learned Assistant Prosecuting Officer moved an application with similar submissions and applied for framing of charge in additional section 326 IPC besides sections 147, 148, 149, 323, 324, 325, 504 and 506 IPC.

• The medical examination report of Yashveer dated 15.08.2017 is on record. The perusal of the above medical examination, admittedly done at primary health centre by the medical officer in charge, reveals that injured had 4 injuries on his person, out of which injury no. 2 was grievous and rest were kept under observation. Injury nos. 2 and 3 were found to have been caused by some sharp edged weapon. The description of injury no. 2 is as below:-

"2.3 x 0.4 cm through and through over left ear lobule. Margin are clear cut. Clotted blood present. Part of left ear lobule missing c̄ facial disfigurement."

7. Chapter XIX of Cr.P.C. provides for procedure for trial of warrant cases by Magistrate. Section 240 Cr.P.C. provides that if upon consideration of police report and the documents sent with it under section 173 Cr.P.C. and making such examination, if any, the Magistrate forms an opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing, a charge against the accused.

Chapter XVI of Cr.P.C. deals with 'charge'. This Chapter begins with Section 211 Cr.P.C. which says that every charge under the Code shall state the offence with which the accused is charged, and the section of the law against which the offence is said to have been committed shall be mentioned in the charge.

The charge should contain particulars as to time, place etc as are reasonably sufficient to give the accused notice of the matter with which he is being charged.

This Chapter comprehensively deals with the matter of framing of charge, what particulars are required to be mentioned, the requirement of mentioning the particular section of the law etc. The purpose is to make the accused aware of all the necessary details of the offence for which he is going to face the trial, so that he is not prejudiced in defending himself. In my view, though the procedural part of the proceeding before a trial court as regard framing of charge is contained in section 240 Cr.P.C., but the substantive part is dealt with Chapter XVI of Cr.P.C.. Chapter XVI of Cr.P.C, apart from dealing with the essential ingredients which should a charge contain, also deals with another very important and substantial provisions of law, which is contained in section 216 Cr.P.C. Section 216 Cr.P.C. is as below:-

"216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

8. At this juncture, it should be kept in mind that section 240 provides for giving an opportunity of hearing to both the sides. It should also be kept in mind that when the court takes cognizance as per provisions under section 190, the accused is not in picture. The Magistrate or the court concerned has to depend upon the facts as revealed from material on record collected by the investigating officer or produced by the complainant. At that stage, the accused is having no opportunity to be heard in defence or to place before the court, his side of the story. In this limited sense, the matter is dealt with by the court concerned in an ex-parte manner at the time of cognizance. The Magistrate definitely applies its mind at the time of cognizance, however when the accused has appeared on the scene, he is given an opportunity to be heard before framing of charge and at that time, the Magistrate can take a more balanced view, on the basis of material before it. The necessary corollary is that at that time, the court has an opportunity to go through the prosecution papers once again. In case the Magistrate/court concerned finds that from the very same papers, which were available at the time of cognizance, some other offence or say an offence under which the chargesheet was not submitted, is also made out, he cannot just turn a blind eye. Where things are there on the face of record, the court cannot look the other way on such technical argument that once cognizance has been taken, he cannot add or alter the charge. It may happen that by oversight or any reason of like nature, any important fact may miss the attention of the court. The court concerned/Magistrate is not powerless, in such circumstances, to correct its own mistake whenever it is detected. The provisions of section 216 Cr.P.C. have been enacted to deal with such eventualities. There may be myriad of circumstances which may set the grounds for altering or adding the charge. In my view, one of such circumstances may include an error by oversight. The legislature had definitely keeping in mind the unforeseen circumstances, which may

arise in any criminal trial, has worded the section 216 Cr.P.C. in a most comprehensive manner. Section 216(1) Cr.P.C. has put no conditions or limitations on the court's power to alter or add any charge. Section 216(2) to section 216(5) Cr.P.C. simply deal with the situation which arises after alteration/addition of the charge.

9. This power to add or alter a charge is comprehensive enough for remedying defects, whether they arise out of the framing of a charge or non-framing of charge and whether they are discovered at the inception of the trial or at subsequent stages till prior to the pronouncement of the judgment. Court' power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. An erroneous and improper charge may be corrected under Section 216 Cr.P.C. by re-framing it properly or by addition or altering it for an offence provable by the evidence. It is discretionary power and of course the discretion should be exercised judicially and not arbitrarily.

10. The Supreme Court in ***Anant Prakash Misra @ Anant Sinha vs. State of Haryana and Another; (2016) 6 SCC 105*** has observed in para-16 as below:-

"16. From the aforesaid, it is graphic that the court can change or alter the charge if there is defect or something is left out. The test is, it must be founded on the material available on record. It can be on the basis of the complaint or the FIR or accompanying documents or the material brought on record during the course of trial. It can also be done at any time before pronouncement of judgment. It is not necessary to advert to each and every circumstance. Suffice it to say, if the court has not framed a charge despite the material on record, it has the jurisdiction to add a charge. Similarly, it has the authority to alter the charge. The principle that has to be kept in mind is that the charge so framed by the Magistrate is in accord with the materials produced before him or if subsequent evidence comes on record. It is not to be understood that unless evidence has been let in, charges already framed cannot be altered, for that is not the purport of Section 216 CrPC."

11. I find it useful to refer to the observations of the Supreme Court in ***Criminal Appeal No. 1934 of 2019 (Dr Nallapareddy Sridhar Reddy vs. the State of Andhra Pradesh and Others) decided on 21.01.2020.*** The facts before the Supreme Court were that after further investigation, an additional/supplementary chargesheet was filed by the investigating officer, however that chargesheet was never brought to the attention of the court concerned or may be it just escaped the attention of the court by oversight or some reason of like nature. The trial court proceeded and reached the stage of the pronouncement of the judgment. At that stage, an application for alteration of charge under section 216 Cr.P.C. was moved. The trial court on the basis of additional/supplementary chargesheet proceeded to frame the charge under section 406 and 420 IPC. The Supreme Court refused to interfere in the order for addition of charge observing that there existed sufficient material for framing of charge which necessitated the addtion and dismissed the appeal. In the aforesaid judgment the Supreme Court referred to following observations by two-Judge Bench of itself in ***P. Kartikalakshmi vs. Sri Ganesh; (2017) 3 SCC 347*** as below:-

"The decision of a two-judge Bench of this Court in P Kartikalakshmi v Sri Ganesh12, dealt with a case where during the course of a trial for an offence under Section 376 of the IPC, an application under Section 216 was filed to frame an additional charge for an offence under Section 417 of the IPC. Justice F M Ibrahim Kalifulla, while dealing with the power of the court to alter or add any charge, held:

"6. ... Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law."

In the same judgment, the Supreme Court also referred to the observations made in CBI v Karimullah Osan Khan; (2014) 11 SCC 538.

The para reproduced by the Supreme Court is being reproduced here as below:-

"17. Section 216 CrPC gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions "at any time" and before the "judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts should also see that its orders would not cause any prejudice to the accused.

18. Section 216 CrPC confers jurisdiction on all courts, including the Designated Courts, to alter or add to any charge framed earlier, at any time before the judgment is pronounced and sub-sections (2) to (5) prescribe the procedure which has to be followed after that addition or alteration. Needless to say, the courts can exercise the power of addition or modification of charges under Section 216 CrPC, only when there exists some material before the court, which has some connection or link with the charges sought to be amended, added or modified. In other words, alteration or addition of a charge must be for an offence made out by the evidence recorded during the course of trial before the court."

12. The above judgment of the Supreme Court reinforced the impression that the court's power to alter or add any charge is unlimited and unrestrained. The

charges can be altered or added at any time till the judgment is pronounced. It may be noted that the addition can be made at the time of framing of any charge or at any subsequent stage. The court's power to add or alter charge cannot be taken away on the basis of the fact that no cognizance was taken in a particular section. This is not to say that the power can be exercised in an arbitrary manner. The only rider is that there must be some material on record justifying the addition or alteration. The legislature has even given the power to frame charge in alternative which further goes on to show that the powers of the courts are comprehensive and unrestrained. The provisions of section 221(1) and (2) Cr.P.C. give a glimpse of unlimited powers of the court.

13. The judgment referred to by the petitioner in **Vikul case (supra)**, does not apply to this case. In the above noted case, the court dealt with a intervening stage after taking of cognizance and before the point of hearing on the issue of framing of charge had reached.

14. Now coming to the facts of the instant case. From the papers on record, this is categorically revealed that the application moved on behalf of the prosecution through APO was heard at the time of framing of charge. This is not the case where once charge had been framed and an addition of some section was made subsequently. Hence, the arguments of the petitioner that no new material was there on the basis of which addition of section was made by the court has no legs to stand.

15. In such circumstances, a pertinent question may arise that the order of framing of charge in additional section of section 326 IPC should be equated with taking of cognizance in additional section. Such an argument sans logic. If such argument is accepted, the only inference can be drawn that the court, in going through the documents/material produced by the prosecution once again at the time of hearing on charge is powerless in drawing any inference for the purpose of framing of charge. Such an interpretation would render the section 240 Cr.P.C. redundant and meaningless. The courts should remain alive to some realities and accept the proposition that there may arise situations where the sections which are mentioned at the time of taking cognizance may defer with the sections of law, under which appropriate charges are found to be framable. To clarify my point of view, I refer to section 190 Cr.P.C., which are as below:-

"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."

The above provisions speak of "taking cognizance of an offence". In my view, offence is a wider term and cannot be construed to mean only particular sections defining any particular offence in IPC or any other penal law. When an offence is committed, more than one sections may be attracted. At the time of taking cognizance, the court shall broadly look into material to find out what offence/offences are made out, however at the time of framing of charge, the court is expected to look into material on record and decide upon, in which particular section the offence is falling. This is not to say that at the time of taking cognizance particular section of law have not be mentioned or need not to be mentioned. This is just to make a distinction between the two stages in a case. I do not agree with the proposition that once cognizance of an offence is taken and particular sections are mentioned in the cognizance order, the court shall have no scope to alter or add, on those sections at the time of framing of charge, whether at the stage of section 240 Cr.P.C. or section 246(1) Cr.P.C.

Broadly, there are four stages in a criminal proceeding; the stage of taking cognizance, the stage of framing of charge, the stage of evidence and the stage of judgment. A distinction has to be maintained as regard duty entrusted on a court, the powers of the court to proceed and difference in judicial approach at different stages. Definitely, as the case proceeds from the stage of cognizance to stage of framing of charge, and onwards the proceedings begins to take shape, the loose ends are tightened and the appraoch becomes more and more penetrative.

16. In this case, at the time of framing of charge, the learned trial court heard both the sides. The attention of the court was brought to the fact that medical report of Yashveer showed grievous injuries caused by sharp edged weapon and that there was facial disfigurement and that the lobule of the ear had been cut through and through and was missing. On the basis of material already on record, the court came to a conclusion that besides charges under sections under sections 147, 148, 149, 323, 324, 325, 504 and 506 IPC, a charge under section 326 IPC is also needed to be framed and accordingly proceeded.

17. In view of the above discussion, I do not find any merit in the petition, therefore, it is **dismissed.**

(2024) 1 ILRA 991
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters U/A 227 No. 12091 of 2022 (Criminal)

Smt. Gudiya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Raghuvansh Misra

Counsel for the Respondents:
G.A., Sri Alok Singh, Sri Deepak Dubey

A. Constitution of India, 1950-Article 227-Criminal Procedure Code,1973-Section 311-In the instant case, revisional court found that some of the material witnesses

such as medical officer/doctor were not produced, which ought to have been examined in a case exclusively triable by the session court-deceased did not die of any injury and she died a natural death-Investigating officer did not find adequate material to charge sheet the accused persons and closed the case by filing a final report-the powers conferred upon the court u/s 311 Crpc have real purpose-though the doctor and any other formal witness may not be 'his witness' but definitely the courts power to summon them remains unaffected-Hence, no interference requires.(Para 1 to 19)

B. The provisions of section 311 Cr.P.C. shall apply even at the stage of inquiry. The trial court or the inquiry court may summon any material witness/witnesses which are necessary to be examined for just decision. It will be rather unwise to put fetters on a court whether it is a trial court, inquiry court, the court of appeal or a revisional court, where it seeks to exercise its powers for production of some important witness for just decision in the matter.(Para 13 to 16)

The petition is dismissed. (E-6)

<u>List of cases cited:</u>

1. Dilip & ors.Vs St. of U.P. & anr.. CRLR No. 93 of 2020

2. Kallu Pal & ors.Vs St. of U.P & anr. (2008) 3 ADJ 254

3. Shivjee Singh Vs Nagendra Tiwary & ors.(2010) 7 SCC 578

4. Dr. Divya Nand Yadav & anr. Vs St. of U.P. & anr. CRLA No. 9188 of 2022

5. Fiona Shrikhande Vs St. of Mah. & anr. (2013) 14 SCC 44

6. Pepsi Food Ltd & anr. Vs Spl. J. M. & ors.(1998) 5 SCC 749

7. Ram Kishore Singh Vs St. of U.P. & ors.CRLR No. 2078 of 2000

(Delivered by Mrs. Jyotsna Sharma, J.)

1. Heard Raghuvansh Misra, learned counsel for the petitioner, Sri Alok Singh, learned counsel for private respondent nos. 2 to 6 and Sri S.C. Mishra, learned AGA for the State.

2. This petition under Article 227 of the Constitution has been filed by the petitioner claiming following relief:-

"(i) issue an appropriate order or direction to set aside the order dated 17.10.2022 of Sri Vivek Sangal, Sessions Judge, Agra in Criminal Revision no. 93 of 2020 (Dilip and others versus State of U.P. and another)."

3. Relevant facts are as below:-

• Smt. Gudiya moved an application under section 156(3) Cr.P.C., on the basis whereof case no. 51 of 2019 under sections 147, 148, 149, 323, 325, 452, 504, 506 and 302 IPC was registered. The allegations in nutshell are that the father and brother in-law of the informant were assaulted with '*lathi-danda'*. They managed to escape. 10 minutes later, the accused persons namely, Than Singh, Dilip, Pawan armed with firearms and other accused persons namely, Sunil, Anil, Lalit and Sachin carrying lathi, danda, farsa came to the informant's house and assaulted her mother in-law Patri Devi. Accused Dilip and Pawan fired at Mahendra and Sachin, which accidentally hit not them, but Anil and Lalit i.e., two of the assailants themselves. Patri Devi died on the spot. Suresh and Hakim Singh suffered fractures.

• The story in the application under section 156(3) Cr.P.C. also mentioned the fact that she tried to lodge an

FIR but the same was not registered by the police. Instead an FIR case crime no. 665 of 2018 was registered against husband of the informant and several others.

After investigation, a final report was submitted by the police.

The first informant filed a protest petition. The CJM, Agra rejected the final report and treated the protest petition as complaint by order dated 09.09.2019.

The court proceeded and examined her and her witnesses. The complainant-Gudiya was examined under section 200 Cr.P.C. Her witness-Vijay as CW1, Laxmi Devi as CW2, Phoolwati as CW3, Dr. C.P. Rawat as CW4, Dr. Sumit Kumar Singh as CW5 and Hakim Singh as CW6 were examined under section 202 Cr.P.C.

The CJM, by order dated 12.03.2020, summoned accused Than Singh under sections 147, 148, 149, 323, 452, 304, 504 IPC; Dilip and Anil under sections 147, 148, 149, 323, 452, 504 IPC; Sunil and Sachin under sections 147, 148, 149, 323, 452, 307, 504 IPC.

The aforesaid accused persons preferred a criminal revision no. 93 of 2020 against summoning order. The revisional court by order dated 17.10.2022 directed the Magistrate concerned to pass a fresh order in the light of the observations of the revisional court and set aside the summoning order.

Now the complainant is before this court challenging the order of the revisional court.

4. The submissions of the petitioner are that the revisional court went beyond its jurisdiction. It re-appreciated the evidence on record, which cannot be done by the revisional court. Further, it is argued that the direction of the revisional court to direct the complainant to produce some more witnesses, is wrong as formal witnesses cannot be said to be the witness of the complainant. Contention of the petitioner is based on proviso to sub-section (2) to section 202 Cr.P.C., which is as below:-

"In an inquiry under Sub-Section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath; Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath."

5. On the basis of above provision, it is argued that the formal witnesses like the doctor and the head moharrir, cannot be categorised as his witnesses, therefore he was not obliged to produce them.

The petitioner refers to the judgment of the Allahabad High Court given in ***Kallu Pal and Others vs. State of U.P. and Another; 2008 (3) ADJ 254***. The High Court observed in para nos. 3 and 4 as below:-

"3. The word "his witness" occurring in the proviso to Sub-section 2 of Section 202 Cr.P.C. is of material significance. The formal witnesses, such as doctor, Investigation Officer, Executive Magistrate, Police constable etc are not under the command of the complainant. They are not the witnesses of the complainants confidence. Hence they are not "his witnesses". Thus the formal

witnesses are not covered by the proviso to Section 202(2) Cr.P.C.

4. The complainant is bound to produce only those witnesses of facts whom he intends to produce in the court of Sessions. The witnesses of fact who are not produced under Section 200 or 202 Cr.P.C, cannot be produced by him, in the court of Sessions. The complainant is not bound to produce those witnesses of fact, whose names are, though mentioned in the complaint but who are not intended to be produced by him in the Court of Sessions."

6. The State and the private respondent have not countered the above proposition of law by bringing into this court's notice any contrary law laid down by the High Court or the Supreme Court in this respect.

7. I do not propose to defer from the interpretation of the word "his witness" as mentioned in the judgment of ***Kallu Pal and Others (supra).*** In my view, the purpose of proviso to section (2) of section 202 Cr.P.C. shall fail if the Court/Magistrate do not play their own role.

8. In a matter before the Supreme Court in ***Shivjee Singh vs. Nagendra Tiwary and others, (2010) 7 SCC 578,*** the issue was whether proviso to section 202(2) Cr.P.C. was mandatory and whether the Chief Judicial Magistrate committed a serious error in taking cognizance against the respondents without insisting on the examination of remaining two witnesses. The Supreme Court in para no. 7 of the judgment held as below:-

"***7. We have considered the respective submissions. By its very nomenclature, Cr.P.C. is a compendium of law relating to criminal procedure. The provisions contained therein are required to be interpreted keeping in view the well recognized rule of construction that procedural prescriptions are meant for doing substantial justice. If violation of the procedural provision does not result in denial of fair hearing or causes prejudice to the parties, the same has to be treated as directory notwithstanding the use of word `shall'."***

After observing as above, the Supreme Court further elaborated the law as to enquiry in section 202 Cr.P.C. and then in para nos. 11, 12 and 13 touched upon 'satisfaction of the Magistrate' before he could proceed to summon the accused.

Para nos. 11, 12 and 13 of the Supreme Court's judgment are as below:-

"11. Section 202(1)empowers the Magistrate to 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 which he thinks fit for the purpose of deciding whether or not there exists sufficient ground for proceeding. By Amending Act No.25 of 2005, the postponement of the issue of process has been made mandatory where the accused is residing in an area beyond the territorial jurisdiction of the concerned Magistrate. Proviso to Section 202(1) lays down that direction for investigation shall not be made where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or where the complaint has not been made by a Court unless the complainant and the witnesses have been examined on oath under Section 200.

12. Under Section 202(2), the Magistrate making an inquiry under sub-section (1) can take evidence of the witnesses on oath. If the Magistrate thinks that the offence complained of is triable exclusively by the Court of Sessions then in terms of proviso to Section 202, he is required to call upon the complainant to produce all his witnesses and examine them on oath.

13. Section 203 empowers the Magistrate to dismiss the complaint if, after considering the statements made by the complainant and the witnesses on oath and the result of the inquiry or investigation, if any, made under Section 202(1), he is satisfied that there is no sufficient ground for proceeding. The exercise of this power is hedged with the condition that the Magistrate should record brief reasons for dismissing the complaint. Section 204, which talks of issue of process lays down that if the Magistrate taking cognizance of an offence is of the view that there is sufficient ground for proceeding then he may issue summons for attendance of the accused in a summons-case. If it is a warrant-case, then the Magistrate can issue warrant for causing attendance of accused."

A thing which is relevant to point out is that after referring to the procedure which could be adopted under section 202(1) and 202(2) Cr.P.C., the Supreme Court spoke of sufficient ground to proceed and the Magistrate's satisfaction thereon.

Further in concluding paras of the judgment, the court held that non-examination of all the witnesses by the complainant as per the provisions of proviso to section 202(2) Cr.P.C. would not vitiate the proceeding and it will not preclude the Magistrate from taking cognizance and issue process or passing a committal order ***if he is satisfied that there existed sufficient ground for doing so.***

9. In my view, the Supreme Court found it desirable that the complainant is directed to examine all his witnesses, however in case the complainant failed to produce any one or one more of his witnesses for some reason that cannot be a ground to assail the summoning order or the committal order. The Supreme Court, in my opinion, did not put any bar on the powers of the Magistrate or the court concerned to summon any of the witnesses, whether from the list of witnesses furnished by the complainant or any other person not from the list, for the purpose of arriving at requisite satisfaction.

This aspect of the matter shall be clearer by going through the view as taken by Allahabad High Court given in ***Criminal Appeal No. 9188 of 2022 (Dr. Divya Nand Yadav and Another vs. State of U.P. and Another) decided on 20.04.2023***. It may be noted that the proceedings before a Magistrate under section 202 Cr.P.C. fall under the head of 'inquiry' as juxtaposed to trial or investigation as defined in section 2(g) and 2(h) Cr.P.C. Further Section 202 Cr.P.C. speaks of 'inquiry' into the case by the Magistrate himself. The law casts burden on the Magistrate to conduct an inquiry himself. The manner in which the provision is worded gives an impression that Magistrate is expected to play an active role and that he cannot afford to be a passive spectator. This point of view has been dealt with in the judgment of Dr. Divya Nand Yadav and Another (supra).

It was held in para nos. 8 and 9 as below:-

"8. It is clear that the examination of witnesses under Section 202 Cr.P.C., as is popularly known, is in fact part of inquiry which a Magistrate may conduct in cases he does not find enough of grounds to immediately proceed to summon the accused. Though not always, this part of procedure too has become a routine matter. In almost all the cases based on complaint, the witnesses are examined without realizing the fact that such a step shall be unnecessary if the Magistrate/the court concerned is satisfied that prima facie case is made out, on the basis of the examination of the complainant and his witnesses at previous stage of the case i.e. section 200 Cr.P.C. Where the Magistrate finds himself short of requisite level of 'satisfaction' then only he may decide to further probe into by ordering for examination of more witnesses. The reasons behind jumping to the next step of Section 202 Cr.P.C. have gone in to oblivion in the rush of work and almost routinization of things.

9. The phrase occurring in Section 202 Cr.P.C. "inquire into the case himself" enjoins the Magistrate that he actually plays its part by examining the witnesses himself, rather than depending upon the statements which might be clouded, cryptic, obscure or ambiguous and sometime very direct and bald. The experience in courts strengthens the impression that more often then not unsupervised, one sided statement may have more to conceal than to reveal. It is said that law is a living being. It grows and develops according to the exigencies of the times. It will not be out of context to mention that the superior courts have observed in a number of cases that the trial courts ought to be quite alert when they decide to take cognizance or summon the accused persons, may be at the stage of Section 204 Cr.P.C. or otherwise. The superior courts have consistently kept on cautioning the courts to be quite circumspect, careful, alert and wakeful while putting the legal machinery in motion. The vicissitudes of cases, peculiar facts and situations do impact the interpretations of law and contribute towards the developments and progress of legal arena."

10. The court in ***Dr. Divya Nand Yadav and Another (supra)*** equated the word 'prima facie satisfaction' with the sufficient ground to proceed on the basis of the judgment of the Supreme Court passed in ***Fiona Shrikhande vs. State of Maharashtra and Another; (2013) 14 SCC 44.*** The relative scope of Sections 203 and 204 Cr.P.C. were noted and considered by the Supreme Court in ***Pepsi Food Limited and another vs. Special Judicial Magistrate and others; (1998) 5 SCC 749, is as below:-***

"Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the

accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

The Supreme Court emphasized the need that the Magistrate should not sit like a silent spectator.

In para no. 14 of the judgment of ***Dr. Divya Nand Yadav and Another (supra),*** this court has held as below:-

"14. The fact of the matter is that the court shall not proceed in a mechanical or a routine manner. It shall apply its mind, which is called a judicial mind and discretion as well. The court/the Magistrate, though shall not go deep into the evidence given and shall not weigh the evidentiary value in a meticulous manner. Except this rider, there is no other obstacles before the court below for arriving at the "prima facie satisfaction" a word which can be equated with the word "prima facie case".

11. A question may arise that in case the complainant for some reason, whether justifiable or not so justifiable, either cannot produce its witness or deliberately withholds any of them, then what course is available to the Magistrate, who is conducting an 'inquiry'. Can he be left at the mercy of the complainant? There may be instances where a Magistrate may find that something more is required before he can record his 'prima facie satisfaction' with regard to summoning of the accused.

12. Moreover, a situation may arise where in a genuine case put before the court, the complainant is helpless in producing even 'his witness' for some extraneous reason. In such a situation definitely he has an option to apply to the court for summoning those witnesses, which he cannot produce himself.

13. In my opinion, section 311 Cr.P.C. is framed to rescue situations, particularly in cases where the Magistrate is of the view that certain person/witness must be examined before he can record his 'satisfaction' to proceed against certain persons. Such person may or may not be from the list. In case name of such witness finds place in the list, the complainant may not be willing to produce him for some reason. Same applies where name of an important witness is deliberately left out of the list.

Section 311 Cr.P.C. is as below:-

"311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, 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; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."

14. From bare perusal, it is evident that the provisions of section 311 Cr.P.C. shall apply even at the stage of inquiry. The

trial court or the inquiry court may summon any material witness/witnesses which, in its opinion, are necessary to be examined for just decision. It will be rather unwise to put fetters on a court whether it is trial court, inquiry court, the court of appeal or a revisional court, where it seeks to exercise its powers for production of some important witness for just decision in the matter. It is not at all necessary that when a court chooses to exercise its powers, it should specifically mention under which provision of law such powers are being exercised.

15. In the instant case, the learned revisional court, after hearing both the sides found a number of facts and circumstances relating to the matter, which needed attention. It may be noted that respondent's main contention is that Patri Devi did not die of any injury and that she died a natural death. Further that after investigation, the investigating officer did not find adequate material to chargesheet the accused persons and closed the case by filing a final report; The court was attentive to the fact that there was a criminal case already registered against the complainant's husband and number of others, (case crime no. 665 of 2018) under sections 147, 148, 149, 302, 307, 504 IPC. The revisionist had before the revisional court, argued that a false FIR against them was lodged by the complainant to create a defence in their favour and to exert pressure on them to settle scores in the wake of pending criminal case against the other side. This fact was also brought into notice of the revisional court that the medical officer/doctor, who prepared medical report of Hakim Singh was not produced by the complainant and there were certain other relevant papers in respect of which witness were not produced. Besides above material facts, brought into notice of revisional court, some other submissions were made with regard to summoning order by the revisionist.

I perused the order passed by the revisional court. The revisional court has given cogent reasons for setting aside the order of the trial court. The revisional court further found that some of the material witness were not produced, which ought to have been examined in a case exclusively triable by the session court.

16. In my view, the powers conferred upon the court under the provisions of section 311 Cr.P.C. have a real purpose. When a court properly exercises such powers in interest of justice, the court exercising supervisory powers should be slow to interfere. Moreover, though the doctor and any other formal witness may not be 'his witness' but definitely, the court's power to summon them remains unaffected. The complainant-petitioner cannot take shelter of the judgment pronounced by the High Court in ***Kallu Pal and Others (supra)*** to circumvent the powers of the inquiry court or the court of revision, which have been provided by statutory law. In my view, even if certain witnesses are not or cannot be produced by the complainant, on the premise that those witnesses were not 'her witnesses' and not under his command, the court is perfectly within its powers to summon and examine them.

17. The respondent has raised an objection against the maintainability of this petition and places reliance on the judgment of the Bench of this Court passed in ***Criminal Revision no. 2078 of 2000 (Ram Kishore Singh vs. State of U.P. and Others).*** In the aforesaid case before the

High Court, a common judgment and order passed by the Sessions Judge, Varanasi in two criminal revisions, whereby both the criminal revisions were allowed, was challenged. The revisional court had held that when a specific task was given to the Magistrate, he ought to have performed in true spirit of order of the court. The revisional court had set aside the order of the C.J.M. concerned, expressing surprise that the main appellant, the circle officer was absolved of the charge, while public persons who were said to be merely standing there, were made accused under section 34 IPC. The revisional court had sent back all the record directing the C.J.M., Varanasi for passing a fresh order, after considering all material facts and circumstances. The order of the revisional court was challenged before the Allahabad High Court. In para no. 17 of the judgment, the Allahabad High Court observed that the Sessions Judge had only set aside the order of the learned Magistrate and to pass an order a fresh and therefore the parties would have another opportunity to address the Magistrate's court. Hence, there was no need to rush to High Court. The court expressed a view that such an order falls within the order of interlocutory order.

18. This may be noted at this juncture that the present petition has been filed under Article 227 of the Constitution of India and the principles, if any, laid down in the above noted judgment cited by the respondents, definitely do not apply here. The issue here is quite different. In the instant case, the revisional court made certain cogent observations in the backdrop of certain facts and circumstances. It was of the view that in the light of the contention that the deceased-Patri Devi died a natural death, the evidence of the doctor and another witness ought to have been recorded, before the Magistrate could have decided the matter of summoning. When the allegations are of serious nature, the courts have to be extra cautious and careful. And this view finds support from the judgment of the Supreme Court in ***Pepsi Food Limited and another (supra).***

19. In my view, there is no good ground to interfere in the impugned order. Hence, the petition is **dismissed.**

(2024) 1 ILRA 999
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Matters U/A 227 No. 12595 of 2023 (Civil)

Jayant Srivastava ...Petitioner
Versus
Prescribed Authority, Payment of Wages Act, 1936, Kanpur & Ors. ...Respondents

Counsel for the Petitionera:
Sri Prabhav Srivastava

Counsel for the Respondents:
Sri Satyendra Narayan Singh, Sri Ishan Mehta (Addl. C.S.C.)

A. Constitution of India, 1950-Article 227-Payment of Wages Act, 1936-Section 17-maintainability of-Court of small causes or the District Court, while exercising the power under section 17(1) of the Act, 1936 functions as a Civil Court and not as persona designate-When the district court decides an appeal u/s 17 of the Act, the High Court has power to revise an order passed by the District court-Hence, the order passed in exercise of such power is amenable under Article 227 of the Constitution of India.(Para 13 to 27)

B. Agreement executed between Smt. Madhubala and M/s Bhoomi Shakti developers Ltd. Under which a sub contract is given. There is no written contract between the petitioner with Shyamji Verma/Respondent no.1 or other respondent no.s 3 to 5. The prescribed authority overlooked the principle that a plaintiff must stand on his own legs and not rely upon the shortcomings of the defendant. Both the Authorities have not addressed the issue regarding the maintainability of case against M/s Bhoomi Shakti Developers Ltd. Of which the petitioner was simply the Managing Director. Prima facie claim could not be raised against the petitioner in his individual capacity describing him as a Builder. No liability of payment of wage could be fixed on the Director of the Company u/s 3 of the act and the petitioner cannot be brought under the ambit of employer under the Act.(Para 29)

The writ petition is allowed. (E-6)

List of cases cited:

1. Radhey Shyam Vs Chhabi Nath (2015) 5 SCC 423

2. Abdul Rashid Vs BDO, Civil Rev. No. 38 of 2000

3. Central Talkies Vs Dwarka Prasad (1961) AIR SC 606

4. Debidutt Dube Vs Cent. India Elec. Supply Co. (1945) AIR Nag. 244

5. Jogendra Nath Vs Chandreswar Singh (1951) Cal. 29

6. Rajkumar Mills Ltd.Indore Vs Insp. PW, (1955) AIR MB 60,

7. A.C Arumughan Vs Mang. Jawahar Mills Ltd. (1956) Mad 79

8. Mang. Codialobail Press Vs K. Monappa (1963) Mys 128

9. The G.M. Vs Paras Nath Tewari (1967) All 576

10. Rameshwar Lal Vs Jogendra Das (1970) AIR Ori 76

11. French Moter Car Co. Ltd. Workers Union Vs French Motor Car Co. Ltd (1989) Lab IC 2134

12. Mukri Gopalan Vs Cheppilat Puthanpurayil Aboobacker (1995) 5 SCC 5

13. LIC Vs Nandini J. Shah & ors.(2018) 15 SCC 356

(Delivered by Ashutosh Srivastava, J.)

1. Heard Shri Prabhav Srivastava, learned counsel for the petitioner and Shri Satyendra Narayan Singh, learned counsel, who has appeared on behalf of respondent No. 2 on caveat.

2. Learned counsel for the petitioner is permitted to make necessary correction in the Serial Number of the parties appearing at various places of the petition.

3. The instant petition under Article 227 of the Constitution of India has been filed for setting aside the final judgment/order dated 19.9.2023 and formal order dated 16.11.2023 passed by the Addl. District & Sessions Judge,-IX at Kanpur Nagar in Misc. Civil Appeal No. 3 of 2023 (Jayant Srivastava and another versus Prescribed Authority, Payment of Wages Act, 1936/Assistant Labour Commissioner, Kanpur Nagar, Kanpur and others) as also the final Award dated 4.6.2022 passed by the Prescribed Authority/Addl. Labour Commissioner, Kanpur in PW Case No. 47 of 2018 (Shyamji Verma and others versus Jayant Srivastava and another). A further direction to the respondent No. 2 to release/return the amount deposited in pursuance to the Award dated 4.6.2022 in

favour of the petitioner has also been prayed for.

4. It is the case of the petitioner that he is the Managing Director of M/s Bhoomi Shakti Developers Pvt. Ltd., a Limited Company incorporated under the Provisions of Companies Act, 1956. The said company entered into a Builders' Agreement with one Smt. Madhubala for development of a residential house. In furtherance of the said Builders' Agreement, a sub contract was given to Shri Shyam Ji/respondent No. 2 for doing false ceiling etc., in the building in question. A sum of Rs.30,000/- was advanced to the said Shri Shyam Ji. However, the work was not got done through Shri Shyam Ji and the payment of Rs.30,000/- was stopped by the Bank upon the instructions from the company. The respondent Nos. 2 to 5 filed an application under the Payment of Wages Act, 1936 before the Prescribed Authority (Addl. Labour Commissioner) which proceeding were registered as PW Case No. 47 of 2018. It was alleged that the respondent Nos. 2 to 5 were engaged as mason on daily wages of Rs.500/- and they worked for the period 1.10.2017 to 28.3.2018 regularly. They were paid a sum of Rs.32,500/- out of total amount of Rs.75,000/-. The company M/s Bhoomi Shakti Developers Pvt. Ltd., was not made a party to the proceedings and only the petitioner was impleaded in the personal capacity as Builder. The learned Prescribed Authority vide its order dated 4.6.2022 allowed the claim of the respondent Nos. 2 to 5 and directed the petitioner to deposit a sum of Rs.2,50,500/- with the Labour Commissioner, Kanpur, failing which the amount would be recovered by issuing recovery certificate. The appeal preferred by the petitioner under Section 17 of the Payment of Wages Act, 1936 before the Appellate Authority i.e. the District & Sessions Judge, Kanpur Nagar has been rejected.

5. At the very out set, a preliminary objection has been raised on behalf of the contesting respondent regarding the maintainability of the petition under Article 227 of the Constitution of India. Learned counsel for the contesting respondent submits that the order of the Appellate Authority under the Payment of Wages Act, 1936 is liable to be assailed in a writ petition under Article 226 of the Constitution of India and the present petition under Article 227 of the Constitution of India is not maintainable. Learned counsel for the petitioner, however, has asserted that the petition under Article 227 of the Constitution of India is maintainable. Shri Ishan Mehta, learned Addl. Chief Standing Counsel for the State of U.P. has also assisted the Court by making submissions that a civil revision under Section 115 CPC would be maintainable.

6. Since the parties are at variance as to the maintainability of the present petition, the Court is of the opinion that the preliminary objection as to the maintainability should be brought to rest before the merits of the respective case can be gone into. The Court, therefore, proceeds to decide the issue regarding maintainability.

7. According to the petitioner, the order passed in Appeal under Section 17 of the Payment of Wages Act, 1936 is assailable under a petition under Article 227 of the Constitution of India and not a writ petition under Article 226 of the Constitution of India as suggested by the

counsel for the contesting respondents. The learned Addl. Chief Standing Counsel for the State of U.P., however, contends that a revision petition under Section 115 CPC is maintainable against the order passed under Section 17 of the Payment of Wages Act, 1936.

8. Before the Court proceeds to examine the respective stand, it would be apt to reproduce the relevant provisions of the Payment of Wages Act, 1936, which provides for an appeal. The relevant provision under Section 17 of the Payment of Wages Act, 1936 is reproduced hereunder:-

"17. Appeal.—

(1) 69 [An appeal against an order dismissing either wholly or in part an application made under sub-section (2) of section 15, or against a direction made under sub-section (3) or sub-section (4) of that section] may be preferred, within thirty days of the date on which 70 [the order or direction] was made, in a Presidency-town 71 [***] before the Court of Small Causes and elsewhere before the District Court—

(a) ……

(b) …….

(c) …….

(1A) …….

(2) …….

(3) …….

(4) ……."

9. A perusal of the provision of Section 17 (1) contemplates that an appeal against an order passed under Section 15 sub-section (2), (3) or (4) may be preferred within 30 days of the date on which the order or direction was made may be preferred in a Presidency Town before the Court of Small Causes and elsewhere before the District Court. The issue is, therefore, as to whether an order passed in appeal under the Payment of Wages Act, 1936 can be held to be a judicial order passed by a Civil Court and as to whether the same would be amenable to a petition under Article 227 or Article 226 or in a Civil Revision under Section 115 CPC.

10. Learned counsel for the petitioner contends that the Court of Small Causes or the District Court by virtue of Section 17 (1) functions as a Court and not as a *persona designata*, the High Court has the power to test the order passed in Appeal under Article 227 of the Constitution of India in view of the law laid down by the Apex Court in the case of ***Radhey Shyam versus Chhabi Nath*** reported in ***2015 (5) SCC 423***. Learned counsel for the contesting respondents, however, has submitted that the Court of Small Causes or the District Court (the Addl. District & Sessions Judge-IX, at Kanpur Nagar in the case at hand) functions as a persona designata and in such circumstances, the order passed in appeal would be amenable in a writ petition under Article 226 of the Constitution of India and the petition under Article 227 of the Constitution of India is not maintainable. Shri Ishan Mehta, learned Addl. Chief Standing Counsel has also submitted that in the context of the Payment of Wages Act, the Court of Small Causes or the District Court by virtue of Section 17 (1) of the Act functions as a Court and not as a persona designata and as such, being subordinate to the High Court, the orders passed in exercise of powers

under Section 17 (1) are subject to revisional jurisdiction under Section 115 of the Code of Civil Procedure. Reliance has been placed upon a Division Bench decision of the High Court of Jummu & Kashmir at Jammu in the case of ***Abdul Rashid versus Block Development Officer (***Civil Revision No. 38 of 2000, decided on 6.8.2004).

11. Though the counsel for the petitioner and the learned Addl. Chief Standing Counsel are on the same floor on the issue that the Court of Small Causes or the District Court while exercising powers under Section 17 (1) of the Payment of Wages Act, 1936 function as Civil Courts and not as *persona designata,* but are at variance as to remedy available against the orders passed in exercise of appellate powers under Section 17 (1). The counsel for the contesting respondents asserts that the Court of Small Causes and District Courts (i.e. District Judge), functions as persona designata and as such, orders passed under Section 17 (1) shall be amenable under a writ petition under Article 226 of the Constitution of India. The air is to be cleared of any such ambiguity.

12. In the opinion of the Court where a judge is appointed purely in his individual capacity by name, he acts as a persona designata, but where he is appointed by his designation alone, he acts as a Court and not as a persona designata. The test to determine whether an appointment has been made as a persona designata or as a member or a class is to find out whether the person appointed has been appointed by his name alone, the description or designation being given only to identify him. Where only the profession or the occupation of the person or the post held by him is mentioned, the appointment is not as persona designata. The Apex Court in the case of ***Central Talkies versus Dwarka Prasad (AIR 1961 SC 606)*** made the following observations:-

"The argument that the District Magistrate was a persona designate can not be accepted. Under the definition of 'District Magistrate' the special authorisation by the District Magistrate had the effect of creating officers exercising the powers of a District Magistrate under the Eviction Act. To that extent, those officers would, on authorization, be equated to the District Magistrate. A persona designata is 'a person who is pointed out or described as an individual, as opposed to a person ascertained as a member of a class, or as filling a particular character'. (See Osborn's Concise Law Dictionary, 4th Edn. page 253). In the words of schwabe C.J. in AIR 1924 Mad 561 (FB) personae designatae are "person selected to act in their private capacity and not in their capacity as judges'."

13. Shri Ishan Mehta, learned Addl. Chief Standing Counsel has argued that the High Court of Jammu & Kashmir at Jammu while deciding the case of Abdul Rashid (supra) has observed in Para 9 of the judgment that there appears a consensus of judicial opinion throughout the country. In ***Debidutt Dube v. Central India Electrical Supply Co., AIR 1945 Nagpur 244,*** the Nagpur High Court held that District Court acting under Section 17 of the Payment of Wages Act is subordinate to the High Court. It decides a 'case' within the meaning of Section 115 of the Civil Procedure Code when it decides an appeal under Section 17 of the Act and the High Court has power to revise an order passed

by the District Court in appeal under Section 17 of the Payment or Wages Act.

14. In ***Jogendra Nath versus Chandreswar Singh, AIR 1951 Calcutta 29***, it was held by a Division Bench of the Calcutta High Court that the Small Causes Court (which is at par with the District Court within the meaning of Section 17 of the Payment or Wages Act) does not act as a persona designata but as a court and, therefore, its orders are revisable by the High Court under Section 115 of Civil Procedure Code.

15. In ***Rajkumar Mills Ltd., Indore versus Inspector, Payment of Wages, AIR 1955 MB 60***, a Division Bench of the then Madhya Bharat High Court held that when an appeal is provided under Section 17 of the Payment of Wages Act to the District Court, that Court is appealed to as one of the ordinary courts of the country, consequently its orders and decrees will be governed by the rules of Civil Procedure Code. Therefore, a revision is competent against the decision of the District Court under Section 115 of Civil Procedure Code.

16. In ***A. C. Arumughan versus Manager, Jawahar Mills Ltd., AIR 1956 Madrass, 79,*** it was held that the word 'final' in Section 17(2) of the Payment of Wages Act prohibits further appeal and not revision under Section 115 of the Code of Civil Procedure and, therefore, the revision would be competent.

17. In ***Manager, Codialabail Press versus K. Monappa, AIR 1963 Mysore 128***, the Mysore High Court taking the same view, observed that since the District Court hearing an appeal under Section 17 from an order under Section 15 is a 'court subordinate to the High Court', the revisional power of the High Court under Section 115 of the Code of Civil Procedure, clearly extends to its decision and to the proceedings before it. The District Court functioning under Section 17 is not a persona designata, but a court, and, so long as that court is subordinate to the High Court, the proceedings before it are clearly revisable under Section 115 of the Code of Civil Procedure. There is nothing in Sub-section (2) of Section 17 which precludes the exercise or such revisional jurisdiction.

18. In The ***General Manager versus Paras Nath Tewari, AIR 1967 Allahabad 576***, a Division Bench of the Allahabad High Court held that when the power to hear an appeal is given under Section 17 to the District Judge as such, and not to any individual, it must be assumed as power given to the court of the District Judge and not as a persona designata to any particular Judge. Hence the District Court hearing an appeal under Section 17 of the Payment of Wages Act acts as a civil court subordinate to the High Court and not as a persona designate.

19. In ***Rameshwar Lal versus Jogendra Das, AIR 1970 Orissa 76***, a Division Bench of the Orissa High Court held that though an order passed by the authority under Section 15 of the Payment of Wages Act is not directly revisable by High Court under Section 115 of Civil Procedure Code for the reason that the Authority is not a 'Court' but only a persona designata, the appellate order by the Court of Small Causes or the District Court, as the case may be, passed in an appeal under Section 17 of the Act from the original order by the Authority under Section 15 of the Act is revisable, they being civil courts subordinate to the High Court.

20. In ***French Motor Car Co. Ltd. Workers' Union versus French Motor Car Co. Ltd., 1989 Lab. I. C. 2134***, the Gauhati High Court has also held that the appellate court constituted under Section 17 of the Payment of Wages Act is amenable to the revisional jurisdiction of the High Court and error of jurisdiction committed by them can be corrected under Section 115 of the Code of Civil Procedure.

21. It would appear from the above brief survey of the case law on the point that almost all the High Courts have unanimously taken the view that the appellate orders – passed by the District Court or the Small Causes Court, as the case may be, being courts subordinate to the High Court in the hierarchy, their orders would not lie outside the scope of Section 115 of the Code of Civil Procedure which empowers the High Court to interfere with the orders of any court subordinate to it. Whereas opinion seems to be divided as to whether the Authority under Section 15(2) is amenable to the revisioinal jurisdiction of the High Court, there is no discordant note as regards the amenability of the appellate orders of District Court/Small Causes Court to the revisional jurisdiction of the High Court.

22. It is thus submitted that the order passed in Appeal under Section 17 (1) of the Payment of Wages Act, 1936 would be amenable to a revision under Section 115 CPC

23. I have considered the rival submissions of the parties.

24. There can be no doubt that the Court of Small Causes or the District Court, as the case may be, while exercising the powers under Section 17 (1) of the Payment of Wages Act, 1936 functions as a Civil Court and not as persona designata. The Apex Court in ***Mukri Gopalan vs Cheppilat Puthanpurayil Aboobacker*** reported in ***1995 (5) SCC 5*** observed that the Appellate Authorities constituted under the enactment constitute a class and cannot be considered as a persona designata. Further, the Appellate Authority functions as a Court.

25. Now, coming to the other issue i.e. whether an order of the Civil Court is amenable to writ jurisdiction under Article 226 or 227 of the Constitution of India before the High Court or to the Revisional jurisdiction of the High Court under Section 115 CPC? The Apex Court in the case of ***Radhey Shyam versus Chhabi Nath, [2015 (5) SCC 423]*** while drawing a distinction between judicial acts of Tribunals and judicial orders of Civil Court held that judicial orders of Courts stand on a different footing and the remedy of a writ petition under Article 226 of the Constitution of India is available against judicial Acts of Tribunals and quasi-judicial authorities and not against judicial orders of Civil Courts, which can be assailed under Article 227 of the Constitution of India. Their Lordships of the Apex Court proceeded to hold that (i) judicial orders of Civil Court are not amenable to writ jurisdiction under Article 226 of Constitution of India (ii) Jurisdiction under Article 227 of the Constitution of India is distinct from jurisdiction under Article 226.

26. The Apex Court in the case of ***Life Insurance Corporation of India Vs. Nandini J. Shah and others reported in 2018 (15) SCC 356*** in para 58 of the judgment held as under:

"In other words, the Appellate Officer while exercising power under Section 9 of the 1971 Act, does not act as a persona designata but in his capacity as a pre existing judicial authority in the district (being a District Judge or judicial officer possessing essential qualification designated by the District Judge). Being part of the district judiciary, the judge acts as a Court and the order passed by him will be an order of the Subordinate Court against which remedy under Article 227 of the Constitution of India can be availed on the matters delineated for exercise of such jurisdiction."

27. In view of the above discussion, I hold that the learned Additional District and Sessions Judge-IX, Kanpur Nagar while exercising powers in Appeal under Section 17 of the Payment of Wages Act, 1936 functions as a Civil Court and not as a persona designata and the order passed in exercise of such powers is amenable before this Court in a petition under Article 227 of the Constitution of India. ***The instant petition under Article 227 is held maintainable and the objections are overruled.***

28. Now, coming to the merits of the petition.

29 . On the perusal of the order of the Prescribed Authority dated 04.06.2022, I find that the claim of the respondent Nos. 2 to 5 has been allowed merely on surmises and conjectures. The learned Prescribed Authority has relied upon the shortcoming of the defence of the petitioner that he failed to produce the attendance register for the period the respondent Nos. 2 to 5 allege to have worked. The petitioner failed to demolish the case of the respondent Nos. 2 to 5. In the opinion of the Court, the learned Prescribed Authority was liable to consider the case of the respondent Nos. 2 to 5 who had instituted the proceedings before it. No written agreement/contract was placed on record and yet, the Prescribed Authority proceeded to allow the claim of the respondent Nos. 2 to 5. A Builder Agreement dated 04.02.2017 executed between Smt. Madhubala and M/s Bhoomi Shakti Developers Ltd., under which a sub contract is stated to have been given to Sri Shyamji Verma, respondent no. 1 herein, has been brought on record. There is no written contract between the petitioner with Shyamji Verma or other respondent nos. 3 to 5. The Prescribed Authority has overlooked the basic principle that a plaintiff must stand on his own legs and not rely upon the shortcomings of the defendant. The Appellate Authority committed the same mistake as was committed by the Prescribed Authority. Both the Authorities have not addressed the issue regarding the maintainability of the case against M/s Bhoomi Shakti Developers Pvt. Ltd., of which the petitioner was simply the Managing Director. Prima facie, the Court is of the view that the claim if any could be raised against M/s Bhoomi Shakti Developers Pvt. Ltd., and not the petitioner in his individual capacity describing him as a Builder. No liability of payment of wages could be fixed on the Director of the Company under Section 3 of the Act and the petitioner cannot be brought under the ambit of employer under the Act.

30. Matter requires consideration.

31. Issue notice to the respondent Nos. 3 to 5, returnable within a month. Steps be taken within a week.

32. Notice on behalf of respondent No. 2 has been accepted by Shri Satyendra

Narayan Singh, learned counsel who has filed caveat.

33. List this case on the date fixed in the notice.

34. All the respondents, if so advised, may file counter affidavit during the said period.

35. Considering the submissions advanced by learned counsel for the petitioner and taking note of the fact that the amount awarded by the Prescribed Authority as upheld in Appeal, has already been deposited by the petitioner with the respondent No. 1, the respondent No. 1 is restrained from releasing the same in favour of the respondent No. 2 to 5 without leave of this Court.

(2024) 1 ILRA 1007
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE RAJENDRA KUMAR -IV, J.

Criminal Misc. Writ Petition No. 7996 of 2023

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

Counsel for the Petitioners:
Sri Mohd. Monis

Counsel for the Respondents:
G.A., Sri Amar Bahadur Maurya, Sri Arvind Singh, Sri Deepak Dubey, Dharmendra Kumar Mishra, Sri Maan Singh, Sri Manoj Kumar Kushwaha, Sri Sunil Kumar Kushwaha

A. Constitution of India, 1950-Article 226-Indian Penal Code, 1860-Sections 363 & 366-petitioners are in live-in-relationship –petitioner no. 1 (major girl) ran away from her parent's custody and she filed habeas corpus petition for the custody of petitioner no. 2 (minor boy)-In the present case, element of inducement is there or not is yet to be investigated particularly in the background of the admitted facts of this case when nobody is coming forward for recording statement-even the victim statement not recorded u/s 161 or 164 Crpc-The act of abduction has been done u/s 366 IPC or not is yet to be ascertained by the Investigating Agency.(Para 1 to 33)

The writ petition is dismissed. (E-6)

List of cases cited:

1. Kiran Rawat & anr.. Vs St. of U.P. & ors., CMWP No. 3310 of 2023

2. D.Velusamy Vs D. Patchaiammal (2010) 10 SCC 469
3. Lata Singh Vs St. of U.P & anr. (2006) 5 SCC 475

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Rajendra Kumar -IV, J.)

1. Supplementary affidavit sworn by the petitioner no. 1 filed today is taken on record.

2. Sri Deepak Dubey submits that he has filed his Vakalatnama on behalf of the informant in the office on 10.7.2023.

3. Heard Sri Mohd. Monis, learned counsel for the petitioners, Sri Deepak Dubey, learned counsel appearing for the informant and Sri G.P. Singh, learned A.G.A. appearing for the State respondents.

4. This writ petition has been filed with the prayer to quash the First Information Report dated 30.4.2023,

registered as Case Crime no. 131 of 2023, under Sections 363, 366 IPC, P.S. Pipari, District Kaushambi. Further prayer has been made not to arrest the petitioner in the aforesaid case.

5. Admitted case of the petitioners is that the petitioners are live in relationship. The date of birth of the victim is 1.1.2004 and thus, she is major and aged about 19 years, whereas the date of birth of the petitioner no. 2 is 15.3.2006 and therefore, he is minor and is aged about 17 years.

6. Submission of learned counsel for the petitioners is that the petitioner no. 1 is major and has left her house voluntarily, therefore, no offence under Section 363 IPC is made out, however, admittedly the boy is minor.

7. During course of arguments it transpired that the connected Habeas Corpus Writ Petition No. 525 of 2023 (Ali Abbas and others vs. State of U.P. and others) has been filed in respect of petitioner no. 2-Ali Abbas, who is stated to be in the custody of the brother and other relatives of the victim-Saloni Yadav. It is submitted that both the petitioners were taken away by the family members of Saloni Yadav, however, the petitioner no. 1-Saloni Yadav, somehow ran away from the spot but the petitioner no. 2-Ali Abbas is still in their custody, therefore, habeas corpus petition was filed.

8. Per contra, learned counsel for the informant submits that the offence under Section 366 IPC is made out. Whether it is a case of abduction, is yet to be investigated and therefore, merely because the girl is major and is in live in relationship with a boy, who is admittedly a minor i.e. below 18 years, it cannot be said that the offence under Section 366 IPC is not made out. He further submits that the habeas corpus petition has been filed on false grounds.

9. Learned A.G.A. has also opposed the petition.

10. We have considered the rival submissions and have perused the record.

11. Present petition has been filed on the ground that the petitioner nos. 1 and 2 are in live-in relationship. The boy-petitioner no. 2 is muslim. Live in relationship i.e. "Zina" as per Muslim Law has been considered by Lucknow Bench of this Court in C**riminal Misc. Writ Petition No. 3310 of 2023 (Kiran Rawat and another vs. State of U.P. and others) vide order dated 28.4.2023** and it has been noticed that in Muslim Law live in relationship is not permitted. Relevant paragraph 21 of the aforesaid judgment is quoted as under:-

"21. However, <u>in Muslim law no recognition can be given to sex outside marriage</u>. "Zina" which has been defined as any sexual intercourse except that between husband and wife includes both extramarital sex and premarital sex and is often translated as fornication in English. <u>Such premarital sex is not permissible in Islam.</u> In fact any sexual, lustful, affectionate acts such as kissing, touching, staring etc. are "Haram" in Islam before marriage because these are considered parts of "Zina" which may lead to actual "Zina" itself. The punishment for such offence according to Quran (chapter 24) is hundred lashes for the unmarried male and female who commit fornication together with the

punishment prescribed by the "Sunnah" for the married male and female that is stoning to death."

(emphasis supplied)

12. That apart in the case of **D. Velusamy vs. D. Patchaiammal 2010 (10) SCC 469** the Hon'ble Apex Court rejected the claim of the respondent for maintenance under Section 125 Cr.P.C. as wife after holding that she had not married the appellant, therefore, it cannot be said that she was a divorced wife, therefore, she was not entitled for maintenance and held that a divorced wife is treated as a wife for the purpose of Section 125 Cr.P.C. but if a person has not even been married obviously that person could not be divorced. Thereafter, the Hon'ble Apex Court went on to consider the 'live-in relationship' from the point of view of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act of 2005). While considering the definition of 'aggrieved person' as provided under Section 2(a), Section 2(f) and other relevant provisions in view of the term used in Section 2(f) "or through a relationship in the nature of marriage" it was observed that certain conditions are to be fulfilled and one of such condition was that they must be of legal age to marry. In this regard Section 2(a) and Section 2(f) of Act of 2005 are quoted as under:-

"2(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent";

"2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family"

13. After considering law of different countries it was held that the 'relationship in the nature of marriage' is akin to a common law marriage. In this regard, paragraphs 31, 32 and 33 of **D. Velusamy (supra)** are quoted as under:-

"31. In our opinion a `relationship in the nature of marriage' is akin to a common law marriage. Common law marriages require that although not being formally married :-

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

(see `Common Law Marriage' in Wikipedia on Google) In our opinion a `relationship in the nature of marriage' under the 2005 Act must also fulfill the above requirements, and in addition the parties must have lived together in a `shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a `domestic relationship'.

32. In our opinion not all live in relationships will amount to a relationship in the nature of marriag8e to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a `keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'

33. No doubt the view we are taking would exclude many women who have had a live in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression `relationship in the nature of marriage' and not `live in relationship'. The Court in the grab of interpretation cannot change the language of the statute."

(emphasis supplied)

14. The abovequoted paragraphs clearly reflects that the Hon'ble Apex Court is of the opinion that 'relationship in the nature of marriage' must satisfy several conditions before it can be covered under the provisions of the Act of 2005. It was also noticed that 'live in relationship' is not mentioned in the aforesaid Act of 2005.

15. In this regard, it would be relevant to refer to the definition of 'child' as given in The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as POCSO Act), which is quoted as under:-

"2. Definitions - (1) In this Act, unless the context otherwise requires-

(a) .....

(b) .....

(c) .....

(d) <u>"child" means any person below the age of eighteen years;"</u>

(emphasis supplied)

16. According to the aforesaid definition 'child' means a person below the age of eighteen years. In other words, a person below the age of 18 years is considered to be a child. It is needless to say that the POCSO Act is a gender neutral Act and as such the definition of a child would apply on a male as well as on female person and if the male is below eighteen years of age he will also be treated as a child.

17. There can be no dispute that a child cannot have live in relationship and this would be an act not only immoral but also illegal as by itself live in relationship has not been given any protective umbrella under any law of the land except that two major persons have right to live their own life and to that extent their personal liberty is to be protected. However, it does not mean that a person, who cannot have protection under any law for having such relationship because of being a child can come forward to seek protection from any criminal prosecution on the ground of such relationship. In other words, an accused who is below 18 years of age cannot seek protection on the ground of live in relationship with a major girl and thus cannot seek quashing of the criminal prosecution against him as his / her activity is not permissible in law and is thus illegal. In case, this is permitted, this would amount to putting premium on an illegal activity and thus would not be in the

interest of our society and we are not inclined to put a seal of approval on such legally impermissible activities.

18. The Hon'ble Apex Court in the case of **Lata Singh vs. State of U.P. and another 2006 (5) SCC 475** has held that a live in relationship between two consenting adults of heterogenic sex does not amount to any offence.

19. There is no law which prohibits the live in relationship, which is a pre-marital sex in the present case. However, in the present case the boy is not major or of 18 years of age and being a child cannot be permitted to have such relationship.

20. In the case of **Kiran Rawat (supra)** this Court has considered this aspect of the matter. In paragraph 8 this Court has observed as under:-

"8. The Supreme Court has further observed in S. Khushboo Vs. Kanniammal, 2010 (5) SCC 600 as follows:

"21. While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of adultery as defined under section 497 I.P.C. At this juncture, we may refer to the decision given by this court in Lata Singh versus State of UP and Another AIR 2006 Supreme Court 2522, wherein it was observed that a live in relationship between two consenting adults of Heterogenic sex does not amount to any offence (with the obvious exception of adultery), even though it may be perceived as immoral. A major girl is free to marry anyone she likes or to live with anyone she likes. In that case, the petitioner was a woman who had married a man belonging to another caste and had begun cohabitation with him. The petitioner's brother had filed a criminal complaint accusing her husband of offences under section 366 and 368 I.P.C., thereby leading to commencement of trial proceedings. This Court had entertained the Writ petition and granted relief while quashing the criminal trial. Furthermore, the court had noted that no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the court. .."

(emphasis supplied)

21. There are several conditions for live in relationship to be treated as relationship in the nature of marriage. In any case, the person has to be major i.e. 18 years of age although he may not be of marriageable age i.e. 21 years. Therefore, this activity of live in relationship in the present case, which is of an extremely short duration cannot come in support of the case of the petitioners. In any case, whether this act of 'abduction', which is covered under Section 366 IPC, by means of 'any deceitful means induces' and is result of inducement, is a matter of investigation and at this stage it cannot be said that no offence under Section 366 IPC is made out taking shelter of, as in the present case, on the ground of impermissible live in relationship.

22. In view of the undisputed fact in respect of age of the petitioner no. 2 and categorical assertion that the petitioners are living in relationship, we find that whether any offence under Section 366 IPC is made out or not is yet to be investigated. As per

learned A.G.A. till date no one has come forward to cooperate in the investigation and till date no statement of any person has been recorded.

23. We have also considered the fact that the petitioner no. 1-the alleged victim-Saloni Yadav has come forward to file supplementary affidavit stating therein that the petitioner no. 1 is major and she had gone with the petitioner no. 2 with her own freewill and since both the petitioners were living with each other but it is after filing of the present petition on 13.5.2023 the informant side had kidnapped the petitioners from Prayagraj and took them to their village i.e. Jalalpur Ghosi. It is also stated that on 15.5.2023 the petitioner no. 1-the victim somehow ran away and reached the place of father of the petitioner no. 2 and narrated the entire story. In other words, she has come forward to file the affidavit against the prosecution case. The offence and date of incident of the alleged offence is 27.4.2023 as per first information report and it is merely within 15 days the petitioners were separated, therefore, to say that they have having live in relationship is not worth believe, which is, at the best only 15 days long. In any case, without going into that aspect of the matter as it is not a case where protection under any Act like Domestic Violence Act or any other Act as discussed above is being made, we find that no statement of the victim under Section 161 and 164 Cr.P.C. have been recorded by the Investigating Officer or by the court. It is also pertinent to note that the petitioner no. 1 has come forward to file this supplementary affidavit when admittedly she is in the company of the accused side.

24. Before we proceed further it would be appropriate to take note of Section 366 IPC, which is quoted as under:-

"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, <u>induces any woman</u> 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."

(emphasis supplied)

25. Section 366 IPC includes kidnapping as well as abduction. The term kidnapping is defined in Section 359 IPC, which provides that kidnapping is two kinds (1) kidnapping from India and (2) kidnapping from lawful guardianship. Section 361 IPC defines kidnapping from lawful guardianship, wherein age of a female is mentioned as 18 years. The definition of abduction is provided under Section 362 IPC, which is quoted as under:-

"362. Abduction.- Whoever <u>by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person</u>."

(emphasis supplied)

26. This definition includes the words 'by force compels' and the words 'or by any deceitful means induce any person to go from any place'.

27. The word 'inducement' has been defined in Black's Law Dictionary as "The act or process of enticing or persuading another person to take a certain course of action". The word 'induce' has been defined as "to make or persuade somebody to do something". In Legal Glossary the word 'induce' has been defined as "to inspire, call forth or bring about by influence or stimulation" and word 'inducement' has been defined as "that which induces; something attractive by which a person is led on or persuaded to action".

28. The element of inducement certainly affects the understanding of a person and persuade another person to take a certain course of action like in the present case running away from the house, living in with a person, who is not major and is even not 18 years of age.

29. In the background of the facts as narrated above where no one is coming forward and not even the victim to get the statement recorded under Section 161 Cr.P.C. or under Section 164 Cr.P.C., at this stage, it cannot be said that there is no use of force, or in any case, inducement.

30. Therefore, at this stage, there is no ground to be influenced by the argument that there is no such use of force or there is no element of inducement at this stage when the girl is coming forward from the company of the accused persons.

31. In the present case, element of inducement is there or not is yet to be investigated particularly in the background of the admitted facts of this case when no body is coming forward for recording statement. Thus, act of abduction has been done and consequently offence is committed under Section 366 IPC or not is yet to be ascertained by the investigating agency.

32. In such view of the matter, we do not find any good ground to grant any indulgence in the present case on the ground that the petitioners are in live in relationship. We find that it is not a fit case for exercising extraordinary jurisdiction under Article 226 of the Constitution of India.

(2024) 1 ILRA 1013
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 14348 of 2023

Shivani & Anr. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Ajai Kumar Srivastava, Sri Mohammad Salman

Counsel for the Respondents:
G.A.

A. Constitution of India,1950-Article 226-Indian Penal Code, 1860-Sections 363, 366, 376 & Section ¾ of POCSO Act-In the Present case, Petitioner prayed for custody of her minor wife-petitioners solemnized their marriage at Arya Samaj-Upon lodging FIR, petitioner no. 2 (girl) was kept in Rajkiya Bal grih since her mother refused to take her custody-Since,

marriage solemnized in violation of section 5(iii) of the Hindu Marriage Act is not declared void or voidable, therefore such child marriages are considered valid, and the husband is recognized as her natural guardian under the Hindu Minority and Guardian Ship Act-Thus, in accordance with section 19 and 21 of the Guardians and Wards Act, coupled with sections 6, 10, 13 of the Hindu Minority and Guardianship Act, 1956, he holds the right to act as a natural guardian of the minor Hindu girl married to him-As per her statement u/s 164 CrPC she asserts that she is 19 years old, and expresses her desire to live with her husband however, in his high school marksheet she actually aged about 16 years 11 months- The paramount consideration in deciding the return of a minor to the custody of a guardian or husband is the welfare of the minor-Since mother declined the custody of the minor wife, the court concludes that she is no longer required to be retained and is free to go with her husband in these circumstances.(Para 1 to 17)

The petition is disposed of. (E-6)

List of cases cited:

1. Jitendra Kumar Sharma Vs St. & anr.. (2010) SCC OnLine Del 2707

2. T. Shiva Kumar Vs. The Insp. of Police (2011) 5 CTC 689

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Vinod Diwakar, J.)

1. Heard Shri Ajay Kumar Srivastava, learned counsel for the petitioners, Shri Vaibhav Ojha, learned A.G.A. for the State-respondent, and perused the record.

2. As per petitioners' case, the petitioner no.1 is the legally wedded wife of petitioner no.2. Pursuant to the registration of impugned F.I.R. being Case Crime No.594 of 2022, under Sections 363 I.P.C., P.S. Gandhi Park, District Aligarh, by the father of petitioner no.2, she has been remanded to Rajkiya Bal Grih/Balika Kendra on the direction of Child Welfare Committee vide order dated 11.1.2023. Therefore, the petitioners have assailed the order dated 11.1.2023 through instant petition for custody of petitioner no.2. In essence, petitioners are husband and wife and husband has prayed for custody of her minor wife.

Brief Facts

3. The prosecution's case unfolds on 30.9.2022, when the mother of the prosecutrix scolded the 17-year-old victim. Following this, the victim left her residence at 03:45 p.m. Despite all possible efforts by the first informant to locate the victim in the vicinity, she remained elusive. The complainant alleged that her daughter had absconded with Manish Pratap Singh, prompting the registration of an F.I.R., Case Crime No.0594 of 2022, under Section 363 IPC, at P.S. Gandhi Park, District Aligarh, on October 1st, 2022.

4. Subsequently, the victim was recovered by police, and her statement was recorded under Section 164 Cr.P.C., disclosed that she is a 19-year-old adult who left her home of her own following a scolding from her mother. She asserted that her journey to Agra and subsequent marriage to petitioner no.2 on 1.10.2022, were free from coercion or inducement, and she has been living contentedly since. In her statement under section 164 Cr.P.C., she said to having completed the fifth class.

5. Upon investigation, the first informant provided the victim's Class-Xth

mark-sheet, indicating her date of birth as 27.8.2006. The victim was sixteen years, four months, and fourteen days on the date of incident, which confirmed her status as a minor. Consequently, Section 363, 366, 376 IPC, and Section 3/4 of the POCSO Act were added to the charges against petitioner no.2.

6. Given the victim's minor status as per her academic records, she was presented before the Child Welfare Committee. The natural guardian refused to take the victim's custody, therefore the victim was sent to Rajkiya Bal Grih/Balika, 7/202 Swaroop Nagar, Kanpur, on 11.1.2023.

7. The petitioner no.2 was arrested on 10.5.2023, and subsequently released on bail from this Court on 6.7.2023.

Petitioners' Submissions

7.1 On 7.10.2022, petitioner no.2 and petitioner no.1 legally solemnized their marriage at Arya Samaj Mandir, Greater Noida, with petitioner no. 1's age is disclosed as 19. The marriage was duly registered at the Marriage Registration Officer-III, District Ghaziabad, vide Registration No.S.N.2239 dated 15.11.2022.

7.2 The petitioner no.1 is the legally wedded wife of petitioner no.2, and their marriage was solemnized willingly and consensually. They continue to live harmoniously as husband and wife, predating the arrest of petitioner no.2.

7.3 The statement of petitioner no.1 was recorded under Section 164 Cr.P.C., wherein she affirmed being 19 years old. She explained that due to a disagreement with her mother, she left her residence willingly and travelled to Agra. Subsequently, petitioner nos.1 & 2 solemnized their marriage. Presently, they were living as married couple. She further conveyed that she completed her education up to the 5th class and desired to accompany her husband (petitioner no. 2). Notably, the victim was a minor on the incident date, as per her academic record, therefore she was presented before the Child Welfare Committee, however, the parents declined custody, leading the Committee to send the victim in Rajkiya Bal Grih/Balika, 7/202 Swarup Nagar, Kanpur, as per the order dated 11.1.2023 passed by Child Welfare Committee.

7.4 The petitioner no.2 was arrested by the police on 10.5.2023 and subsequently sent to jail. He was later released on bail by this Hon'ble Court through an order dated 6.7.2023 in Criminal Misc. Application No.26019 of 2023.

7.5 As per Section 6 of the Hindu Minority and Guardianship Act, 1956, the husband is the natural guardian of a married woman. Consequently, petitioner no.2 is entitled to the custody of petitioner no.1.

7.6 Section 17(5) of the Guardians and Wards Act, 1890 stipulates that the Court shall not appoint or declare any person as a guardian against the will of a minor married girl if the marriage adheres to Clause (iii) of Section 5 of The Hindu Marriage Act, rendering it neither void nor voidable.

7.7 Considering Sections 19 and 21 of The Guardians and Wards Act in conjunction with Sections 6, 10, and 13 of

the Hindu Minority and Guardianship Act, 1956, petitioner no.2 is the natural guardian of petitioner no.1, given their marital union.

7.8 The action of the Child Welfare Committee, sending petitioner no.1 to Nari Niketan, is inconsistent with Sections 19 and 21 of the Guardians and Wards Act, read in conjunction with Sections 6, 10, and 13 of the Hindu Minority and Guardianship Act, 1956. Consequently, the Committee's action is deemed voidable under Article 21 of the Constitution of India.

7.9 Learned counsel for the petitioners has relied upon ***Jitendra Kumar Sharma v. State and Another1, and T. Shiva Kumar v. The Inspector of Police2***, wherein the minor wife was allowed to reside with her husband considering the welfare of minor wife.

8. On the contrary, the learned A.G.A. contends that; i) the alleged victim's age at the time of the incident was 16 years and 11 months, according to her academic records, leading to the registration of the First Information Report (F.I.R.) as Case Crime No.0594 of 2022 under Section 363 of the Indian Penal Code at P.S. Gandhi Park, District Aligarh; **ii)** in accordance with Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, the age determination can be established through the victim's academic records. Upon scrutiny of said records, it was established that the victim was a minor. Consequently, she was presented before the Child Welfare Committee, rendering the committee's decision to send the girl to Rajkiya Bal Grih; and iii) furthermore, the complainant has corroborated the prosecution's case, affirming that her underage daughter, approximately 17 years old, was lured away by petitioner no.2.

9. Learned A.G.A. further contends that petitioner no.1 was minor at the time of marriage, rendering the marriage null and void from its inception. Consequently, petitioner no.2 faces charges under Section 363, 366, 376, 468 I.P.C. read with Section 3/4 POCSO Act.

Conclusion

10. Citing ***T. Shivakumar (supra)***, the full Bench of the Madras High Court emphasizes that a marriage solemnized in violation of sub-section (iii) of Section 5 of the Hindu Marriage Act is not declared void or voidable. While Section 11 deals with void marriages, Section 12 provides grounds for annulment. Both the Hindu Marriage Act and the Child Marriage Restraint Act do not explicitly declare the marriage of a minor as void or voidable. Therefore, such child marriages are considered valid, and the husband of a minor wife is recognized as her natural guardian under the Hindu Minorities and Guardianship Act.

11. The Bench expressed the view that, despite the marriage being voidable under the Hindu Marriage Act, 1955, due to the girl's age at the time, the circumstances warranted consideration. The couple, having deliberately chosen life partners against parental wishes and maintaining their relationship by cohabitation, prompted the Court to invoke Section 25 of the Guardians and Wards Act, 1890. The Bench emphasized that, in light of the paramount importance of the ward's welfare, this aspect could not be disregarded. Consequently, the Bench concluded, "The petitioner, as the husband, is in a relationship with respondent. In accordance with Sections

19 and 21 of the Guardians and Wards Act, coupled with Sections 6, 10, and 13 of the Hindu Minority and Guardianship Act, 1956, he holds the right to act as the natural guardian of the minor Hindu girl married to him, as statutorily designated the girl's husband. Hence, it is unfounded to allege any element of abduction or enticement in this context."

12. On the basis of the arguments advanced by counsel for the parties, two issues have emerged before this Court: **i)** about the validity of the marriage solemnised between petitioner no.1 and petitioner no.2, **ii)** who is entitled to the custody of Shivani-the minor wife, it is her mother, or it is her husband or someone else.

13. So far as the validity of marriage of the petitioners are concerned, it shall be decided in accordance with Hindu Marriage Act, 1955 in conjoint reading with the relevant provisions of the Child Marriage Restriant Act, 1929, which is not the case before us, therefore, we are not passing any order on this issue. Needless to say that the petitioners have also annexed Marriage Certificate as Annexure-6 to the writ petition, issued by the Marriage Registration Officer, Ghaziabad, and at this stage, we have no reason to doubt the genuineity of the marriage certificate in the instant case. The instant petition has been filed for release of minor-wife's custody by the husband. We are leaving it open for the parties to raise the issue of validity of marriage in appropriate proceedings before the competent court, if any, would arise in future.

14. Concerning the custody of the minor-wife, her statement under Section 164 Cr.P.C. asserts that she is 19 years old, married to petitioner no.2 through Hindu rites and customs, and has been living as husband and wife since the date of marriage, and subsequently registered at the Marriage Registration Office-III, Ghaziabad, U.P. She further expresses her desire to live with her husband and requests to be handed over to him.

15. The court opines that a minor possesses the capacity to form an intelligent preference about the choice of living arrangements. The paramount consideration in deciding the return of a minor to the custody of a guardian or husband is the welfare of the minor.

16. The co-ordinate Bench of this Court consistently holds the view that a minor capable of making conscious decisions about her welfare and future life and voluntarily entering into a marital relationship should be considered. It is noteworthy that the mother of petitioner no.1 has declined the custody of the minor wife. Consequently, the court concludes that petitioner no.1 is no longer required to be retained and is free to go with her husband. She is at liberty to live with the man of her choice.

17. Accordingly, the petition stands **disposed of** in above stated terms.

(2024) 1 ILRA 1017
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2023

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 14702 of 2023
AND
Criminal Misc. Writ Petition No. 14706 of 2023

Amit Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shiv Sagar Singh, Sri Manish Gupta

Counsel for the Respondents:
G.A.,Sri Sanjay Yadav, Sri Gyan Prakash Singh (Sr. Adv.)

A. Constitution of India, 1950-Article 226-Indian Penal Code, 1860-Sections 409, 420, 466, 467, 469, 471 & 120-B & Prevention of Corruption Act, 1988-Sections 13(1)(d), 13(2)-Challenge to-sanction order for the petitioner's prosecution-FIR registered and the case was transferred to the CBCID-the closure report was challenged before the High Court-CBI directed to conduct an investigation into the allegations of corruption and illicit accumulation of money to Rs. 954 Crores in connection with award of contracts-there is no question of the annulment of the impugned sanction for prosecution order at this decisive stage of the investigation when the investigation has brought to light the involvement of the petitioners in the award of contract, besides other intentional irregularities for illegal pecuniary gain supported by substantive evidence gathered by the CBI-Such interference would be deemed unwarranted at this critical phase of the investigation-The court's leniency would undermine the very essence of Section 19 of the Act, 1988 leading to a substantial detriment of the interests of justice.(Para 1 to 47)

The writ petition is dismissed. (E-6)

<u>List of cases cited:</u>

1. Kanhaiya Lal Saraswati Vs St. (2021) LE All 149 DB

2. Vijay Rajmohan Vs St. reptd. by the Insp. of Police, CBI , ACB, Chennai, T.N. (2022) LivLaw (SC) 832

3. A. Sreeniwas Reddy Vs Rakesh Sharma & anr. (2023) 8 SCC 711

4. St. of Chhttisg. Vs Aman Kumar Singh (2023) 6 SCC 559

5. St. of Karn. Vs S Sube Gauda (2023) Law Suit 750

6. Vinod Kumar Garg Vs St. (Gov. of NCT of Delhi) (2020) 2 SCC 88

7. B. Saha & ors.Vs M.S Kochar (1979) 4 SCC 177

8. Pukhraj Vs St. of Raj. & anr. (1973) 2 SCC 701

9. Nanjappa Vs St. of Karn. (2015) 14 SCC 186

10. St. of Karn. Lokayukta Police Vs S. Subbegowda (2023) SCC OnLine SC 911

11. Oswal Fats & Oils Ltd Vs Addl. Commr. (Admin.) Bareilly Div. Bareilly & ors.(2010) 4 SCC 728

12. R. Vs. Kensington Income Tax Commr. (1917) 1 KB 486 (DC & CA)

13. St. of Har. Vs Karnal Distillery Co. Ltd. (1977) 2 SCC 431

14. Vijay Kumar Kathuria (Dr.) Vs St. of Har. (1983) 3 SCC 333

15. Welcom Hotel Vs St. of A.P. (1983) 4 SCC 575

16. G. Narayanaswamy Reddy Vs Govt of Karn.(1991) 3 SCC 261

17. S.P Chengalvaraya Naidu Vs Jaganath (1994) 1 SCC 1

18. Agricultural & Processed Food Products Vs Oswal Agro Furane (1996) 4 SCC 297

19. UOI Vs Muneesh Suneja (2001) 3 SCC 92

20. Prestige Lights Ltd Vs S.B.I. (2007) 8 SCC 449

21. Sunil Poddar Vs UBI (2008) 2 SCC 326

22. KD Sharma Vs SAIL & ors.(2008) 12 SCC 481

23. G Jayashree Vs Bhagwandas S . Patel (2009) 3 SCC 141

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

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Vinod Diwakar, J.)

1. Heard Shri Manish Gupta along with Shri Shiv Sagar Singh, learned counsel appearing for the petitioners, Shri Gyan Prakash, learned Senior Counsel assisted by Shri Sanjay Kumar Yadav, learned counsel appearing for the CBI.

2. Pursuant to the issuance of the impugned Sanction Order1 (hereinafter referred to as the 'impugned order'), the petitioners have filed the present writ petition under Article 226 of the Constitution of India, seeking to quash and set aside the impugned order granting sanction for the petitioners' prosecution in the case registered as RC/DST/2015/A/004/STB/DLI by the Central Bureau of Investigation (CBI) upon the High Court's direction.

3. In order to decide the contentions raised in these petitions, succinct facts are imperative to arrive at a just and reasonable conclusion within the given factual context. For the sake of convenience, the salient facts are delineated as follows:

4. The core of the accusations emanates from the initial FIR registered on 13.1.2012 as Case Crime No.280 of 2012, invoking sections 409, 420, 466, 467, 469, 471 and 120-B IPC read with sections 13(1)(d) & 13(2) of Prevention of Corruption Act, 1988 at P.S. Sector- 39 NOIDA, Gautam Budh Nagar, Uttar Pradesh by the local police. Subsequently, the case was transferred to the Crime Branch- Criminal Investigation Department (CBCID), Meerut, for an impartial and unbiased investigation; upon completion of the investigation, the CBCID submitted its final report before the court of learned Special Judge (SC/ST), Gautam Budh Nagar, which was accepted on 27.11.2014.

5. The closure report was challenged before the High Court and in pursuance to the order dated 16.7.2015 passed by the Lucknow Bench of this Court in Misc. Bench No.12396 of 2014, the STF Branch of CBI re-registered an FIR bearing Case No. RC/DST/2015/A/004 on 30.7.2015 against Yadav Singh, the then Chief Engineer, NOIDA/Greater Noida and Yamuna Express Authority and other unknown persons, under section 120-B IPC read with sections 409, 420, 466, 467, 469 and 471 IPC read with section 13(2) & 13(1)(d) of Prevention of Corruption Act, 1988. The CBI was directed to conduct an investigation into the allegations of corruption and illicit accumulation of money to Rs. 954 Crores by Yadav Singh, other accused persons and entities connected thereto in the award of contracts.

6. Against this backdrop, the CBI took over the investigation and concluded the first phase of investigation on 15.3.2016, and accordingly filed the charge-sheet against Rajeev Kumar (JE), R.D. Sharma (JE), Ompal Singh (JE), Devi Ram Arya (Assistant Project Engineer), Jashpal Singh (Assistant Project Engineer), Ramendra (Project Engineer) and Yadav Singh (Chief Mechanical Engineer) and other private accused persons for commission of offences under section 120-B read with sections 420, 109, 468, 471 IPC and section 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988. The CBI concluded the investigation with the finding "*that the further investigation in the instant case is still continuing", and if any new evidence emerged against any of the*

above-mentioned accused persons or any other, a supplementary charge-sheet along with the additional list of witnesses and/or documents, if any, will be filed in due course with the permission of this Court."

7. The investigation culminated with the revelation that Junior Engineers, within their respective jurisdictions, prepared rough estimates by quoting exorbitant rates against the department's interests. The Project Engineer and Assistant Project Engineer knowingly transmitted these rough estimates to higher authorities, contravening the Central Public Works Department (CPWD) manual for financial gain. Yadav Singh, the then Chief Mechanical Engineer (CME), approved inflated preliminary and detailed estimates without conducting a market survey. Tender norms were consistently compromised at each stage to favour contractors unduly. The compromise extended to the quality of work, selection of unauthorized firms, intentional disregard for poor work quality, flouting established procedures to favour contractors, and the acceptance of substantial kickbacks.

8. During the investigation, it was disclosed that contractors commenced work even before contract awards, and in pursuance of a criminal conspiracy, private contractors orchestrated tender proceedings by forming a cartel.

9. Furthermore, the prosecution asserts that Yadav Singh, while serving as CME in Noida, unduly favoured M/s Gul Engineers Co. by awarding 31 electrical work contracts amounting to Rs.37.99 crores during the period 2007-2012. This alleged favouritism transpired in criminal conspiracy with other officers/officials of the Noida Authority and Javed Ahmed, Proprietor of M/s Gul Engineers Co., who was a longstanding friend of Yadav Singh. It is alleged that M/s Gul Engineers Co. did not meet the eligibility criteria for work experience and was engaged in the cartelization of bidders. Yadav Singh, in conspiracy with others, awarded contracts at exorbitant rates, causing a wrongful loss of approximately Rs.2.2 crores in the contracts under question in this petition.

10. Consequently, the CBI has sought sanction for the prosecution of the accused companies concerning a batch of contracts. Given the number of companies, contract details, nature of work, and assigned areas, the CBI has sought sanction for prosecution on a Contract Bond-wise. During the inquiry, it was prima facie evident that five firms/companies associated with friends and family members of Yadav Singh were unduly favoured, resulting in gross violations of tender norms and procedures, and causing illegal losses to the Noida Authority. These entities include: (1) M/s Gul Engineers Co., Proprietor Javed Ahmed, (2) M/s SMP Technology Pvt. Ltd., Directors Sai Raju, Manish Kumar, and Prem Pradeep, (3) M/s Abu Infracon Pvt. Ltd., Directors Kumar Saurav and Prem Pradeep, (4) M/s Sanjay Electricals, Proprietor Sanjay Kumar Gupta, and (5) M/s Shakambari Projects, Ranchi, Proprietor Sanjay Kumar Sharma.

11. The petitioners assailed the impugned sanction order dated 24.8.2023, on the following grounds:

11.1 The CBI has previously taken a stand before the co-ordinate Bench in Criminal Misc. Writ Petition No.12437 of 2022, titled Javed Ahmad v. CBI and others, that the investigation in the impugned charge-sheet has already

concluded regarding two contracts awarded to the accused company. The said petition is pending disposal before this Court. Considering the fact that the investigation is concluded, the CBI is precluded from seeking fresh sanction for the petitioners' prosecution.

11.2 The sanction order dated 24.8.2023 was mechanically issued without due application of mind, and additionally, it contravenes section 13(1)(d) of the Prevention of Corruption Act, 1988, repealed on 26.7.2018.

11.3 The sanctioning authority failed to consider that the impugned sanction was sought seven years after registration of the FIR, despite the petitioners not being implicated in any of the charge-sheets filed on 15.3.2016, 31.5.2017, and 6.10. 2021.

11.4 The investigation into contracts awarded to M/s Gul Engineers, an accused company, mentioned in RC/DST/2015/A/004, constitutes an abuse of investigative power, aiming to harass the petitioners.

11.5 Out of 67, the trial court has examined 40 witnesses so far and allowing further investigation would be an unending prosecution against the petitioners.

11.6 Initiating a de-novo investigation into alleged contract awards would defy the rule of law, the prosecuting agency's role is not to perpetuate investigations endlessly but to unearth the unvarnished truth, in line with constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India.

11.7 The investigating agency's biased and tainted approach, as evident in this case, is impermissible, and this Court's intervention is necessary to uphold justice and preserve the sanctity of the rule of law.

12. Per contra, Shri Gyan Prakash, learned Senior Counsel for the CBI states that there are serious allegations of systematic corruption against the accused persons, who, by holding government positions in connivance with contractors and private individuals, were involved in large-scale corruption. The conspiracy to do corruption was meticulously planned and executed by the accused, making the investigating agency invest a lot of effort and time, and the petitioners did not approach this Court with clean hands. The petitioners have not stated the correct facts before the Court, and the source of receipt of the impugned order has not been disclosed in the petition. Such concealment has been done to achieve an ulterior purpose, which amounts to abuse of the process of court. The concealment of material facts is impermissible to the litigants and such petitioners are required to be dealt with for contempt of court for abusing the process of the court.

13. To fortify his contentions, learned Senior Counsel has extensively relied upon two orders. Firstly, an order dated 17.6.2022, issued vide letter No.2243/RC/DST/2015/A/0004/STB/DLI, wherein the sanctioning authority was formally approached to accord sanction for the prosecution against the petitioners. It is noteworthy that the request letter was marked as ***"confidential***", explicitly indicated at the top right corner of the letter under the heading "***confidential"***. The pertinent excerpt from the letter dated 17.6.2022, is reproduced herein below:

"CENTRAL BUREAU OF INVESTIGATION SPECIAL TASK BRANCH

5 B, CGO Complex, Lodhi Road,
New Delhi-110003
Phone No. 011-2436857 (Fax No. 011-24368662)

Confidential

No. 2243/RC/DST/2015/A/0004/STB/DLI
Dated 17.06.2022

To,
The Chief Executive Officer,
New Okhla Industrial Development Authority (NOIDA)
Sector-6, NOIDA

Sub- Forwarding of CBI Report and Model Selection Orders in RC/DST/2015/A/0004/STB/DLI.

*****

CBI Report sent herewith may please be treated as a confidential document and no reference to it may be made, while pursuing the matter further or any other action initiated upon it. In case any applicant seeks copy of the Report or part thereof under RTI Act, view of CBI should be ascertained as per section 11 of RTI Act, 2005 before deciding the matter.

*****

It is therefore, requested that Sanction Order U/s 10 of the PC Act- 1988 & PC(Amendment) Act-2018 may be accorded by the Competent Authority for prosecution of the above public servants of NOIDA as required under the law and may please be sent to this office in duplicate as early as possible, so that charge sheet can be filed in the Court of Law.

Sd/-
Superintendent of Police
CBI, STB, New Delhi"

14. In response to the letter dated 17.6.2022, the Government of Uttar Pradesh, through Letter No.5107/77-4-23-27 N/20CT dated 24.8.2023 granted sanction for the prosecution against the petitioners. At that time, the petitioners held the position of Junior Engineer (Electrical/Mechanical) in the NOIDA Authority. The impugned order reached the petitioners' possession before the Central Bureau of Investigation (CBI) obtained a copy of the said sanction order. It is pertinent to note that the model sanction order was issued by the CBI on 17.6.2022 against the petitioners and other co-accused persons. The government accorded sanction on 26.8.2023, the petitioners challenged the said sanction order through the present petition on 3.10.2023, and the CBI received the impugned sanction order on 6.10.2023 via post. In summary, the petitioners gained access to the impugned order illegally and unauthorisedly before the prosecuting agency contrary to the confidentiality clause of the document, and they obtained the impugned order, a document they could only acquire after the filing of the charge-sheet or during trial.

15. In response to the arguments fortified by Shri Manish Gupta, learned counsel for the petitioners, Shri Gyan Prakash, learned Senior Counsel, submits

that the charge-sheet no.2/16 in RC No.DST/2015A/004, was filed concerning **Contract Bond No.375**/AO/E in C/E & M-II/11-12, dated 8.12.2011; **Contract Bond No.376**/AO/E in C/PE(E&M)-II/11-12, dated 8.12.2011, and **Contract Bond No.382**/AO/E in C/PE/(E&M)-II/11-12, dated 9.12.2011 against accused Yadav Singh, Ramendra, Ravi Ram Arya, Rajeev Kumar, Jai Pal Singh, R.D. Sharma, Om Pal Singh, Kusum Lata, Vinod Kumar Goel, Pradeep Garg, Pankaj Jain, and M/S Tirupati Constructions- through its representatives. Additionally, supplementary charge-sheet no.7/17 was filed against Babita Devi wife of Ramendra on 31.5.2017.

16. In supplementary charge-sheet no.6/17, dated 31.5.2017, pertaining to **Contract Bond No.24**/ENC/PE (E&M-III)/ 2011-12, dated 24.10.2011, and **Contract Bond No.31**/ ENC/PE (E&M-III)/ 2011-12, dated 16.11.2011, Yadav Singh, Vimal Kumar Manglik, Sushil Kumar Agarwal, Rajesh Kumar Sharma, Pankaj Jain, and M/S JPS Constructions Company- through its legal representatives, have been arrayed as accused.

17. Supplementary charge-sheet no.5/21, dated 6.10.2021, was filed concerning **Contract Bond No.133**/SFAO/CDE/PE-II/CCD-IV-11-12, dated 23.12.2011. The accused in this charge-sheet included Yadav Singh, R.K. Johri, R.K. Jain, S.K. Gupta, Sant Ram, Deepak Kumar, A.C. Singh, Anil Sharma, Santosh Kumar Srivastava, Davendra Kumar Gangal, N.U. Khan, and M/S Anand Buil Tech Pvt. Ltd.- through its Director Davendra Kumar Gangal.

18. The impugned sanction for prosecution order is sought with respect to the tenders awarded to i) M/s Gul Engineers under **Contract Bond No.405**/E&C/AO-E&M-I/2011-12, dated 15.12. 2011, for work related to shifting 11 KV feeder of Yamuna Pushta from village Gadhi to village Nagli Noida; ii) M/s Gul Engineers under **Contract Bond No.416**/E&C/AO-E&M-I/2011-12, dated 16.12.2011, for work related to the conversion of 33 KV, 11 KV, and LT Electric Lines into an underground system coming from both sides of Kailash Hospital Road between Sector-26 and 27, Noida; and iii) the tender awarded to M/s NKG Infrastructure Ltd. under **Contract Bond No.994**/E&C/AO-E&M-I/2011-12, dated 22.12.2011, for work related to providing a 33 KV Double Circuit Line from 220 KV Station Base-II, Noida.

19. Consequently, the CBI requested the State Government to accord sanction under Section 19 of the Prevention of Corruption Act, 1988 (as amended by Act No.16 of 2018) against Yadav Singh, Chief Maintenance Engineer (JAL), NOIDA; A.C. Singh, Finance Controller (FC); Santram, CPE, E&M-II Division; Pramod Kumar, Junior Engineer, E&M-I, NOIDA; Dr. Nizamuddin, Assistant Project Engineer, E&M-I Division; S.K. Gupta, Project Engineer, E&M-I Division; Ramendra, PE, E&M-II Division; J.P. Singh, APE, E&M-II Division; Amit Kumar, Junior Engineer, E&M-II Division; P.K. Dixit, Accounts Officer, regarding Contract Bonds awarded to M/S Gul Engineering, and similarly against Yadav Singh, A.C. Singh, Santram, R.P. Burman, S.K. Gupta, Dr. Nizamuddin, and Pramod Kumar regarding Contract Bonds awarded to M/s NKG Infrastructures Pvt. Ltd.

20. Amit Kumar, Junior Engineer, E&M-II NOIDA, and Pramod Kumar,

Junior Engineer E&M-I NOIDA, are before us, seeking to quash the impugned sanction for prosecution.

21. Shri Gyan Prakash, learned Senior Counsel has cited and referred to various authorities, including ***Kanhaiya Lal Saraswati v. State2; Vijay Rajmohan v. State represented by the Inspector of Police, CBI, ACB, Chennai, Tamil Nadu3; A. Sreeniwas Reddy v. Rakesh Sharma and another4; State of Chhattisgarh v. Aman Kumar Singh5; State of Karnataka v. S Sube Gauda6; Vinod Kumar Garg v. State (Government of National Capital Territory of Delhi)7***, and a judgment and order dated 3.9.2020 passed by a co-ordinate Bench of this Court in Criminal Misc. Writ Petition No.7707 of 2020 titled Man Singh v. Central Bureau of Investigation.

22. Speaking for ***A. Sreenivasa Reddy case (supra)***, J.B. Pardiwala, J. stated that the word "sanction" is not defined in the statute. The dictionary meaning of the word "sanction" is as under:

"42. The word "sanction" has not been defined in CrPC. The dictionary meaning of the word "sanction" is as under:

"Webster's Third New Internal Dictionary: Explicit permission or recognition by one in Authority that gives validity to the act of another person or body; something that authorizes, confirms, or countenances.

The New Lexicon Webster's Dictionary: Explicit permission given by someone in Authority.

The Concise Oxford Dictionary: Encouragement given to an action, etc. by custom or tradition; express permission, confirmation or ratification of a law, etc. authorize, countenance, or agree to (an action, etc.)

Stroud's Judicial Dictionary: Sanction not only means prior approval; generally it also means ratification.

Words and Phrases: The verb 'sanction' has a distinct shade of meaning from 'authorize' and means to assent, concur, confirm or ratify. The word conveys the idea of sacredness or of Authority.

The Law Lexicon by Ramanatha Iyer: Prior approval or ratification.

In 78 Corpus Juris Secundum at p. 579, different meanings have been given to the word as a noun and as a verb. As a noun, it means penalty or punishment provided as a means of enforcing obedience to a law and, in a wider sense, an authorisation of anything, and it may convey the idea of authority. As a verb "sanction" is defined as meaning to assent, concur, confirm or ratify. In United States v.Tillinghast [United States v. Tillinghast, 55 F 2d 279 (DRI 1932)], it was held that where legal rights are involved it is doubtful whether it should be construed as requiring less than an unmistakable expression of approval."

23. For the ready reference, the relevant portion of sub-sections 1, 3 and 4 of Section 19 of the Prevention of Corruption Act are reproduced herein:

"(1) No court shall take cognizance of an offence

punishable under 2[sections 7, 11, 13 and 15] alleged to have been committed by a public servant, except with the previous sanction 3[save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)]-

(a) in the case of a person 4[who is employed, or as the case may be, was at the time of commission of the alleged offence employed] in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person 4[who is employed, or as the case may be, was at the time of commission of the alleged offence employed] in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office: [Provided that no request can be made, by a person other than a police officer or an officer of an investigation agency or other law enforcement authority, to the appropriate Government or competent authority, as the case may be, for the previous sanction of such Government or authority for taking cognizance by the court of any of the offences specified in this sub-section, unless- (i) such person has filed a complaint in a competent court about the alleged offences for which the public servant is sought to be prosecuted; and (ii) the court has not dismissed the complaint under section 203 of the Code of Criminal Procedure, 1973 (2 of 1974) and directed the complainant to obtain the sanction for prosecution against the public servant for further proceeding: Provided further that in the case of request from the person other than a police officer or an officer of an investigation agency or other law enforcement authority, the appropriate Government or competent authority shall not accord sanction to prosecute a public servant without providing an opportunity of being heard to the concerned public servant:

Provided also that the appropriate Government or any competent authority shall, after the receipt of the proposal requiring sanction for prosecution of a public servant under this sub-section, endeavour to convey the decision on such proposal within a period of three months from the date of its receipt:

Provided also that in case where, for the purpose of grant of sanction for prosecution, legal consultation is required, such period may, for the reasons to be recorded in writing, be extended by a further period of one month:

Provided also that the Central Government may, for the purpose of sanction for prosecution of a public servant, prescribe such guidelines as it considers necessary.

Explanation.- For the purposes of sub-section (1), the expression "public servant" includes such person-

(a) who has ceased to hold the office during which the offence is alleged to have been committed; or

(b) who has ceased to hold the office during which the offence is alleged to have been committed and is holding an office other than the office during which the offence is alleged to have been committed.]

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

Explanation- For the purposes of this section,-

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

24. In ***B. Saha and others v. M.S. Kochar8***, a 3-judge Bench of the Supreme Court emphasized the requirement of a reasonable connection between the act and the discharge of official duty. The Court held that the act must bear a substantive relation to the duty, allowing the accused to make a reasonable but not a pretended or fanciful claim that the act was performed in the course of official duty.

25. In ***Pukhraj v. State of Rajasthan and another9***, the Supreme Court delved into the object, nature, and scope of according sanctions. The Court recognized the legislative intent behind this provision, aiming to shield public servants from unnecessary harassment. The Supreme Court, outlined the test of the scope of official duty, as under:

"The test appears to be not that the offence is capable of being committed only, by a public servant and not anyone else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty. The section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty, nor need the act constituting the offence be so inseparably connected with the official duty as to form part and parcel of the same transaction. What is necessary is that the offence must be in respect of an act done or purported to be done in the discharge of an official duty. It does not apply to acts done purely in a private capacity by a public servant. Expressions such as the "capacity in which the act is performed", "Cloak of office" and "professed exercise of office" may not always be appropriate to describe or

delimit the scope of the section. An act merely because it was done negligently does not cease to be one done or purporting to be done in execution of a duty."

26. In the case of ***Nanjappa v. State of Karnataka10,*** the Supreme Court extensively addressed the stage at which the validity of a sanction accorded under Section 19(1) of the Act could be challenged. The Court carefully navigated through the intricacies of Section 19(1), as well as Section 19(3) and 19(4) of the said Act, elucidating when the question of the validity of sanction could be raised and outlined the powers of sub-section (3) of Section 19 of the court in appeal, confirmation, or revision.

27. The legal position regarding the importance of sanction under Section 19 of the Prevention of Corruption Act is thus much too clear to admit equivocation. The statute forbids taking of cognizance by the court against a public servant except with the previous sanction of an authority competent to grant such sanction in terms of clauses (a), (b) and (c) to Section 19(1). The question regarding the validity of such sanction can be raised at any stage of the proceedings. The competence of the court trying the accused so much depends upon the existence of a valid sanction. In case the sanction is found to be invalid, the court can discharge the accused, relegating the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with the law. If the trial court proceeds, despite the invalidity attached to the sanction order, the same shall be deemed to be non-est in the eyes of the law and shall not forbid a second trial for the same offences, upon grant of a valid sanction for such prosecution.

28. It would be apt to reproduce the relevant extract of Najappa's case (supra) hereinunder:

"23.1. It was argued on behalf of the State with considerable tenacity worthy of a better cause, that in terms of Section 19(3), any error, omission or irregularity in the order sanctioning prosecution of an accused was of no consequence so long as there was no failure of justice resulting from such error, omission or irregularity. It was contended that in terms of Explanation to Section 4, "error includes competence of the authority to grant sanction". The argument is on the face of it attractive but does not, in our opinion, stand closer scrutiny.

23.2. A careful reading of sub-section (3) to Section 19 would show that the same interdicts reversal or alteration of any finding, sentence or order passed by a Special Judge, on the ground that the sanction order suffers from an error, omission or irregularity, unless of course the court before whom such finding, sentence or order is challenged in appeal or revision is of the opinion that a failure of justice has occurred by reason of such error, omission or irregularity. Sub-section (3), in other words, simply forbids interference with an order passed by the Special Judge in appeal, confirmation or revisional proceedings on the ground that the sanction is bad save and except, in cases where the appellate or revisional court finds that failure of justice has occurred by such invalidity. What is noteworthy is that sub-section (3) has no application to proceedings before the Special Judge, who is free to pass an order discharging the accused, if he is of the opinion that a valid order sanctioning

prosecution of the accused had not been produced as required under Section 19(1).

23.3. Sub-section (3), in our opinion, postulates a prohibition against a higher court reversing an order passed by the Special Judge on the ground of any defect, omission or irregularity in the order of sanction. It does not forbid a Special Judge from passing an order at whatever stage of the proceedings holding that the prosecution is not maintainable for want of a valid order sanctioning the same.

23.4. The language employed in sub-section (3) is, in our opinion, clear and unambiguous. This is, in our opinion, sufficiently evident even from the language employed in sub-section (4) according to which the appellate or the revisional court shall, while examining whether the error, omission or irregularity in the sanction had occasioned in any failure of justice, have regard to the fact whether the objection could and should have been raised at an early stage. Suffice it to say, that a conjoint reading of sub-sections 19(3) and (4) leaves no manner of doubt that the said provisions envisage a challenge to the validity of the order of sanction or the validity of the proceedings including finding, sentence or order passed by the Special Judge in appeal or revision before a higher court and not before the Special Judge trying the accused.

23.5. The rationale underlying the provision obviously is that if the trial has proceeded to conclusion and resulted in a finding or sentence, the same should not be lightly interfered with by the appellate or the revisional court simply because there was some omission, error or irregularity in the order sanctioning the prosecution under Section 19(1). Failure of justice is, what the appellate or revisional court would in such cases look for. And while examining whether any such failure had indeed taken place, the Court concerned would also keep in mind whether the objection touching the error, omission or irregularity in the sanction could or should have been raised at an earlier stage of the proceedings meaning thereby whether the same could and should have been raised at the trial stage instead of being urged in appeal or revision."

29. The Supreme Court revisited the issue in hand in the case of the ***State of Karnataka, Lokayukta Police v. S. Subbegowda12***. In this case, the State of Karnataka, Lokayukta Police, through an appeal, challenged the judgment and order passed by the High Court of Karnataka at Bangalore in Criminal Petition No.4463 of 2018. The High Court had discharged the accused from offences charged under Section 13(1)(e) read with Section 13(2) of the Prevention of Corruption Act, 1988, asserting that the sanction granted by the government to prosecute the accused was illegal and lacked jurisdiction. After the examination of 17 prosecution witnesses, in the midst of the trial, the accused filed an application under Section 227 of the Criminal Procedure Code (Cr.P.C.), contending that the State Government had no jurisdiction to accord the sanction for prosecution under Section 19(1) of the said Act. The Supreme Court thus held that:

"15. As a matter of fact, such an interlocutory application seeking discharge in the midst of trial would also not be maintainable. Once the cognizance was taken by the Special Judge and the charge was framed against the accused, the trial could neither have been stayed nor scuttled in the midst of it in view of Section 19(3) of

the said Act. In the instant case, though the issue of the validity of sanction was raised at an earlier point of time, the same was not pressed for. The only stage open to the respondent-accused in that situation was to raise the said issue at the final arguments in the trial in accordance with law."

30. Shri Gyan Prakash, learned Senior Counsel for CBI further drawn the attention of the Court to the fact that the impugned order has been obtained by the petitioner illegally and unauthorizedly which is also apparently reflected from the records. At the outset, we would say that the petitioner has approached this Court under Article 226 of the Constitution of India invoking writ jurisdiction which ought to be exercised judiciously and circumspectly by the courts, with a primary focus on serving the ends of justice rather than causing harm to the legally prescribed procedural framework.

31. Before delving into the arguments and submissions, it is imperative to underscore that the impugned order is enveloped in a confidential clause, the verbatim content of which is articulated herein: "CBI Report sent herewith may please be treated as a confidential document, and no reference to it may be made while pursuing the matter further or any other action initiated upon it. In case any applicant seeks a copy of the Report or part thereof under the RTI Act, the view of CBI should be ascertained as per section 11 of the RTI Act, 2005, before deciding the matter." Additionally, the letter dated 17.06.2022 was explicitly ascribed as ***"confidential***," prominently indicated at the top right corner of the letter under the heading ***"confidential."***

32. The revelation that the petitioners obtained access to the impugned sanction orders before this reached the prosecuting agency's office, despite the explicit presence of a confidential clause in the official communication, is a matter of profound concern. The petition, however, fails to elucidate the source of this information and the method by which the petitioners acquired access to the impugned sanction order. The legal principles governing this scenario are succinctly encapsulated as follows:

33. In ***Oswal Fats and Oils Limited v. Additional Commissioner (Administration), Bareilly Division, Bareilly and others13,*** the Supreme Court has held that it is settled law that a person who approaches the court for a grant of relief, equitable or otherwise, is under a solemn obligation to candidly disclose all the material/important facts that have a bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the court to bring out all the facts and refrain from concealing/suppressing any material fact within his knowledge or that he could have known by exercising the diligence expected of a person of ordinary prudence. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person.

34. The relevant excerpt from ***R. v. Kensington Income Tax Commissioner14***, case is reproduced herein below wherein His Lordship Cozens-Hardy, MR aptly held:

"The Court, for its own protection, is entitled to say:

'We refuse this writ ... without going into the merits of the case on the

ground of the conduct of the applicant in bringing the case before us."

Warrington, L.J. was also of the same opinion. In a concurring judgment His Lordship observed: (Kensington case [(1917) 1 KB 486 (DC & CA)] KB p. 509)

"... It is perfectly well settled that a person who makes an ex parte application to the Court—that is to say, in absence of the person who will be affected by that which the Court is asked to do—is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him."

35. In **State of Haryana v. Karnal Distillery Co. Ltd.15; Vijay Kumar Kathuria (Dr.) v. State of Haryana16; Welcom Hotel v. State of A.P.17; G. Narayanaswamy Reddy v. Govt. of Karnataka18; S.P. Chengalvaraya Naidu v. Jagannath19; Agricultural and Processed Food Products v. Oswal Agro Furane20; Union of India v. Muneesh Suneja21; Prestige Lights Ltd. v. SBI22; Sunil Poddar v. Union Bank of India23; K.D. Sharma v. Steel Authority of India Limited and others 24; G. Jayashree v. Bhagwandas S. Patel25; and Dalip Singh v. State of U.P.26**, the Supreme Court and different High Courts have repeatedly invoked and applied the rule that a person who does not disclose all material facts has no right to be heard on the merits of his grievance.

36. The jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary. Prerogative writs mentioned therein are issued for doing substantial justice. It is, therefore, of utmost necessity that the petitioner approaching the writ court must come with clean hands, put forward all the facts before the court without concealing or suppressing anything and seek appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the court, his petition may be dismissed at the threshold without considering the merits of the claim.

37. The aforementioned principles have been acknowledged and consistently adhered to in our legal system. In ***K.D. Sharma case (supra),*** the Supreme Court observed that the party who invokes the extraordinary jurisdiction of this Court under Article 32 or of a High Court under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation, even if they are against him. He cannot be allowed to play "*hide and seek*" or to *"pick and choose"* the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in the disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of writ courts and exercise would become impossible. The petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because "the court knows the law but not facts".

38 . In ***Suo Motu Proceedings against R. Karuppan, Advocate29***, the Supreme Court underscored the imperative need to

uphold the sanctity of affidavits submitted by parties, emphasizing the dual responsibility of preserving and protecting their integrity. Simultaneously, the Court expressed its disapproval of the submission of incorrect statements devoid of accuracy, emphasizing the necessity to discourage such irresponsible filings. The Supreme Court's excerpts from the case are reproduced hereunder: (SCC p. 293, para 13)

"*13. Courts are entrusted with the powers of dispensation and adjudication of justice of the rival claims of the parties besides determining the criminal liability of the offenders for offences committed against the society. The courts are further expected to do justice quickly and impartially not being biased by any extraneous considerations. Justice dispensation system would be wrecked if statutory restrictions are not imposed upon the litigants, who attempt to mislead the court by filing and relying upon false evidence particularly in cases, the adjudication of which is dependent upon the statement of facts. If the result of the proceedings are to be respected, these issues before the courts must be resolved to the extent possible in accordance with the truth. The purity of proceedings of the court cannot be permitted to be sullied by a party on frivolous, vexatious or insufficient grounds or relying upon false evidence inspired by extraneous considerations or revengeful desire to harass or spite his opponent. Sanctity of the affidavits has to be preserved and protected discouraging the filing of irresponsible statements, without any regard to accuracy.*"

39. In the same fashion, the Supreme Court in ***Muthu Karuppan v. Parithi Ilamvazhuthi30,*** expressed the view that giving false evidence by filing a false affidavit is an evil that must be effectively curbed with a strong hand. The prosecution should be ordered when it is considered expedient in the interest of justice to punish the delinquent, but there must be a prima facie case of "deliberate falsehood" on a matter of substance, and the court should be satisfied that there is a reasonable foundation for the charge, it is noteworthy that this observation was made in the context of contempt of court proceedings, but the view was expressed to perverse the purity of judicial proceedings.

40. Refocusing on the present issue, the instant case can be narrowly delimited in two distinct facets: firstly, regarding the question of maintainability, and secondly, concerning the substantive merits of the case.

41. So far as the issue of maintainability is concerned, it has already been discussed in presiding paras that the request for sanction was issued vide letter dated 17.6.2022 in which there was a confidential clause that expressly states to treat the CBI report as a confidential document and no reference to it to be made while pursuing the matter further or any other action initiated upon the same. It was also indicated that if the applicant seeks a copy of the report or part thereof under the RTI Act, the view of CBI be ascertained as per Section 11 of the RTI Act. It is noteworthy that the request letter was marked as ***"confidential"***, explicitly indicated at the right corner of the letter dated 17.6.2022 under the heading "***confidential".***

42. Upon scrutinizing the case record, it conspicuously lacks any indication of the circumstances or manner in which the

petitioner acquired a copy of the contested sanction order. The affidavit accompanying the petition is notably silent on both the origin of the information and the reliability of the impugned order's contents. It is imperative to note that the affidavit, as per Rule 12 of Chapter IV of the Allahabad High Court Rules, 1952, is non-compliant. This rule explicitly mandates that the facts asserted in the affidavit should be within the deponent's personal knowledge or, if from another source, such source must be disclosed. Regrettably, the petitioner has neither disclosed the information source nor elucidated on the means by which the impugned order came into their possession.

43. The person who does not disclose all material facts has no right to be heard on the merits of his grievances31. He must disclose all material facts without any reservation, even if they are against him. The petitioner must disclose all facts having a bearing on the relief sought without any qualification. The Court knows the law but not the facts32; an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soil hands33"; the sanctity of affidavits filed by parties has to be preserved and protected, and at the same time, the filing of irresponsible statements has to be discouraged34. The submission of incomplete affidavits and the failure to disclose the source of information in affidavits must be strongly discouraged to uphold the integrity and purity of judicial proceedings.

44. Recentring back to the issue before us, pursuant to the High Court's directive, the CBI took up the matter and re-registered the FIR as RC/DSP/2015/8/004 under Section 409, 420, 466, 467, 469, 471, and 120B IPC, along with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988, focusing on corruption and the illicit accumulation of Rs.954 crores by Shri Yadav Singh, other accused individuals, and connected entities in the award of contracts.

45. Following the investigation, the CBI filed the charge sheet and supplementary charge sheets on 15.3.2016, 31.5.2017, and 6.10.2021, respectively, against numerous accused persons related to different Contract Bonds, securing prosecution sanction. The petitioners, Amit Kumar and Pramod Kumar, both served as Junior Engineers in E&M-II Division and E&M-I Division at NOIDA, respectively. According to the CBI Report and the Model Sanction Order dated 17.6.2022, there is sufficient evidence to launch prosecution against the petitioners for offences under Section 409, 420, 466, 467, 469, 471, and 120B IPC, along with Section 13(2) and 13(1)(d) of the Prevention of Corruption Act, 1988 (as amended by Act No.16 of 2018), and the substantive offences thereof concerning Contract Bonds awarded to M/s Gul Engineering Company and M/s NKG Infrastructure Pvt. Limited.

45.1 Further examination of the impugned sanction order reveals substantial evidence against petitioner Amit Kumar in M/S Gul Engineering Company, which obtained the contract for Project No. 416 through the creation of forged and fabricated documents, and was found involved in corruption. Similarly, the involvement of petitioner Pramod Kumar was identified in the award of contracts related to Project No.405 (awarded to M/S Gul Engineering Company) and Project No.494 (awarded to M/S NKG Infrastructure Pvt. Limited).

45.2 The petitioners were not charge-sheeted in the earlier charge sheet and supplementary charge- sheets. Their involvement has come to light during the investigation concerning Project No. 416, 405, and 494, awarded to M/S Gul Engineering Company and M/S NKG Infrastructure Pvt. Limited, respectively. In connection with the order dated 28.9.2022, passed in Criminal Misc. Writ Petition No.12437 of 2022 on behalf of the accused, Javed Ahmad, seeking the quashing of the impugned FIR where the CBI has sought an impugned sanction order, it is imperative to examine the relevant portion of the order dated 28.9.2022 before delving into Shri Manish Gupta's, submissions. The relevant portion is reproduced as follows;

"on specific query, learned counsel appearing for CBI submits that though notice was received on 22.08.2022, but, till date no instruction has been received.

****

"learned counsel for CBI prays for and is granted four weeks time to file counter affidavit. Rejoinder affidavit, if any, be filed within two weeks thereafter.

List on 09.11.2022.

Till the next date of listing, petitioner shall not be arrested pursuant to impugned FIR. The CBI to justify as to how they are proceeding with the investigation in the impugned FIR when the matter has already been closed"

45.3 The aforementioned petition was first time listed on 28.9.2022 and has since been not listed before this Court. As apparent from the record, the observations recorded by the co-ordinate Bench of this Court in the last three lines of the order were based on the contentions raised by the petitioner's counsel. The order dated 28.9.2022 grants four weeks' time to file a counter affidavit to the CBI, and it is noteworthy that, in the opening line, the CBI counsel explicitly stated that no instructions were received in his office on the date of the order. Given these facts, the petitioners cannot presume that the investigation is concluded with respect to FIR as RC/DSP/2015/8/004 under Section 409, 420, 466, 467, 469, 471, and 120B IPC read with Section 13(2) and 13(1)(d) of Prevention of Corruption Act, 1988. The contention that the investigation qua petitioners is concluded, who were not party to Criminal Misc. Writ Petition No.12437 of 2022 is factually incorrect; therefore, the argument is misconceived and rejected.

45.4 The petitioner's next contention is that even after the repeal of Section 13(1)(d) of the Prevention of Corruption Act 1988 with effect from 26.7.2018, the competent authority, in utter disregard of the law, mechanically issued a sanction order to prosecute the petitioners under Section 13(1)(d) of the Prevention of Corruption Act 1988. The sanction pertains to Contract Bond No.405, 406, and 494, which were awarded to M/S Gul Engineers and M/S NKG Infrastructure Pvt. Limited on 15.12.2011, 16.12.2011, and 22.12.2011, respectively, much prior to the repeal of Section 13(1)(d) of the Prevention of Corruption Act, 1988. The argument on this point is legally incorrect and thus rejected.

45.5 Lastly, the petitioner's counsel argued that the commencement of the trial would frustrate the purpose of a speedy trial, as 40 out of 67 witnesses have

already been examined by the trial court. It is emphasized that the petitioners were not named as accused in the previous charge sheets filed on 15.3.2016, 31.5.2017, and 6.10.2021. Therefore, the trial against the petitioners could be initiated concerning distinct and separate Contract Bonds, and it would not be vitiated under the law. There are enough procedural safeguards in the Code of Criminal Procedure in this regard.

45.6 In essence, the petitioners have not approached this Court with clean hands, and no disclosure of facts has been made as to how the impugned order reached their hands before the prosecuting agency. Serious allegations of corruption are levelled against the petitioners, and no illegality or arbitrariness has been observed in the impugned order. Since the petitioners were not named as accused in the previous charge sheets, The contracts in question were bestowed in December, 2011, and it is pivotal to note that Section 13(1)(d) of the Prevention of Corruption Act, 1988, was rendered inoperative as of 26.7.2018. Consequently, initiating prosecution under Section 13(1)(d) of the Prevention of Corruption Act, 1988, does not render trial vitiated.

46. That there is no question of the annulment of the impugned sanction for prosecution order at this decisive stage of the investigation, especially when the investigation is in its early stages and has brought to light the involvement of the petitioners in the award of Contract Bond Nos.405, 406, and 494 in defiance of CPWD Manual, besides other intentional irregularities for illegal pecuniary gain supported by substantive evidence gathered by the CBI. Such interference would be deemed unwarranted at this critical phase of the investigation. The petitioners do not meet the criteria for rare exceptional circumstances where non-interference by the constitutional court would occasion a failure of justice. The court's leniency would undermine the very essence of Section 19 of the Prevention of Corruption Act, 1988, leading to a substantial detriment to the interests of justice.

47. The petition in Criminal Misc. Writ Petition No.14702 of 2023 and Criminal Misc. Writ Petition No.14706 of 2023 is misconceived and devoid of merits and, therefore, ***dismissed,*** and alternative prayer sought, on the ground of parity with the order dated 28.9.2022 passed by co-ordinate Bench of this Court in Criminal Misc. Writ Petition No.12437 of 2022, is misconceived and, hence dismissed. The observations made herein are expressly confined to the disposition of the instant petitions and hold no relevance or impact on the ongoing investigation or any other proceedings of the case.

48. The conspicuous acquisition of the impugned sanction order by the petitioners, notwithstanding its confidential designation, raises serious apprehensions for the country's foremost investigative agency. We defer to the discernment of the Central Bureau of Investigation (CBI) to introspect and scrutinize their internal operational procedures. It prompts contemplation on the adequacy of measures in place to avert such breaches within the ambit of the agency or competent sanctioning authority. Should there be a dearth of systematic protocols to address such contingencies, it is suggested that comprehensive guidelines be formulated and integrated into the CBI Crime Manual for future reference if not in existence.

49. The Registrar (Compliance) is instructed to dispatch a copy of this order to the Chairman, Central Vigilance Commission, New Delhi, and the Director, Central Bureau of Investigation, New Delhi. Their attention is drawn to the observations outlined in the preceding paragraph for their necessary action and consideration.

(2024) 1 ILRA 1035
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Misc. Writ Petition No. 1003006 of 2023

Ram Murti Sharma & Ors. ...Petitioners
Versus
VII A.D.J., Faizabad & Ors. ...Respondents

Counsel for the Petitioners:
Rakesh Pathak

Counsel for the Respondents:
C.S.C., S.L. Mishra

A. Constitution of India, 1950-Article 226-Indian Penal Code, 1860-Sections 147, 323, 504 & 506-Criminal Procedure Code, 1973-Sections 200, 202-Challenge to-summoning order-without recording evidence u/s 200, 202 Cr.PC learned magistrate had summoned the petitioners to face trial which is against the mandate of settled law-At the stage of inquiry under section 202 CrPC accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made.(Para 18 to 23)

The writ petition is allowed. (E-6)

List of Cases cited:

1. S.K Sinha C.E.O VS Videocon Internl. Ltd & ors.(2008) 2 SCC 492

2. Rosy & anr. Vs St. of Ker. & ors.(2000) 2 SCC 230

3. Shivjee Singh Vs Nagendra Tiwary & ors. , CRLA No. 1158 of 2010 (SLP (Crl.) No 1416 of 2009)

4. Pakhandu & ors. Vs St. of U.P & ors.(2001) ALL LJ 2798

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

1. List has been revised.

2. No one appeared on behalf of respondent No.3 even in the revised call.

3. Vakalatnama filed today in the Court by Shri Anand Mani Tripathi, Advocate on behalf of the petitioners is taken on record.

4. Heard Shri Anand Mani Tripathi, learned Counsel for the petitioners, Shri Ashok Kumar Singh, learned A.G.A-I for respondent Nos.1 and 2.

5. This Criminal Misc. Writ Petition has been filed on behalf of the petitioners with following main prayers:-

"i) issue a writ, order or direction in the nature of Certiorari quashing the orders dated 15.11.1997 and 05.07.1996 and 23.09.1995 passed by VIIth Additional District Judge, Faizabad and Additional Chief Judicial Magistrate IVth, Faizabad contained in Annexure Nos.6 and 4 and 2 respectively to this writ petition.

ii)...
iii)..."

6. Learned Counsel for the petitioners submits that the petitioner are innocent and have been falsely implicated in the present case and were summoned to face trial by learned court below without following the due process established by law and consequential orders were also passed without considering the evidence and material on record.

7. Learned Counsel for the petitioners further submits that initially the F.I.R. was lodged by respondent No.3 under Sections 147, 323, 504 and 506 I.P.C., which was registered as Case Crime No.53/1994, Police Staiton-Raunahi, District-Faizabad (now Ayodhya), thereafter, the matter was investigated thoroughly and after investigation the Investigating Officer did not find any evidence against the petitioners and submitted the final report in the court concerned. He further submits that thereafter at the time of acceptance of final report the complainant-respondent No.3 in the present case moved an application for setting aside the final report submitted by the police in the form of a protest petition.

8. Learned Counsel for the petitioners further submits that learned Civil Judge, Junior Division, Faizabad (now Ayodhya) without considering the material placed on record and without recording the evidence under Section 200 and 202 Cr.P.C. allowed the application/protest petition filed by the respondent No.3 vide order dated 23.09.1995 and summoned the petitioners to face trial. He further submits that the summoning order is bad in the eye of law as no evidence was recorded under Section 200 and 202 Cr.P.C., thus, the procedure established by law was not followed by the court below while passing the summoning order.

9. Learned Counsel for the petitioners further submits that being aggrieved by the summoning order dated 23.09.1995, the petitioners moved an application for setting aside the summoning order and for discharging them from the alleged offences, thereafter, learned Additional Chief Judicial Magistrate IVth heard the petitioners and vide order dated 05.07.1996 rejected the application in a cursory manner without considering the legal position of the case in hand.

10. Thereafter, aggrieved by the order dated 05.07.1996 passed by learned Additional Chief Judicial Magistrate IVth, the petitioners preferred a revision before the Sessions Judge, Faizabad (now Ayodhya) under Section 397 Cr.P.C. for cancellation of the summoning order with a prayer that the trial court may be directed to consider the contention of the petitioners regarding the validity of the order impugned therein, thereafter, the revisional court without considering the case established by the petitioners dismissed the revision vide order dated 15.11.1997 and the order is totally non speaking and has been passed without application of mind.

11. Learned Counsel for the petitioners further submits that the impugned orders passed by the courts below are passed in a cursory manner without considering the legal position and the mandatory provision of recording the evidence under Section 200 and 202 Cr.P.C., which has not been followed in the present case and the petitioners were directed to face trial.

12. In support of his arguments, learned Counsel for the petitioners places reliance on paragraph No.22 of the judgment of Hon'ble Apex Court in the case of ***S.K. Sinha, Chief Enforcement Officer vs. Videocon International Ltd. and Others reported in (2008) 2 SCC 492.*** Paragraph No.22 of the aforesaid judgment is reproduced hereunder:-

"22. Chapter XV (Sections 200-203) relates to Complaints to Magistrates and covers cases before actual commencement of proceedings in a Court or before a Magistrate. Section 200 of the Code requires a Magistrate taking cognizance of an offence to examine the complainant and his witnesses on oath. Section 202 however, enacts that a Magistrate is not bound to issue process against the accused as a matter of course. It enables him before the issue of process either to 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 there is sufficient ground for proceeding further. The underlying object of the inquiry under Section 202 is to ascertain whether there is prima facie case against the accused. It thus allows a Magistrate to form an opinion whether the process should or should not be issued. The scope of inquiry under Section 202 is, no doubt, extremely limited. At that stage, what a Magistrate is called upon to see is whether there is sufficient ground for proceeding with the matter and not whether there is sufficient ground for conviction of the accused."

13. Further, learned Counsel for the petitioners places reliance on paragraph Nos. 10, 11 and 12 of the judgment of the Hon'ble Apex Court in the case of ***Rosy and Another vs. State of Kerala and Others reported in (2000) 2 SCC 230***. Paragraph Nos.10, 11 and 12 of the aforesaid judgment is reproduced hereunder:-

"10. It is only if the Magistrate decides to hold the inquiry the proviso to sub-section (2) of Section 202 would come into operation. If the offence is triable exclusively by the court of Sessions, the Magistrate himself has to hold the inquiry and no direction for investigation by police shall then be made. Inquiry can be held for recording evidence on oath and if he thinks fit. Sub- section (2) of Section 202 gives discretion to the Magistrate to record evidence of witnesses on oath. To this discretionary power, the proviso carves out an exception. It provides that for the offence triable exclusively by the court of Session the Magistrate shall shall call upon the complainant to produce all his witnesses and examine them on oath. Then the next stage after holding inquiry is passing of appropriate order of either dismissal of the complaint or issue of process. That is provided under Section 203 and 204 of the Code. Hence, on receipt of the complaint, the Magistrate by following the procedure prescribed under Section 200 may issue process against the accused or dismiss the complaint. Section 203 specifically provides that after considering the statement on oath, if any, of the complainant and witnesses and the result of the inquiry or investigation, if any, under Section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. For dismissal of complaint, he is required to briefly record his reasons for so doing. In other cases, he has to issue process i.e. either summons or warrants as the case may be as provided under Section

204. However, no summons or warrant is to be issued against the accused until a list of the prosecution witnessess has been filed. Therefore, the question of complying with the proviso to sub-section (2) of Section 202 would arise only in cases where the Magistrate before taking cognizance of the case decides to hold the inquiry and secondly in such inquiry by him, if he decides to take evidence of witnesses on oath. But the object and purpose of holding inquiry or investigation under Section 202 is to find out whether there is sufficient ground for proceeding against the accused or not and that holding of inquiry or investigation is not an indispensable course before issue of process against the accused or dismissal of the complaint. It is an enabling provision to form an opinion as to whether or not process should be issued and to remove from his mind any hesitation that he may have felt upon the mere perusal of the complaint and the consideration of the complainant's evidence on oath.

11. In a case, Ranjit Singh v. The State of Pepsu (now Punjab, AIR (1959) SC 843, where the Sub-Inspector of Police was convicted under Section 193 IPC by First Class Magistrate, it was contended that the procedure adopted by the Magistrate was erroneous because he did not hold an enquiry as required under Sections 200 and 202 of the Code. This Court negatived the said contention and held thus :

"That contention is equally untenable because under Section 200 proviso (aa) it is not necessary for a Magistrate when a complaint is made by a Court to examine the complainant and neither Section 200 nor Section 202 requires a preliminary enquiry before the Magistrate can assume jurisdiction to issue process against the person complained against."

Further, it is settled law that the inquiry under Section 202 is of limited nature. Firstly, to find out whether there is prima facie case in issuing process against the person accused of the offence in the complaint and secondly, to prevent the issue of process in the complaint which is either false or vexatious or intended only to harass such a person. At that stage, the evidence is not to be meticulously appreciated, as the limited purpose being of finding out "whether or not there is sufficient ground for proceeding against the accused". The standard to be adopted by the Magistrate in scrutinising the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. (Re : Chandra Deo Singh v. Prakash Chandra Bose & Anr., Vadilal Panchal v. Dattatraya Dulail Ghadigaonker, Pramatha Nath Talugdar v. Saroj Ranjan Sarkar, Nimaljit Singh Hoon v. The State of W.B. and Mohinder Singh vs. Gulwant Singh.

12. This Court in Kewal Krishan v. Suraj Bhan dealt with the case where instead of finding out prima facie case made out against the accused, the Magistrate passed an order by meticulously appreciating the evidence in a case exclusively triable by a Sessions Court, at the stage of Sections 203 and 204. The Court held that the Magistrate committed an irregularity by exceeding his jurisdiction and observed thus :

"At the stage of Sections 203 and 204, Criminal Procedure Code in a case exclusively triable by the Court of Session, all that the Magistrate has to do is to see "whether on a cursory perusal of the complaint and the evidence recorded during the preliminary inquiry under Sections 200 and 202. Criminal Procedure Code, there is prima fade evidence in support of the charge levelled against the accused. All that he has to see is whether or not there is "sufficient ground for proceeding against the accused."

The Court further made it clear thus :

"At this stage, the Magistrate is not to weigh the evidence meticulously as if he were the trial Court. The standard to be adopted by the Magistrate in scrutinising the evidence is not the same as the one which is to be kept in view at the stage of framing charges. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204, if there is prima fade evidence in support of the allegations in the complaint relating to a case exclusively triable by the Court of Session, that will be a sufficient ground for issuing process to the accused and committing them for trial to the Court of Session." "

14. Further, learned Counsel for the petitioners places reliance on paragraph Nos.12 and 14 of the judgment of the Hon'ble Apex Court in the case of ***Shivjee Singh vs. Nagendra Tiwary and others reported in Criminal Appeal No.1158 of 2010 (Arising out of SLP (Crl.) No.1416 of 2009)***. Paragraph Nos.12 and 14 of the aforesaid judgment is reproduced hereunder:-

"12. The use of the word 'shall' in proviso to Section 202(2) is prima facie indicative of mandatory character of the provision contained therein, but a close and critical analysis thereof along with other provisions contained in Chapter XV and Sections 226 and 227 and Section 465 would clearly show that non examination on oath of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the concerned Magistrate of the jurisdiction to pass an order for taking cognizance and issue of process provided he is satisfied that prima facie case is made out for doing so. Here it is significant to note that the word 'all' appearing in proviso to Section 202(2) is qualified by the word 'his'. This implies that the complainant is not bound to examine all the witnesses named in the complaint or whose names are disclosed in response to the order passed by the Magistrate. In other words, only those witnesses are required to be examined whom the complainant considers material to make out a prima facie case for issue of process. The choice being of the complainant, he may choose not to examine other witnesses. Consequence of such non-examination is to be considered at the trial and not at the stage of issuing process when the Magistrate is not required to enter into detailed discussions on the merits or demerits of the case, that is to say whether or not the allegations contained in the complaint, if proved, would ultimately end in conviction of the accused. He is only to see whether there exists sufficient ground for proceeding against the accused.

14. Although, Shah, J. and Thomas, J. appear to have expressed divergent views on the interpretation of

proviso to Section 202(2) but there is no discord between them that non examination of all the witnesses by the complainant would not vitiate the proceedings. With a view to clarify legal position on the subject, we deem it proper to observe that even though in terms of the proviso to Section 202(2), the Magistrate is required to direct the complainant to produce all his witnesses and examine them on oath, failure or inability of the complainant or omission on his part to examine one or some of the witnesses cited in the complaint or whose names are furnished in compliance of the direction issued by the Magistrate, will not preclude the latter from taking cognizance and issuing process or passing committal order if he is satisfied that there exists sufficient ground for doing so. Such an order passed by the Magistrate cannot be nullified only on the ground of non-compliance of proviso to Section 202(2)."

15. Lastly, learned counsel for the petitioners places reliance on paragraph Nos.7 and 10 of the judgment of this Court in the case of ***Pakhandu and others vs. State of U.P. and Others reported in 2001 ALL. L.J. 2798***. Paragraph Nos. 7 and 10 of the aforesaid judgment is reproduced hereunder:-

"7. Chapter XIV of the Code of Criminal Procedure deals with the conditions requisite for initiation of proceedings. For the purpose of this case, we are concerned with Section 190(1) alone which is reproduced below:

190. Cognizance of offences by Magistrate :- (1) Subject to the provisions of this Chapter and 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.

10. The other course open to the Magistrate is that instead of taking cognizance, he may send the complaint/application under Section 156(3), Cr.P.C. for police investigation. If the course is adopted, the police will have to investigate the matter as per the procedure laid down in Section 157 onwards. If upon investigation the police came to the conclusion that there was no sufficient evidence or any reasonable ground of suspicion to justify the forwarding of accused for trial and submitted final report for dropping the proceedings, following courses are open to the Magistrate and he may adopt any one of them as the facts and circumstances of the case may require :

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant;

(II) He may take cognizance under Section 190(1)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed

by the police, there is sufficient ground to proceed;

(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202, Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued."

16. Learned Counsel for the petitioners submits that the ratio of laws laid down by Hon'ble Apex Court and this Court which are cited above are applicable in the present case also, the entire proceedings initiated against the petitioners is liable to be set aside as due process established by law has not been followed in the present case while summoning the petitioners to face trial, therefore, the summoning order is totally bad in the eye of law, thus, the impugned orders dated 15.11.1997, 05.07.1996 as well as order dated 23.09.1995 may be set aside and the present petition may be allowed.

17. Per contra, learned A.G.A-I opposed the contentions made by learned Counsel for the petitioners and submits that prima facie offence is made out against the petitioners, the summoning order is legally correct and no interference by this Court is required in the present case, thus, he submits that the present petition may be dismissed.

18. After considering the arguments advanced by learned Counsel for the parties and after going through impugned orders, it transpires that without recording evidence under Section 200 and 202 Cr.P.C. learned Magistrate had summoned the petitioners to face trial which is against the mandate of law settled by Hon'ble Apex Court in the judgments referred above has observed that before summoning the accused, it is mandatory for the magistrate to record evidence under Section 200 and 202 Cr.P.C. In the present case learned Magistrate has totally failed to appreciate the legal aspect of the case and revisional court has also erred to appreciate the legal question involved in the present case, further learned Civil Judge, Junior Division, Faizabad (now Ayodhya) also without considering the material placed on record and without recording the evidence under Section 200 and 202 Cr.P.C. allowed the application/protest petition filed by the respondent No.3 vide order dated 23.09.1995, thus, it transpires that the courts below have passed the impugned orders in a cursory manner.

19. It is further observed that the standard to be adopted by the Magistrate in scrutinizing the evidence is also not the same as the one which is to be kept in view at the stage of framing charges. At the stage of inquiry under Section 202 Cr.P.C. accused has no right to intervene and that it is the duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made.

20. It is further observed that instead of finding out prima facie case made out against the accused, the Magistrate passed an order by meticulously appreciating the evidence in a case exclusively triable by a

Sessions Court, at the stage of Sections 203 and 204. The standard of proof and judgment, which is to be applied finally before finding the accused guilty or otherwise is not exactly to be applied at the stage of framing charges. A fortiori, at the stage of Sections 202/204.

21. Thus, this Court is satisfied with the arguments advanced by learned Counsel for the petitioners and the judgments referred above. The impugned orders dated 15.11.1997, 05.07.1996 and 23.09.1995 were passed ignoring the legal questions.

22. In view of the discussions and observations and judgments referred above, the impugned orders are liable to be set aside.

23. Accordingly, the orders dated 15.11.1997, 05.07.1996 and 23.09.1995 passed by VIIth Additional District Judge, Faizabad (now Ayodhya), Additional Chief Judicial Magistrate IVth, Faizabad (now Ayodhya) and Civil Judge, Junior Division, Faizabad (now Ayodhya) are **set aside** and reversed, in pursuance thereto further proceedings are also **quashed**, consequently, the present petition is hereby **allowed**.

(2024) 1 ILRA 1042
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Appeal No. 1553 of 2023

Basant Kumar Bihani ...Appellant
Versus
Union of India ...Opposite Party

Counsel for the Appellant:
Pranjal Krishna

Counsel for the Opposite Party:
Shiv P. Shukla

Criminal Law - Prevention of Corruption Act, 1988 - Sections 7, 13(1)(d), 13(2) & 20 - Indian Evidence Act, 1872 - Section 65B - Code of Criminal Procedure, 1973 - Sections 154, 234 & 313 - Appellant challenged conviction under Sections 7 and 13(2) r/w 13(1)(d) of the Prevention of Corruption Act, alleging improper FIR registration, inadmissible electronic evidence, and lack of corroborative evidence for bribe demand and acceptance. Court held: (1) FIR registration was valid under Section 154 Cr.P.C., as the complaint disclosed a cognizable offence, requiring no preliminary inquiry (*Lalita Kumari Vs Govt. of U.P., (2014) 2 SCC 1; (2023) 9 SCC 695*). (2) Electronic evidence (CDs Q-1, Q-2, Q-3, Q-7 and transcripts Q-4, Q-5, Q-6) was inadmissible due to lack of Section 65B certificates at the time of filing and belated submission after 8-13 years, violating mandatory requirements (*Anvar P.V. Vs P.K. Basheer, (2014) 10 SCC 473; Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal, (2020) 7 SCC 1*). (3) No independent witness corroborated complainant's claim of bribe demand and acceptance; her testimony contained contradictions, rendering it unreliable (*Neeraj Dutta Vs St. (NCT of Delhi), (2023) 4 SCC 731*). (4) Trial court's approach, prioritizing defense submissions over prosecution's case, indicated a presumption of guilt, vitiating the trial (*Section 234 Cr.P.C.*). (5) Prosecution failed to prove demand and acceptance of bribe beyond reasonable doubt, a sine qua non for conviction under Sections 7 and 13(1)(d) (*B. Jayaraj Vs St. of A.P., (2014) 13 SCC 5; K. Shanthamma Vs St. of Telangana, (2022) 4 SCC 574*). Appeal allowed; conviction set aside; appellant acquitted. (Paras 18-96)

Appeal Allowed; Conviction Set Aside.

List of Cases cited:

1. Vineet Narain Vs U.O.I., (1998) 1 SCC 226 (Para 15)

2. Lalita Kumari Vs Govt. of U.P., (2014) 2 SCC 1 (Para 16)

3. Lalita Kumari Vs St. of U.P., (2023) 9 SCC 695 (Para 17)

4. Neeraj Dutta Vs St. (NCT of Delhi), 2022 SCC OnLine SC 1724 (Para 15)

5. Neeraj Dutta Vs St. (NCT of Delhi), (2023) 4 SCC 731 (Para 88)

6. Neeraj Dutta Vs St. (NCT of Delhi), 2023 SCC OnLine SC 280 (Para 90)

7. K. Shanthamma Vs St. of Telangana, (2022) 4 SCC 574 (Para 92)

8. Anvar P.V. Vs P.K. Basheer, (2014) 10 SCC 473 (Para 25)

9. Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal, (2020) 7 SCC 1 (Para 27)

10. Shafhi Mohammad Vs St. of Himachal Pradesh, (2018) 2 SCC 801 (Para 26)

11. St. of Karn. Vs T. Naseer, 2023 SCC OnLine SC 1447 (Para 31)

12. Bipin Shantilal Panchal Vs St. of Guj., (2001) 3 SCC 1 (Para 21)

13. Paras Jain Vs St. of Raj., 2015 SCC OnLine Raj 8331 (Para 28)

14. Kundan Singh Vs St., 2015 SCC OnLine Del 13647 (Para 29)

15. B. Jayaraj Vs St. of A.P., (2014) 13 SCC 5 (Para 91)

16. Dashrath Singh Chauhan Vs CBI, (2019) 17 SCC 509 (Para 91)

17. N. Vijaykumar Vs St. of Tamilnadu, (2021) 3 SCC 687 (Para 91)

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

1. Heard Sri Pranjal Krishna, the learned Counsel for the appellant and Sri Shiv P. Shukla, the learned Counsel for the respondent-C.B.I.

2. The instant Appeal has been filed challenging the validity of the judgment and order dated 31.03.2023 passed by the learned Special Judge (Prevention of Corruption Act), CBI Court No. 3, Lucknow in Criminal Case No. 02 of 2011 titled State versus Basant Kumar Bihani, arising out of RC No. 0062010A002 under Sections 7 and 13 (2) read with 13 (1) (d), Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act'), Police Station CBI/ACB, Lucknow.

3. Briefly stated, facts of the case are that Sri Murad Ali, husband of the complainant Noor Fatima, had died on 10.04.2004. On 20.07.2004 Noor Fatima had given a letter stating that she will apply for compassionate appointment of her elder daughter Khushboo as soon as she attains majority. On 02.12.2006 she gave another letter stating that though the elder daughter had attained majority, she did not want to accept compassionate appointment as she wanted to pursue higher studies and she requested that her elder daughter be given appointment after she completes higher studies. On 30.05.2007, Noor Fatima gave another letter stating that as her elder daughter was keen to pursue higher studies, a seat be kept reserved for the younger daughter till she attains majority and completes her education. On 09.05.2008 the appellant's predecessor sent a reply stating that as per the Rules, the younger daughter could not be appointed and the complainant herself can take the appointment.

4. The complainant gave another letter on 04.06.2008 stating that her elder daughter was getting married and the name

of her younger daughter Roshni be registered for compassionate appointment.

5. In furtherance of the appellant's comments, his subordinate officer replied on 21.02.2009 that the above request was not as per the rules.

6. The complainant again gave letters dated 09.10.2009 & 10.04.2009 requesting for registration of the name of her younger daughter Roshni for the appointment and the appellant had rejected the request by writing a note on the letter itself.

7. At 05:59 p.m. on 07.10.2010, the complainant sent a complaint through fax, alleging that some unknown person had met her as a messenger of the appellant and had asked her to talk to the appellant with respect to the appointment of her daughter. She stated that some calls took place during the period 01.01.2010 and 07.01.2010 between the appellant and herself, wherein the appellant had demanded Rs.2,50,000/- as bribe for compassionate appointment of her second daughter. On the aforesaid complaint, the C.B.I. registered a First Information Report (FIR) at 06:30 p.m. on 07.01.2010.

8. On 08.10.2010 a team of C.B.I. officers reached Varanasi for trap proceedings. It arranged two independent witnesses from State Bank of India. Pre-trap proceedings started in SBI Guest House at Sigra, Varanasi at 05:30 p.m. the complainant reached the guest house between 06:00 to 06:15 p.m. and the pre-trap proceedings concluded at 07:15 p.m. and the C.B.I. team left for the official bungalow of the appellant.

9. The trap proceedings were conducted between 08:00 and 08:15 p.m. and the C.B.I. claims to have caught the appellant red handed while demanding and accepting from the complainant Smt. Noor Fatima bribe of Rs. 50,000/-, under impression of the same being Rs.2,50,000/-. A charge sheet was filed against the appellant u/s 7 and 13(2) r/w 13(1)(d) of the Act on 20.01.2011.

10. On 18.07.2011 the Trial Court had framed the following charges against the appellant: -

Firstly, that in the year 2010, the appellant was working as Chief Commercial Officer, Locomotive Workshop, Railway, Varanasi and he had demanded Rs.2,50,000/- from the complainant Noor Fatima, as bribe for giving compassionate appointment to her younger daughter. As the complainant had only Rs 50,000/-, on 08.01.2010 the C.B.I. team arranged the Rs 50,000/- in five packets in such a manner as would make it appear five packets of Rs. 500/- each (total Rs.2,50,000/-) and a C.B.I. team arrested him red handed while taking bribe on 08.01.2010 and recovered the said amount of Rs 50,000/- from him. Thus the appellant committed an offence punishable under Section 7 of the Act.

Secondly, that on the above mentioned date, time and place, the appellant received an amount of Rs 50,000/- from the complainant Noor Fatima in the above manner, illegally in a corrupt manner and by misusing his position and benefitted himself financially, which is a criminal offence and thus he committed an offence punishable under Section 13 (2) read with Section 13 (1) (d) of the Act 1988, of which cognizance had been taken by the court.

11. Prosecution examined 15 witnesses and adduced some documentary

evidence. Statement of the appellant was recorded under Section 313 Cr.P.C. and he produced 5 defense witnesses and 33 documents.

12. The Learned Trial Court had framed the following points for determination: -

I. Whether the accused is a public servant and if yes, whether the competent authority had granted sanction for his prosecution in accordance with the law?

II. Whether the accused had demanded and accepted bribe for making compassionate appointment of the complainant's daughter?

III. Whether the matter of compassionate appointment of the complainant's daughter was pending before the applicant and whether he was competent to take a decision thereon?

IV. Whether the amount of bribe received by the accused had been recovered by the CBI team from him?

13. The Trial Court decided all the points against the appellant and convicted him for commission of offence under Section 7 of the Act and has sentenced him to undergo rigorous imprisonment for 2 years and pay a fine of Rs. 40,000/- and in default in payment of fine to undergo additional rigorous imprisonment for 2 months. He has been convicted for committing the offence under Section 13(2) read with 13(1)(d) of the Act and has been sentenced to undergo rigorous imprisonment for 3 years and to pay a fine of Rs. 60,000/- and in default of payment of fine, to undergo rigorous imprisonment for additional 3 months.

14. The order of conviction and sentence passed by the trial Court has been assailed before this Court on the following grounds: -

I. The F.I.R. was registered without verification of genuineness of the allegations leveled in the complaint.

II. The electronic evidence in the form of the compact discs containing copies of the conversations recorded in a Digital Voice Recorder, were not accompanied by certificates under Section 65 B of the Indian Evidence Act and the certificate was filed at a highly belated stage. Therefore, the electronic evidences were not admissible.

III. There was no witness of the demand and acceptance of bribe, apart from the complainant herself. In absence of a shadow witness having accompanied her and having corroborated her evidence, conviction cannot be based on the statement of the complainant alone, particularly when there are discrepancies in the statements.

IV. The presumption provided under Section 20 of the Act does not apply to Section 13 (1) (d) and it is a legal and rebuttable presumption.

V. The CBI officers have not acted fairly in this manner. They have tampered with the evidence and have concealed relevant evidence from the Court.

15. The learned Counsel for the appellant has relied upon the judgments of **Vineet Narain and others versus Union of India and another,** (1998) 1 SCC 226, **Lalita Kumari v. Govt. of U.P.**, (2014) 2

SCC 1, **Neeraj Dutta versus State** (NCT Of Delhi) 2022 SCC OnLine SC 1724, Neeraj Dutta versus State (NCT Of Delhi) 2023 SCC OnLine SC 280, **K. Shanthamma versus State of Telangana,** (2022) 4 SCC 574, **Anvar P. V. versus P. K. Basheer and others**, (2014) 10 SCC 473 and **Arjun Panditrao Khotkar versus Kailash Kushanrao Gorantyal and others**, (2020) 7 SCC 1.

16. In support of the first submission that the F.I.R. was registered without verification of genuineness of the allegations leveled in the complaint, the learned Counsel for the appellant has relied upon the judgment in the case of **Lalita Kumari v. Govt. of U.P.,** (2014) 2 SCC 1, wherein the Hon'ble Supreme Court had issued the following directions: -

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

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

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

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

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

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

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

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

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should

be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

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

17. Para 120.7 of Lalita Kumari (Supra) has been modified by **Lalita Kumari v. State of U.P**., (2023) 9 SCC 695, so as to make it as follows: -

"120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed fifteen days generally and in exceptional cases, by giving adequate reasons, six weeks' time is provided. The fact of such delay and the causes of it must be reflected in the General Diary entry."

18. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, only then a preliminary inquiry may be conducted to ascertain whether cognizable offence is disclosed or not but if the information discloses commission of a cognizable offence, registration of FIR is mandatory under Section 154 of the Code and no preliminary inquiry is permissible in such a situation. As the F.I.R. in the present case clearly discloses commission of a cognizable offence, there was no need for verification of the genuineness of the allegations leveled in the complaint. Accordingly, the first submission of the learned Counsel for the appellant that the judgment of the trial Court stands vitiated because the F.I.R. was registered without verification of genuineness of the allegations levelled in the complaint, cannot be accepted and the same is turned down.

19. The second submission of the learned Counsel for the appellant is that the electronic evidence in the form of compact discs containing the conversation recorded in a Digital Voice Recorder and call detail records, was not accompanied by certificates under Section 65 B of the Indian Evidence Act and the certificates were filed at a highly belated stage and the electronic evidence was not admissible for this reason. The C.B.I. claims that the conversations between the complainant and the appellant were recorded in a Digital Voice Recorder and the same were copied on compact discs marked Q-1, Q-2 and Q-3 and transcripts of the conversations were marked as Q-4, Q-5 and Q-6 respectively and those were filed in the Court along with the charge-sheet on 20.01.2011.

20. Examination of PW-1 commenced on 18.08.2011 and it concluded on 21.12.2011. Examination of PW-2 started on 26.03.2013 but thereafter PW-2 did not appear on several dates and therefore, examination-in-chief of PW-3 was started on 07.03.2013, i.e. after almost 1 year, and it continued on 12.04.2013 and 13.05.2013. As PW-2 showed up on 30.05.2013, his examination-in-chief was resumed and it continued till 03.08.2015 and he was cross examined on 26.08.2015. After this examination in chief of PW-3 resumed on

10.09.2015 and she was cross examined on 23.09.2015. PW-4 to PW-9 were examined between 18.11.2015 to 31.01.2017.

21. On 22.04.2016 the appellant had filed an application for excluding the electronic record from consideration as it was inadmissible and when no decision was taken on the application, he filed another application dated 17.02.2017 for deciding the earlier application. On 22.03.2017, the trial Court passed an order that it was conducting the trial as per the law laid down in **Bipin Shantilal Panchal v. State of Gujarat,** (2001) 3 SCC 1, wherein it was held that *Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration.*

22. Thereafter the examination of the remaining prosecution witnesses continued. Examination-in-chief of PW-13 commenced on 08.05.2019 and it continued on 09.05.2019 and 31.05.2019 and during continuance of examination in chief of PW-13, an application was filed on 31.05.2019 for filing three certificates under Section 65-B of the Evidence Act and the same were taken on record vide order dated 25.11.2021 and those were marked as A-33, A-34 and A-35. On the appellant's objections, the trial Court passed an order dated 19.04.2022 that the certificates had merely been taken on record and the issue of admissibility was not considered at that stage.

23. The prosecution evidence stood closed on 15.12.2022 and the case was fixed for examination of the accused under Section 313 Cr.P.C. The accused remained present in the Court on 11 dates, but he was not examined. The prosecution moved several applications for summoning an additional witness and a witness who had not appeared despite service of summons and then an application dated 31.01.2023 was filed for taking a certificate dated 24.01.2023 regarding call detail records on record. The appellant had opposed the application, but the certificate was taken on record vide order dated 01.02.2023.

24. Section 65 B of the Evidence Act provides 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 o****r, 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) ** * **

(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) * * *."

(Emphasis supplied)

25. In **Anvar P. V. v. P. K. Basheer,** (2014) 10 SCC 473, the Hon'ble Supreme Court held that: -

"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."***

(Emphasis supplied)

26. In **Shafhi Mohammad versus State of Himachal Pradesh**, (2018) 2 SCC 801, the Hon'ble Supreme Court had held that: -

"29. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory.

30. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies."

27. In **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**, (2020) 7 SCC 1 the Hon'ble Supreme Court overruled the judgment in **Shafhi Mohammad** (Supra) so far as it held that "In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded" and held that: -

"45. Thus, it is clear that the major premise of Shafhi Mohammad that

such certificate cannot be secured by persons who are not in possession of an electronic device is wholly incorrect. An application can always be made to a Judge for production of such a certificate from the requisite person under Section 65-B(4) in cases in which such person refuses to give it.

* * *

47. ...where the requisite certificate has been applied for from the person or the authority concerned, and the person or authority either refuses to give such certificate, or does not reply to such demand, the party asking for such certificate can apply to the court for its production under the provisions aforementioned of the Evidence Act, CPC or CrPC. Once such application is made to the court, and the court then orders or directs that the requisite certificate be produced by a person to whom it sends a summons to produce such certificate, the party asking for the certificate has done all that he can possibly do to obtain the requisite certificate. Two Latin maxims become important at this stage. The first is lex non cogit ad impossibilia i.e. the law does not demand the impossible, and impotentia excusat legem i.e. when there is a disability that makes it impossible to obey the law, the alleged disobedience of the law is excused.

* * *

51. On an application of the aforesaid maxims to the present case, it is clear that though Section 65-B(4) is mandatory, yet, on the facts of this case, the respondents, having done everything possible to obtain the necessary certificate, which was to be given by a third party over whom the respondents had no control, must be relieved of the mandatory obligation contained in the said sub-section.

52. We may hasten to add that Section 65-B does not speak of the stage at which such certificate must be furnished to the Court. In Anvar P.V. this Court did observe that such certificate must accompany the electronic record when the same is produced in evidence. We may only add that this is so in cases where such certificate could be procured by the person seeking to rely upon an electronic record. However, in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the person concerned, the Judge conducting the trial must summon the person/persons referred to in Section 65-B(4) of the Evidence Act, and require that such certificate be given by such person/persons. This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned. This is, of course, subject to discretion being exercised in civil cases in accordance with law, and in accordance with the requirements of justice on the facts of each case. When it comes to criminal trials, it is important to keep in mind the general principle that the accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, under the relevant sections of the CrPC.

* * *

56. Therefore, in terms of general procedure, ***the prosecution is obligated to supply all documents upon which reliance may be placed to an accused before***

commencement of the trial. T**hus, the exercise of power by the courts in criminal trials in permitting evidence to be filed at a later stage should not result in serious or irreversible prejudice to the accused. A balancing exercise in respect of the rights of parties has to be carried out by the court, in examining any application by the prosecution under Sections 91 or 311 CrPC or Section 165 of the Evidence Act.* ***Depending on the facts of each case, and the court exercising discretion after seeing that the accused is not prejudiced by want of a fair trial, the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time. *If it is the accused who desires to produce the requisite certificate as part of his defense, this again will depend upon the justice of the case — discretion to be exercised by the court in accordance with law."*

(Emphasis supplied)

28. In **Arjun Panditrao Khotkar** (Supra), the Hon'ble Supreme Court quoted with approval the following approved the following view of the High Court of Rajasthan in **Paras Jain v. State of Rajasthan,** 2015 SCC OnLine Raj 8331: -

"15. Although, it has been observed by the Hon'ble Supreme Court that the requisite certificate must accompany the electronic record pertaining to which a statement is sought to be given in evidence when the same is produced in evidence, but in my view it does not mean that it must be produced along with the charge-sheet and if it is not produced along with the charge-sheet, doors of the court are completely shut and it cannot be produced subsequently in any circumstance. Section 65-B of the Evidence Act deals with admissibility of secondary evidence in the form of electronic record and the procedure to be followed and the requirements be fulfilled before such an evidence can be held to be admissible in evidence and not with the stage at which such a certificate is to be produced before the court. One of the principal issues arising for consideration in the above case before the Hon'ble Court was the nature and manner of admission of electronic records.

* * *

23. When legal position is that additional evidence, oral or documentary, can be produced during the course of trial if in the opinion of the court production of it is essential for the proper disposal of the case, how it can be held that the certificate as required under Section 65-B of the Evidence Act cannot be produced subsequently in any circumstances if the same was not procured along with the electronic record and not produced in the court with the charge-sheet. In my opinion it is only an irregularity not going to the root of the matter and is curable. It is also pertinent to note that certificate was produced along with the charge-sheet but it was not in a proper form but during the course of hearing of these petitioners, it has been produced on the prescribed form."

29. The Hon'ble Supreme Court also approved the following view taken by a Division Bench of the Delhi High Court in **Kundan Singh versus State,** 2015 SCC OnLine Del 13647: -

"50. Anvar P.V. partly overruled the earlier decision of the Supreme Court on the procedure to prove electronic record(s) in Navjot Sandhu, holding that

Section 65-B is a specific provision relating to the admissibility of electronic record(s) and, therefore, production of a certificate under Section 65-B(4) is mandatory. Anvar P.V. does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under Section 311 CrPC or, at the appellate stage under Section 391 CrPC. Evidence Act is a procedural law and in view of the pronouncement in Anvar P.V. partly overruling Navjot Sandhu, the prosecution may be entitled to invoke the aforementioned provisions, when justified and required. Of course, it is open to the court/presiding officer at that time to ascertain and verify whether the responsible officer could issue the said certificate and meet the requirements of Section 65-B."

30. While approving the aforesaid view, the Hon'ble Supreme Court summarized the law on the point in **Arjun Panditrao Khotkar** (Supra) by stating that:-

"So long as the hearing in a trial is not yet over, the requisite certificate can be directed to be produced by the learned Judge at any stage, so that information contained in electronic record form can then be admitted, and relied upon in evidence."

* * *

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. , and incorrectly "clarified" in Shafhi Mohammad v. State of H.P., (2018) 2 SCC 801. 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 (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.

* * *

64. To obviate this, general directions are issued to cellular companies and internet service providers to maintain CDRs and other relevant records for the period concerned (in tune with Section 39 of the Evidence Act) in a segregated and secure manner if a particular CDR or other record is seized during investigation in the said period. The parties concerned can then summon such records at the stage of defense evidence, or in the event such data is required to cross-examine a particular witness. This direction shall be applied, in criminal trials, till appropriate directions are issued under relevant terms of the applicable licences, or under Section 67-C of the Information Technology Act, which reads as follows:

***"67-C. Preservation and retention of information by intermediaries.**—(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.*

(2) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an

imprisonment for a term which may extend to three years and also be liable to fine."

73. The reference is thus answered by stating that:

73.1.Anvar P.V. , as clarified by us hereinabove, is the law declared by this Court on Section 65-B of the Evidence Act. The judgment in Tomaso Bruno, being per incuriam, does not lay down the law correctly. Also, the judgment in Shafhi Mohammad and the judgment dated 3-4-2018 reported as Shafhi Mohd. v. State of H.P. , do not lay down the law correctly and are therefore overruled.

73.2. ***The clarification referred to above is that the required certificate under Section 65-B(4) is unnecessary if the original document itself is produced****. This can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him.* ***In cases where the "computer" happens to be a part of a "computer system" or "computer network" and it becomes impossible to physically bring such system or network to the court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1), together with the requisite certificate under Section 65-B(4).*** *The last sentence in para 24 in Anvar P.V. which reads as "... if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act ..." is thus clarified; it is to be read without the words "under Section 62 of the Evidence Act,...". With this clarification, the law stated in para 24 of Anvar P.V. [Anvar P.V. v. P.K. Basheer, does not need to be revisited.*

73.3. The general directions issued in para 64 (supra) shall hereafter be followed by courts that deal with electronic evidence, to ensure their preservation, and production of certificate at the appropriate stage. These directions shall apply in all proceedings, till rules and directions under Section 67-C of the Information Technology Act and data retention conditions are formulated for compliance by telecom and internet service providers.

(Emphasis supplied)

31. In reply to this submission, the learned Counsel for the respondent – CBI has relied upon the judgment in the case of **State of Karnataka Versus T. Naseer alias Nasir alias Thandiantavida Naseer alias Umarhazi alias Hazi and Others**, 2023 SCC OnLine SC 1447, which arose out of serial bomb blasts in Bangalore on 25.07.2008, in which one woman had lost her life whereas several persons were injured. During the course of investigation certain electronic devices such as a Laptop, an external Hard Disc, 3 Pen Drives, 5 floppies, 13 CDs, 6 SIM cards, 3 mobile phones, one memory card and 2 digital cameras etc. were seized at the instance of an accused. The original electronic devices were submitted before the Trial Court along with the additional charge-sheet dated 09.06.2010. The Trial Court vide order dated 07.04.2017 ordered that the CFSL Report dated 29.11.2010 with reference to the electronic devices was inadmissible in evidence in the absence of a certificate under Section 65-B of the Act. The prosecution's case was that the original devices being already on record (as a primary evidence) and there was no

requirement of a certificate under Section 65-B of the Act. Still, as a matter of abundant caution, a certificate under Section 65-B of the Act was obtained and when PW-189 was further examined in chief on 27.04.2017, a certificate under Section 65-B of the Act was sought to be produced. The Trial Court opined that the certificate issued under Section 65-B of the Act produced on 27.04.2017 was not admissible in evidence. The order of the Trial Court was upheld by the High Court. In appeal, the Hon'ble Supreme Court held that: -

*"14. From the aforesaid facts, it cannot be inferred that there was delay of six years in producing the certificate. In fact, r**eport received from CFSL, Hyderabad on the basis of the contents of electronic devices dated 29.11.2010 was already placed before the Trial Court on 16.10.2012. In fact, the stand of the prosecution was that when the original electronic devices were already produced and marked MOs, there was no need to produce the certificate under Section 65-B of the Act. Still, as a matter of abundant caution, the same was produced that too immediately after objection was raised by the accused against the production of CFSL report prepared on the basis of the electronic devices seized.***

*15. Fair trial in a criminal case does not mean that it should be fair to one of the parties. Rather, the object is that no guilty should go scot-free and no innocent should be punished. **A certificate under Section 65-B of the Act, which is sought to be produced by the prosecution is not an evidence which has been created now…"***

32. **T. Naseer (Supra)** was decided on the basis of the aforesaid peculiar facts where the primary electronic evidence had already been filed by the prosecution and the certificate under Section 65 B was not prepared later, whereas in the present case, the primary evidence in the shape of the Digital Voice Recorder had not been filed by the prosecution and the certificates filed in the present case had been created long after preparation and filing of the secondary evidence. Therefore, the judgment of **T. Naseer** (Supra) would not be applicable to the facts of the present case.

33. In the present case, the first conversation between the appellant and the complainant was through the mobile phone of the complainant, which was recorded on a CD-Q1. The complainant did not give her mobile phone to the Investigating Officer. The complainant did not state that she had prepared the CD. Nobody stated that he had prepared the CD-Q1. The two subsequent two conversations between the complainant and the appellant were recorded in a Digital Voice Recorder, and the Digital Voice Recorder was not produced in evidence before the Court. The recorded conversations were copied on compact discs marked Q-2 and Q-3 and transcripts of the three conversations were marked as Q-4, Q-5 and Q-6 respectively. The compact discs and transcripts of the conversations were filed in the Court along with the charge-sheet on 20.01.2011, but this secondary evidence was filed without the requisite certificate under Section 65 B of the Evidence Act.

34. On 22.04.2016 the appellant had filed an application for excluding the electronic record from consideration as it was inadmissible and when no decision was taken on the application, he filed another application dated 17.02.2017 for deciding the earlier application.

35. In Application under Section 482 Cr.P.C. No. 4939 of 2017 filed by the appellant, this Court had passed the following order on 10.08.2017: -

"Having regard to the rival submissions made by the parties, it is gathered that the court below while dealing with the matter has not delved into the admissibility of protection available under Section 62 of the Evidence act vis-a-vis the evidence of the complainant. The question which was raised before the court below is regarding the admissibility of electronic record as an evidence under Section 65B particularly when there was no certificate supporting the said evidence, as envisaged under law.

The process of leading evidence under Section 62 and 65B stand at variance. ***If the prosecution proceeds to adduce the evidence of C.D. and CDR, it would certainly require a certificate as per law propounded by the apex court which in any case has to be filed at the time of filing of evidence before the trial court.***

This aspect of the matter deserves to be and shall be considered by the trial court as soon as the prosecution leads its evidence and in case the electronic record is placed reliance upon before the trial court, the same shall be entertained strictly within the principles laid down by the apex court in the judgment mentioned above. ***In other words, such an evidence cannot be proceeded with unless a certificate has already been filed before the competent court.***

The trial court is, however, free to proceed with the evidence, in case the original device allegedly used in the recording of the voice is filed by the complainant through CBI and in that event the course open under law as per Section 62 of the Evidence Act shall remain open."

36. During continuance of examination in chief of PW-13, an application was filed on 31.05.2019 for filing three certificate under Section 65-B of the Evidence Act and the same were taken on record vide order dated 25.11.2021 and the trial Court had passed an order dated 19.04.2022 that the certificates had merely been taken on record and the issue of admissibility was not considered at that stage.

37. Then an application dated 31.01.2023 was filed for taking a certificate dated 24.01.2023 regarding call detail records on records regarding six phone calls between the mobile numbers of the complainant and the appellant during 01.01.2010 and 08.02.2010. The accused opposed the application on the ground that statement of the accused under Section 313 Cr.P.C. had been recorded on 20.01.2023 and the matter was at the stage of defence evidence. The defence had already produced three witnesses on 31.01.2023 and thereafter three dated had been fixed for defence evidence and the application filed at that stage was not maintainable. However, the trial Court allowed the application by merely stating that it was necessary in the interest of justice. The Court did not mention any exceptional circumstance justifying the certificate under Section 65 B being taken on record at the aforesaid belated stage.

38. The certificate dated 24.01.2023 was marked as Exhibit A-46 and it reads as follows: -

"Certified that the information pertaining to mobile number 97948616000

being produced is the computer generated record, which was produced by computers maintained by our company during the period when the said computer was used regularly to store and process information and the undersigned was having lawful control over the use of computer(s) and during the aforesaid period the information of this kind contained in electronic record is derived was regularly fed into the computer in the ordinary course of business and throughout the material part of the period when the said computer was operating properly and the information contained in the form of hard copy is an electronic record of which reproduces such information which was feed into the computer and to the ordinary course of business and there are no chances of tampering & manipulations.

That the information contains in the electronic record is automatically fed into the system in the ordinary course of business and the computer generated information is certifying to the best of my knowledge and beliefs."

39. It is relevant to note that the certificate of the calls made between 01.01.2010 and 08.02.2010 was issued on 24.01.2023 and PW-15, who had issued the certificate, had stated that he was not in the service of the company between April 2015 to April 2018. Therefore, he could not have certified

40. A certificate under Section 65 B of the Evidence Act must accompany the electronic record when the same is produced in evidence by a person who is in a position to produce such certificate being in control of the said device. In the present case, the digital voice recorder was in control of CBI and, therefore, a certificate under Section 65 B of the Evidence Act was mandatorily required to be filed along with the secondary evidence of electronic record, namely the compact discs containing copies of conversation recorded in the digital voice recorder and the transcript of that recorded conversation. The accused must be supplied all documents that the prosecution seeks to rely upon before commencement of the trial, including the certificate under Section 65 B of the Evidence Act.

41. Although the court may in appropriate cases allow the prosecution to produce such certificate at a later point in time, but in the present case, neither any reasons were assigned by the prosecution for not filing the certificate under Section 65 B of the Evidence Act along with the secondary evidence, nor was the certificates filed soon thereafter. The certificates were not filed even after the order dated 10.08.2017 passed by this Court in application under Section 482 Cr.P.C. No. 4939 of 2017 filed by the appellant. The trial Court has not assigned any reasons for taking the certificate regarding the Compact Discs on record at a highly belated stage, after more than 8 years and the certificate regarding Call Detail records after 13 years since filing of the charge-sheet and the documentary evidence.

42. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without the safeguards provided in Section 65 B (4) of the Evidence Act, the whole trial based on proof of electronic records can lead to travesty of justice. The certificates prepared after more than 8 and 13 years since filing of the documentary evidence cannot be said to fulfil the mandate of Section 65 B of the

Evidence Act and the trial Court has erred in convicting the appellant on the basis of secondary electronic evidence filed without being accompanied by the requisite certificate under Section 65 B of the Evidence Act.

43. Therefore, I decide the second point in favour of the appellant by holding that applying to the law laid down by the Hon'ble Supreme Court in **Arjun Panditrao Khotkar** (Supra) to the facts of the present case, the secondary electronic evidence filed in the shape of CDs Q-1, Q-2, Q-3 and the transcript of conversation filed in the shape of Q-4, Q-5 and Q-6 was not admissible in evidence. Another CD - Q7 was also filed, but no certificate under Section 65 B was filed regarding that CD and, therefore, CD - Q7 is inadmissible in evidence.

44. The third submission of the learned Counsel for the appellant is that there was no witness of the demand and acceptance of bribe, apart from the complainant herself. In absence of a shadow witness having accompanied her and having corroborated her evidence, conviction cannot be based on the statement of the complainant alone, particularly when there are discrepancies in the statements.

45. The point no. 2 framed by the trial Court for determination, was whether the appellant had demanded and accepted bribe from the complainant. It does not make a mention of the amount allegedly demanded as bribe and it also does not mention the amount allegedly given by the complainant and accepted by the appellant as bribe.

46. The discussion on this point in the judgment of the trial Court begins with the submissions made by the learned Counsel for the appellant, and not by discussing the prosecution case. Section 234, Cr.P.C. provides that: -

> ***"234. Arguments.****—When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply:*
>
> *Provided that where any point of law is raised by the accused or his pleader, the prosecution may, with the permission of the Judge, make his submissions with regard to such point of law."*

47. It is only if the submissions made on behalf of the prosecution make out a case for conviction of the accused that the accused should be required to rebut the submissions. In case the prosecution fails to make out a case for conviction, there would be no necessity for the defence to advance any submissions. Therefore, the Court should deal with the submissions also in the aforesaid order. However, in the present case, the trial Court proceeded to consider the submissions of the defence first, without considering the submissions of prosecution, which indicates that the trial Court was proceeding in a manner which indicates that it had presumed the accused to be guilty and it had required the accused person to prove his innocence. This error in the basic approach of the trial Court towards adjudication of the case has vitiated the trial Court's judgment.

48. The learned Counsel for the respondent-CBI has submitted that the complainant had given an application dated 20.07.2004 addressed to GM, DLW, Varanasi for appointment of her daughter Khushboo Murad on compassionate

ground, but no reply was received by her in this regard. She gave another letter dated 02.12.2006 addressed to GM, DLW and no information regarding this application was received. Thereafter, the complainant gave two more applications dated 30.05.2007 and 04.06.2008 for registration of her second daughter Roshni Murad for appointment in place of her elder daughter Khushboo Murad. In reference to her letter dated 04.06.2008, she received a reply dated 21.02.2009 from DLW office in which it was said that registration of her daughter could not be done as per the rules. The application dated 04.06.2008 of the complainant was rejected by the appellant. Thereafter she gave two more applications dated 09.04.2009 and 10.04.2009 for registration of her second daughter Roshni Murad, but no reply was received in respect of the aforesaid letters. Then she met the then CPO – the appellant B. K. Bihani, but he did not give a clear reply. After this, the appellant had called her through a messenger and had demanded bribe. The messenger gave the mobile number of the accused to complainant. Complainant talked to the appellant but no conversation regarding demand of money took place. The messenger contacted the complainant again and instructed her to talk the accused in clear terms and to offer bribe to him. The complainant again called the appellant through his phone number 9794861600 and demanded bribe from her.

49. The conversation regarding demand of bribe of amount Rs. 2,50,000/- was recorded by the complainant in her mobile phone. On 08.01.2010 she met with CBI team and the CD - Q1 brought by her was played before all, including the independent witnesses.

50. The complainant called the accused on his mobile phone at 06:15 put it on speaker mode and told the accused that she had brought the money and asked the appellant as to where should she meet him. The appellant told that he would inform her in half an hour. The complainant stated that this conversation was heard by all the persons and it was recorded in a CD - Q2. After some time, the accused called the complainant from landline phone No. 05422270102 at about 06:50 and told her to come alone with the money in 45 minutes at his bungalow. The said conversation was heard by all and recorded on CD - Q-3. The pre-trap memo was signed by all. The complainant stated that when she reached inside the bungalow of the accused, he had demanded the bribe money. The complainant proved the transcript of the conversations by her oral testimony.

51. The learned Counsel for the CBI has submitted that the complainant has proved the demand, acceptance and recovery of bribe money by the accused B K Bihani. If the work of the complainant was not pending with the accused or if he was not competent to do the work then a question arises that why he was entertaining a lady and even calling her to his official house in the night and that too all alone.

52. The learned Counsel for the respondent submitted that the accused tried to flee which shows the conduct of the accused relevant under section 8 of Indian Evidence Act.

53. The learned Counsel for the respondent also submitted that PW-4 stated that the file of appointment on compassionate grounds should have been presented to the General Manager and

remark of accused was not as per direction of Railway board. PW-5, Nagendra Nath Pathak proved the procedure of appointment on compassionate ground and also proved D-14, file related to appointment on Compassionate ground of Khushbu Murad and also deposed about all the applications of the complainant and orders thereon. He further stated that there was 6 months' delay in making the noting on the file of the complainant. Further, according to the master circular, the period of five year (after death) could be relaxed by General Manager.

54. The learned Counsel for the respondent further submitted that the appellant had not forwarded the application of the complainant to the General Manager, although it was addressed to the GM and the appellant was sitting over the file. Although the appellant was not competent to deal with the case, he had called the complainant alone to his house whose official work was pending with him.

55. PW-6 had proved that the mobile number 9794861600 was being used by the appellant and this phone number was used to call the complainant for demand of bribe. PW-7, Tara Shankar SDE, Dept. of P&T, Varanasi confirmed his signature on Call record of phone number 05422270102. According to this call record a call was made from above landline number 05422270102 to the mobile number of the complainant on 08.01.2010 at 06:53 PM which was of 2073 seconds.

56. PW-8, Viplav Sharma, Inspector, CBI stated that on 08.01.2010, the conversation between the accused and the complainant in CD - Q1 was heard by all. He also stated that accused called the complainant over his mobile phone from his land line number at about 06:45 PM which was heard by all. The learned Counsel for the respondent submitted that the aforesaid evidences proved that a demand was made by accused. The conversation was recorded in a CD which was sent for voice examination to CFSL New Delhi. The Voice report confirmed voice in Q 1, Q 2, Q 3 and Q 7 matched with sample voice of appellant.

57. As has already been held in the preceding paragraphs, the CDs Q 1, Q 2 and Q 3 where not accompanied by any certificate under Section 65 B and the CDs are not admissible in evidence. No certificate under Section 65 B has been in respect of the CD Q 7 and it is not admissible in evidence for this reason.

58. So far as the submission regarding voice sample report is concerned, the certificate dated 20.08.2011 (Exhibit A-45) was issued by Sri. Amitosh Kumar, Senior Forensic Officer. Gr. II-cum-Assistant Chemical Examiner to the Government of India, Physics Division, Central Forensic Science Laboratory, Central Bureau of Investigation, New Delhi. The Officer has certified that "the voice marked exhibits Q-1 (I) (A), Q-2 (I) (A), Q-3 (I) (A), Q-7 (II) (A), Q-1 (I) (A) & Q-7 (III) (A) are the probable voice of the person (Shri Basant Kumar Bihani) whose specimen voice are marked as exhibits S1 (I) (A) & SA-1 (I) (A). He has not given a categorical finding that the voice samples belonged to the accused. Therefore, the accused cannot be punished on the basis of the expert's opinion that the voice in question was the probable voice of the appellant as conviction can be based only on proof beyond reasonable doubt, and not on a mere probability.

59. The prosecution has produced the complainant as PW2-Noor Fatima and in her Examination-in-chief she has stated that during the pre-trap proceedings, a CD - Q1 containing the earlier recorded conversation was played which was heard by all present and it disclosed that the appellant had demanded the illegal gratification of Rs.2.5 Lakhs from her. This conversation was made on 04.01.2010 and it was recorded in the mobile phone of the complainant. It is mentioned in the pre-trap memorandum that the CD was produced by the complainant, which was heard by all present, whereas the complainant stated in her Cross-examination that she had not given the CD containing recording of conversation in her mobile phone during the pre-trap proceedings. No witness has stated that he had prepared the CD – Q1. The certificate under Section 65-B of the Evidence Act (Paper No. A-70, Exhibit A-33) regarding this CD has been prepared and produced by PW-13 on 31.05.2019, i.e. after about a decade. It is stated in the certificate that the CD containing a pre-recorded conversation was produced by the complainant Noor Fatima. PW-13 did not state that he had prepared the CD or that the CD was prepared in his presence. Nobody said that he had prepared the CD - Q1. Therefore, the certificate under Section 65-B issued by PW-13 regarding CD – Q1 becomes meaningless. In absence of evidence regarding maker of CD – Q 1, and the CD – Q1 having been filed without being accompanied by a certificate under Section 6 B, is not admissible in evidence.

60. The transcript of conversation recorded in CD Q-1 has been filed as Q-4. This conversation was held during a phone call made by the complainant to the appellant, wherein the complainant stated that an unknown person had met her as the messenger of the appellant and had given the appellant's number to her. The appellant stated that he had not sent any messenger and his number was a CUG number and it was known to the public. Secondly the appellant stated that the complainant's work could not be done from his level. Thirdly the complainant insisted that the appellant should get her work done and that she would serve the appellant, but the appellant did not make a specific demand of money for doing her work.

61. The transcript of the conversation recorded in CD Q-2 has been filed as Q-5 and in this conversation the appellant merely stated that he was busy and will talk later.

62. The transcript of the conversation recorded in CD Q-3 has been filed as Q-6 and in this conversation the appellant asked the complainant to come alone to his home.

63. The CD-Q3 contains a recording of a conversation running into 187 seconds whereas as per the Call Detail Records, the call ran into 2073 seconds, which indicates that the prosecution has not produced the entire conversation in evidence. The conversation allegedly happened telephonically, but the CBI has neither seized the mobile phone of the complainant nor that of the appellant so as to prove the said conversation.

64. There is no recording of the conversation held during the trap proceedings, when the appellant allegedly demanded and accepted bribe.

65. PW-2 stated In her Examination-in-chief that she had received a call on her mobile phone from the landline phone of the appellant and he had put her mobile

phone on speaker mode and made everyone present there listen to the conversation, in which the appellant had asked her to come to him with the money within 45 minutes. The conversation happened telephonically, but the CBI has neither seized the mobile phone of the complainant nor has it proved that the landline number, from which a call was made to the complainant's mobile phone, belonged to the appellant.

66. PW-2 (the complainant) stated in her Examination-in-chief that the appellant took her inside the room, latched the room from inside, asked her to sit down and asked for the money, whereupon she took out the currency notes from a polythene bag and handed it over to the appellant. The appellant took the money and placed it on the table. This statement of PW-2 is not corroborated by any other evidence, as it was not heard by any other person and it was not recorded in the Digital Voice Recorder, whereas the other conversations between the complainant and the appellant were recorded. The CBI claimed that the Digital Voice Recorded which was working during the pre-trap proceedings and the post trap proceedings, had not functioned during the trap proceedings.

67. One of the independent witnesses accompanying the trap team, namely Vijay Kushwaha, was examined as PW 3. He stated in his Examination-in-chief that initially it was agreed that the other independent witness Pradeep Srivastava will accompany the complainant as the shadow witness but as the appellant had asked the complainant to come alone, Pradeep Srivastava remained with the trap team. In his Cross examination, PW 3 stated that prior to reaching the house of the appellant, he had not heard the voice of the appellant, which statement was contradictory to the statement made by the complainant that the recording of conversation between the complainant and the appellant was played and everyone had heard that conversation. PW 3 further stated that the complainant had told that the appellant had called her alone, indicating that the alleged conversation between the complainant and the appellant had not been heard by the independent witness PW-3. PW-3 further stated in his cross examination that he did not remember that upon the complainant telling that the appellant had called her alone, whether any member of the trap team had asked her to tell it to the appellant that she is a woman and it was night time, therefore, she could not come alone. He even did not remember whether during the two telephonic conversations between the appellant and the complainant there was any reference to bribe.

68. PW-3 further stated that when the Trap Laying Officer Mahesh Singh got a missed call on his mobile phone, all persons went running inside the house of the appellant and the complainant told them that the appellant had demanded money. It is relevant to note that the complainant had stated in her statement that the appellant had latched the door from inside. When there is no statement that the latch was opened by the complainant or the appellant, how did all the other members of the trap team get inside the appellant's house, also remained unexplained, which also raises a doubt against the version of the complainant.

69. Further, the alleged independent witness PW-3 stated that on the instructions of the Trap Laying officer Mahesh Kumar Singh he had picked up the currency notes that were kept on the table, which shows

that PW 3 was acting as a member of the trap team and a subordinate of the trap laying officer. The learned Counsel for the respondent has submitted that PW-3 was directed to make the recovery to prevent of the possibility of the recovery being labeled as planted. This submission cannot be accepted as making the recovery was the function of the members of the trap laying team and the role of the independent witness was to witness the proceedings independently. When the independent witnesses started acting on the instructions of the trap laying officer, he lost his independent character. Moreover, in making the recovery, he acted beyond his authority. Therefore, it appears that PW-3 was acting under the instructions of the Trap Laying Officer as his subordinate member of the trap team and he was not witnessing the trap proceedings independently.

70. Another member of the trap team namely Viplav Sharma has been examined as PW-8 and he stated in his examination-in-chief that when the team members went inside the appellant's house, the complainant pointed towards the appellant and told that he had demanded Rs.2,50,000/- as bribe and had accepted Rs.50,000/- assuming the same to be Rs.2,50,000/-. In his cross examination, PW-8 stated that the members of the trap team did not witness any conversation regarding any demand or acceptance.

71. Another member of the trap team A. K. Sharma (PW-12) stated that the appellant had made a phone call from a landline number of his office to the mobile phone of the complainant and as per his statement, the team members had believed that the appellant was on the other side of the line as per the statement of the complainant herself. However, no evidence has been lead to connect the landline number 05422270102, from which the call was made to the mobile phone of the complainant, belonged to the appellant.

72. PW-12 further stated in his examination-in-chief that when the team members went inside the appellant's house, the complainant told that the appellant had demanded Rs.2,50,000/- as bribe and had accepted Rs.50,000/- assuming the same to be Rs.2,50,000/-. In his cross examination, PW-13 stated that the members of the trap team did not witness any conversation regarding any demand or acceptance.

73. The Trap Laying Officer Mahesh Singh has also made similar statements.

74. This indicates that except for the complainant herself, there is no other witness of the alleged demand of bribe made by the appellant. When there are contradictions with respect to the statements made by the complainant in this regard as noted above, her statement becomes doubtful and cannot form the basis of conviction of the appellant.

75. Moreover, no reasonable person of ordinary prudence can accept that Rs.50,000/- can be arranged in five packets so as to make it appear Rs.2,50,000/- and any person or ordinary person, and at any rate, a person holding a Class I post in a Government Department, will accept Rs.50,000/- treating the same to be Rs.2,50,000/-. The story set up by the prosecution that they had arranged Rs.50,000/- in five packets so as to make the same appear to be Rs.2,50,000/- is inherently improbable.

76. In his statement recorded under Section 313 Cr.P.C. the appellant had categorically denied all the allegations leveled against him. A question was asked to the appellant regarding the letter dated 09.04.2009 submitted by the complainant for compassionate appointment of her daughter and it was put to the appellant that no reply was communicated to the complainant. In reply, the appellant stated that he had given a clear reply by making an endorsement on the letter. The appellant stated that the complainant's younger daughter was not entitled to be get compassionate appointment as per the Rules and this request had already been rejected by his predecessor officer. The appellant stated that the phone number 05422270102 was not of his office. He denied that he had sent any messenger to the complainant. He declined having made any conversation with the complainant. The appellant further stated that Noor Fatima had herself stated that she had not given any CD regarding any pre-trap conversation. The appellant also stated that he was caught in the big hall which was used as the drawing/dining room whereas the money was kept on a table in the visitor's room and he had not touched the money. However, Noor Fatima had shook hands with him. The appellant also stated that his fingers were washed in plain water and the color of the water did not change. The colored solution was prepared afterwards. The appellant further stated that the T.L.O. had concealed important primary evidence of the Digital Voice Recorded and he had committed an offence under Section 204 IPC. The appellant stated that CFSL New Delhi is an organization subordinate to the CBI. The appellant stated that he had been falsely implicated because he had told that the complainant's younger daughter was not entitled to be given appointment on compassionate ground.

77. After examination of PW-15 – an official of mobile phone service provider company Airtel who had given evidence regarding the call detail records relating to the period 01.01.2010 to 08.10.2020, the appellant denied that he knew the holder of the other mobile phone number and he stated that the witness PW-15 was not competent to issue the certificate under Section 65 B of the Evidence Act.

78. The appellant had examined five defence witnesses – the appellant's wife Smt. Sangeeta Bihani was examined as DW-1 and amongst other things, she stated that on 13.01.2010, some CBI officials had come to her house along with two employees of DLW, one of whom was Mr. Sahay and the other was from Vigilance Department of DLW. They had demanded the Laptop computer of the appellant and they had deleted something from it. No question was put to her to contradict her on this point.

79. DW - 2 Atul Kumar was posted as a Bungalow Peon at the appellant's house. He stated that he was present in the house when the complaint had come there, Mrs. Bihani had asked him to offer the visitor some water and tea and when he had heard the appellant speaking in a loud voice that he did not do such things and he will not accept the thing.

80. DW-3 Dinesh Prasad Singh had retired from the post of Senior Personnel Officer from the Railway in the year 2014 and he had proved the signature of K. B. Sahay on Defence Document 1. He also stated that after about 8-9 months since the incident, the complainant had come to him

and had requested to get her talk to the appellant. He had made a phone call to the appellant and had given the phone to the complainant, who had said on phone that her daughter should be appointed as a Section Engineer.

81. DW-4 Naveen Prakash Tiwari proved the signatures of Prem Nath Tiwari on paper no. C 71/2 when was a letter dated 31.03.2010 written by Prem Nath Tiwari to the appellant.

82. The appellant had examined himself as DW-5 and he stated that the complainant's letter dated 04.06.2008 was placed before him in January / February 2009 and he had taken a decision thereon and the same decision had been taken by his predecessor officer. The S.P.O. had communicated the decision to the complainant. The complainant sent two more letters dated 09.04.2009 and 10.04.2009 and he had reiterated his decision by writing a note on the upper right corner of the letter, which shows that the appellant's decision was clear that the request was not in accordance with the law. The complainant med the appellant in his office some time towards the end of April 2009 and requested for appointment of her younger daughter and he told her that the younger daughter could not be appointed. The complainant then stated that her elder daughter would complete her B.Tech. course in an year and she be appointed as a Section Engineer. However, as per the relevant circular of Railway Board, on the date of attaining majority the complainant's elder daughter had passed class XII and the qualification of B.Tech acquired by her later in the year 2010 could not be taken into consideration and by that time, her case for claim of compassionate appoint would become time barred. The complainant had come to with the appellant on the occasion of new-year and she had told him that she had constructed a Shiv Temple, which had surprised the appellant and he had appreciated it. The complainant had stated that she would come to invite the appellant and his family on the occasion of a special pooja on Makar Sankranti. On the date of the trap, she had come to his house, shook hands with him and had said that she was passing by and she dropped in to invite him for the Makar Sankranti pooja. Thereafter she requested for appointment of her younger daughter and when the applicant stated that she could not be appointed, she stated that then her elder daughter be appointed as a Section Engineer, whereupon the appellant stated that the appointment can be made as per Rules only. The complainant offered a polythene bag held in her hand and said there were Rs.50,000/- in it and the appellant should get her daughter appointed as a Section Engineer. This was unexpected for the appellant and he said in a loud voice that he did not do such works and he would not do it. He went inside to call her wife so that she may turn her away. The appellant's wife was in the bathroom and after waiting for 1-2 minutes, he came back and while he was putting aside a stool kept in the way, the CBI team entered the room and caught him. He was taken to the wash basin, plane water was filled in two glasses and his hands were washed, but nothing happened and he said in a loud voice that nothing had happened, but the team leader made him sit quietly in a corner under the gaze of a person for about 3 hours. He further stated that the laptop computer of CBI team has malfunctioned and they had demanded the appellant's laptop computer and had done some work on it.

83. The appellant had submitted several documentary evidences also, including a video file – Document No. 24 which was accidently left by the CBI team in the appellant's laptop, which indicated that the CBI team was using two Digital Voice recorders. On 13.01.2010, the CBI persons had again gone to the appellant's house and they had deleted some files from the appellant's laptop computer. However, as they had come illegally, they left in a hurry and in the haste, they omitted to delete one file from the laptop computer. The appellant stated that the file, in which it was recorded that he had declined to accept money from the complainant, had been deleted by the CBI people. He further stated that the CBI team was using more than one Digital Voice Recorder during the trap proceedings and it is not possible that all of those had malfunctioned during the trap.

84. The appellant also stated that when during the cross examination of PW-8 Viplav Sharma, he had put a question regarding the visit to his home, he had got startled and had drank water and the appellant had pointed out this demeanour of the witness to the notice of the court.

85. The appellant had further stated that the complainant was holding her mobile phone in her hand and she was also recording the incident and she did not give her mobile phone to the investigating officer. Thus three recording devices were removed from the scenario.

86. Although the trial court has given a brief narration of the statements of the defence witnesses, while arriving at a finding on the point of demand and acceptance of bribe, the trial court did not take into consideration and deal with the statement of any of the defence witnesses, which vitiates the finding of the trial court on this point.

87. In view of the aforesaid discussion, I come to the conclusion that the prosecution could not prove beyond reasonable doubt the demand of Rs.2,50,000/- made by the appellant as bribe and acceptance of Rs.50,000/- by him treating the same to be Rs.2,50,000/- and the finding of trial court on this point is wrong and unsustainable.

88. In **Neeraj Dutta v. State** (NCT of Delhi), (2023) 4 SCC 731, the following question had been referred for decision to a Constitution Bench of the Hon'ble Supreme Court: -

> *'The question whether in the absence of evidence of complainant/direct or primary evidence of demand of illegal gratification, is it not permissible to draw inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 based on other evidence adduced by the prosecution.*'

While answering the question, the Hon'ble Supreme Court summarised the law on the point as follows: -

(a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections 7 and 13 (1)(d) (i) and (ii) of the Act.

(b) In order to bring home the guilt of the accused, the prosecution has

to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. *This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.*

(c) Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

(d) In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind:

(i) if there is an offer to pay by the bribe giver without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a case of acceptance as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.

(ii) On the other hand, if the public servant makes a demand and the bribe giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is a case of obtainment. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Section 13 (1)(d)(i) and (ii) of the Act.

(iii) In both cases of (i) and (ii) above, the offer by the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Section 13 (1) (d), (i) and (ii) respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe giver and inturn there is a payment made which is received by the public servant, would be an offence of obtainment under Section 13 (1)(d) and (i) and (ii) of the Act.

(e) The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.

(f) In the event the complainant turns 'hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

(g) In so far as Section 7 of the Act is concerned, on the proof of the facts in issue, Section. 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law. Of course, the said presumption is also subject to rebuttal. ***Section 20 does not apply to Section 13 (1) (d) and (ii) of the Act.***

(h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature."

89. The Constitution Bench of the Hon'ble Supreme Court answered the question as follows: -

"In the absence of evidence of the complainant (direct/primary, oral/documentary evidence), it is permissible to draw an inferential deduction of culpability/guilt of a public servant under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act based on other evidence adduced by the prosecution."

90. After the Constitution Bench had answered the question referred to it, the Hon'ble Supreme Court allowed the Appeal against conviction and the judgment is reported as Neeraj Dutta v. State (NCT of Delhi), 2023 SCC OnLine SC 280. In that case, the prosecution had alleged that the first demand was made by the appellant to the complainant in the morning of 17.04.2000 when he met her at her residence. There was no charge framed on the basis of this demand and there was no evidence about the first demand made in the house of the appellant as no one except the complainant was present there. According to the prosecution case, the second demand was made during the trap and PW-5 was the witness to the second demand made by the appellant on 17.04.2000, who stated that that appellant had asked the complainant **to give papers regarding his electricity meter and Rs. 10,000/- to her as she was in a hurry**. The Hon'ble Supreme Court held that *"This is not a case where a specific demand of gratification for providing electricity meter was made by the appellant to the complainant in the presence of the shadow witness." And that "Every demand made for payment of money is not a demand for gratification. It has to be something more than mere demand for money."*

91. In **B. Jayaraj versus State of A. P., (2014) 13 SCC 5, Dashrath Singh Chauhan v. CBI**, (2019) 17 SCC 509 and **N. Vijaykumar versus State of Tamilnadu,** (2021) 3 SCC 687 also, the Hon'ble Supreme Court held that demand of illegal gratification is sine qua non to constitute the offence under Section 7 and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. Where only recovery of the tainted currency notes from the possession of the accused was proved and there was no proof of demand, the offence under Section 7 was not established. The above also will be conclusive insofar as the offence under Sections 13(1)(d)(i) and (ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or

abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established.

92. In **K. Shanthamma v. State of Telangana**, (2022) 4 SCC 574, PW-1, who was the only witness to the alleged demand and acceptance, stated that firstly, the demand was made of Rs 3000 by the appellant on 24-2-2000. Thereafter, continuously for three days, she reiterated the demand when he visited the appellant's office. Lastly, the appellant made the demand on 29-2-2000 and 23-3-2000. In his cross-examination, he did not state that the appellant reiterated her demand at the time of trap. His version was that on his own, he told her that he had brought the amount. The Hon'ble Supreme Court held that the version of PW 1 in his examination-in-chief about the demand made by the appellant from time to time was an improvement. There was no other evidence of the alleged demand. Thus, the evidence of PW 1 about the demand for bribe by the appellant was not at all reliable and the demand made by the appellant was not proved conclusively. The Hon'ble Supreme Court held that this was a case where the demand of illegal gratification by the appellant was not proved by the prosecution. Thus, the demand which is sine qua non for establishing the offence under Section 7 was not established.

93. The law laid down by the Hon'ble Supreme Court in the aforesaid cases fully supports the case of the appellant. The only evidence of the demand and acceptance is the statement of the complainant herself and there are contradictions in her statement, which have been noticed above. Therefore, I am of the view that the demand for and acceptance of bribe amount by the appellant, is not proved beyond reasonable doubt.

94. In **N. Vijaykumar** (Supra), the Hon'ble Supreme Court has cautioned that "Before recording conviction under the provisions of the Prevention of Corruption Act, the courts have to take utmost care in scanning the evidence. Once conviction is recorded under the provisions of the Prevention of Corruption Act, it casts a social stigma on the person in the society apart from serious consequences on the service rendered."

95. Therefore, I am of the considered view that the prosecution has failed to prove the demand and acceptance of bribe by the appellant and the finding to this effect recorded by the trial court is vitiated and is liable to be set aside.

96. In view of the foregoing discussion, the appeal is ***allowed.*** The judgment and order dated 31.03.2023 passed by Sri. Vijesh Kumar, the learned Special Judge (Prevention of Corruption Act), CBI Court No. 3, Lucknow in Criminal Case No. 02 of 2011 titled State versus Basant Kumar Bihani, arising out of RC No. 0062010A002 under Sections 7 and 13 (2) read with 13 (1) (d), Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act'), Police Station CBI/ACB, Lucknow, is hereby **set aside.** The appellant is acquitted of all the charges levelled against him. However, there will be no order as to costs.

(2024) 1 ILRA 1070
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 2951 of 2013

Km. Gulrooh Tarannum @ Raxi ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
S.P. Singh, Anil Ragav, C.K. Bharadwaj, Devendra Dahma, Noor Mohammad, Pankaj Kumar Shukla, Prashant Mishra, Rohan Gupta

Counsel for the Opposite Party:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 302/34 & 307/34 - Indian Evidence Act, 1872 - Section 32(1) - Code of Criminal Procedure, 1973 - Sections 161 & 313 - Appellants challenged conviction under Sections 302/34 and 307/34 I.P.C. for murder of Suman and attempt to murder Kamla. Court held: (1) St.ment of Kamla recorded under Section 161 Cr.P.C. was not admissible as dying declaration under Section 32(1) of Evidence Act for charge under Section 307 I.P.C., as her death was not in issue (Indrapal Vs St. of M.P., (2001) 10 SCC 76). (2) Kamla's St.ment was inadmissible for charge under Section 302 I.P.C. regarding Suman's death, as it did not relate to cause or circumstances of Kamla's death (In re Peria Chelliah Nadar, AIR 1942 Mad 450). (3) Failure to confront appellants with Kamla's St.ment during examination under Section 313 Cr.P.C. vitiated trial, causing prejudice and violating natural justice (Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622). (4) Prosecution witnesses (PW-1, PW-2, PW-3, PW-4) did not implicate appellants; PW-4 was hostile, and no eye-witness account supported involvement. (5) No corroborative evidence or dying declaration linked appellants to the crime; conviction based on inadmissible St.ment was unsustainable (Sukhar Vs St. of U.P., (1999) 9 SCC 507). Judgment of conviction set aside; appellants acquitted. (Paras 21-57)

List of Cases cited:

1. Indrapal Vs St. of M.P., (2001) 10 SCC 76 (Para 32)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. This appeal is by the accused appellant against the judgment and order of conviction and sentence, dated 01.06.2013, passed by the Additional Session Judge, Court No.2, Aligarh in Session Trial No.951 of 2008, State vs. Km. Gulrooh Tarannum @ Raxi (arising out of Case Crime No.633 of 2007) Police Station Civil Line, District Aligarh, whereby the accused appellant has been convicted under section 302 IPC and sentenced to life imprisonment with fine of Rs.50,000/- and in default of fine she is to undergo six months additional simple imprisonment, separately, for committing murder of two deceased Hasan Aziz Farooqi and Rana Aziz Farooqi; under section 304 IPC for two years rigorous imprisonment with fine of Rs.5,000/ and in default of fine she is to undergo one month additional simple imprisonment; under section 420 IPC for three years rigorous imprisonment with fine of Rs.10,000/- and in default of fine she is to undergo three months additional simple imprisonment; under section 467 IPC for five years rigorous imprisonment with fine of Rs.20,000/- and in default of fine she is to undergo six months additional simple imprisonment; under section 468 IPC for

three years rigorous imprisonment with fine of Rs.10,000/- and in default of fine she is to undergo three months additional simple imprisonment; under section 471 IPC for one year rigorous imprisonment. All the sentences are to run concurrently.

2. Hasan Aziz Farooqi was employed in Aligarh Muslim University and retired from the post of Section Officer. His wife Smt. Rana Aziz Farooqi was a teacher in Aligarh Public School. After her retirement both Hasan Aziz Farooqi and Smt. Rana Azia Farooqi were living at House No.3/18, United Colony, Amir Nisha, Police Station Civil Lines, Aligarh. As per the informant (PW-1), Hasan Aziz Farooqi and Smt. Rana Aziz Farooqi were to reach Lucknow on 23.11.2007 but they did not reach. Their nephew Rehaw Farooqi, who was residing at Lucknow, called the informant to go and verify. Accordingly, the informant came to the house of Hasan Aziz Farooqi and found the door to be locked from outside. He smelled stench coming out of the house and contacted the owner Fazal Abbas (PW-2). The house was searched from all sides and with the help of neighbours the lock was broke open. It was found that dead body of Smt. Farooqi was lying on double bed whereas dead body of Hasan Aziz Farooqi was lying on the floor. It appeared that the death has occurred several days back. The informant suspected that some unknown person killed the elderly couple and locked the house. A written report (Ex.Ka.1) in that regard has been given by the informant to the Incharge, Police Station Civil Lines, Aligarh. Contents of the written report were transcribed in the general diary and First Information Report was lodged as Case Crime No.633 of 2007, under Section 302 IPC, Police Station Civil Lines, District Aligarh on 24.11.2007 at 11.30 am.

3. According to the prosecution case, the accused appellant was living in a different portion of the same house where deceased couple was also residing. After dead body of elderly couple was found the police contacted the accused appellant and she was arrested on 26.11.2007. According to the police, one Nokia mobile phone belonging to the accused herself and one mobile phone belonging to deceased couple was recovered from the accused appellant. Recovery is said to have been witnessed by PW-1. During the course of investigation it was found that the deceased couple had opened a joint saving bank account in the Bank of Baroda, Branch Malkhan Nagar, Aligarh bearing account no.2161010000716 on 31st August, 2007. It was found that deposits made in the joint account of deceased couple had been withdrawn vide five cheques bearing cheque no.760722 dated 18.10.2007 for a sum of Rs.2,10,000/-; cheque no.760727 dated 22.10.2007 for a sum of Rs.25,000/-; cheque no.760737 dated 23.10.2007 for a sum of Rs.1,34,000/-; cheque no.760730 dated 13.11.2007 for a sum of Rs.45,000/- and; cheque no.760734 dated 14.11.2007 for a sum of Rs.2,56,000/-. The cheque leaflets utilized for withdrawal of the aforesaid amounts was actually issued to the accused appellant who had a separate account in the same branch. The primary reason for implicating the accused appellant in the present case is the use of cheque leaflets issued by Bank of Baroda to the accused appellant, for withdrawing aforesaid amounts from the joint account of the deceased couple. The cheque book issue register was recovered by the police vide Ex.Ka.35.

4. Investigation proceeded in the matter and inquest was conducted between 01.30 pm to 02.45 pm and the inquest witnesses found the death to have occurred several days earlier. There were no apparent signs of injury on the body of the two deceased. The inquest witnesses opined that in order to ascertain the cause of death postmortem be carried out of the dead bodies of two deceased. The bodies accordingly were sealed and sent for postmortem. The postmortem was conducted on 25.11.2007 at 09.45 am. The condition of the bodies as also the injuries noticed on the two deceased in the postmortem are enumerated hereinafter:-

"Deceased – Hasan Aziz Farooqi

Age- 62 years

Antemortem Injuries

1. Contusion 6cm x 3cm right side face on dissection fractured temporal bone right side.

2. Contusion 3cm x 2cm over nose, deformity of nose, fractured of nose bone.

3. Contusional area of size 10cm x 6cm left side chest, fractured 5th and 6th ribs.

Cause of death – Due to haemorrhagic shock and respiratory failure as a result of ante-mortem injuries.

Duration – Two to Seven days

Deceased – Rana Aziz Farooqi

Age- 55 years

Antemortem Injuries

1. Contusion 12cm x 6cm left side chest, fractured left side 3rd, 4th, 5th ribs.

2. Contusion 20cm x 10 cm right side chest, fractured right side 3rd, 4th, 5th and 6th ribs.

Cause of death – Due to haemorrhagic shock and respiratory failure as a result of ante-mortem injuries.

Duration – Two to Seven days"

5. As per the postmortem reports the cause of death of both the deceased was haemorrhage due to shock and respiratory failure as a result of ante-mortem injuries. The expected time of death as per the postmortem report was 2 to 7 days prior to conduct of postmortem.

6. The Investigating Officer collected bloodstained and plain earth as well as clothes of the two deceased, as also the cheque leaflets utilized for withdrawal of the amount, and sent it all to the Forensic Laboratory, for its opinion. Report of the Forensic Laboratory has been exhibited as Ex.Ka.47 as per which blood was found on the clothes of two deceased but the signatures made on the cheque leaflets did not match with the handwriting of the accused appellant.

7. The Investigating Officer recorded the statement of witnesses and ultimately submitted charge sheet against the accused appellant under Sections 302, 404 IPC on 12.02.2008. The concerned Magistrate having taken cognizance committed the case to the court of sessions where it got registered as Session Trial No.851 of 2008.

Charges were framed against the accused appellant under Sections 302, 404, 406, 420, 467, 468, 471 IPC on 17.01.2009. The accused appellant was made aware of the charges to which she denied and demanded trial.

8. As per the prosecution case, the accused appellant was in dire need of money as she had availed of education loan and its repayment was due. With ill motive and object the accused appellant withdrew amounts from the account of the deceased couple by fabricating documents and then gave poison to Hasan Aziz Farooqi on 16.11.2007. After Hasan Aziz Farooqi became unconscious the accused pounced on his chest and caused his death due to suffocation and the injuries caused, on the same day. When Smt. Rana Aziz Farooqi returned at 04.30 in the same evening, the accused appellant offered her coffee in a similar fashion by mixing poison in it and after she became immobile pressed on her chest too and suffocated her to death.

9. In order to prove its case the prosecution has relied upon documentary evidence in the form of first information report as Ex.Ka.2; written report as Ex.Ka.1; recovery memo of bloodstained and plain earth as Ex.Ka.16; recovery memo of mobile as Ex.Ka.33; recovery memo of cheque book register and supurdginama as Ex.Ka.35; recovery memo of cheques and sample signature card as Ex.Ka.36; postmortem report of Hasan Aziz Farooqi as Ex.Ka.31; postmortem report of Rana Aziz Farooqi as Ex.Ka.32; report of Forensic Science Laboratory as Ex.Ka.47 & Ex.Ka.48; inquest reports of Hasan Aziz Farooqi as Ex.Ka.5 and Rana Aziz Farooqi as Ex.Ka.11; chargesheet as Ex.Ka.37 and; site plan as Ex.Ka.4 etc.

10. In addition to the above documentary evidence, the prosecution has produced oral testimony of informant Shams Iqbal as PW-1. Fasal Abbas Naqvi, who was the owner of the house wherein deceased couple and accused were residing, has been produced as PW-2. PW-3 is Shabuddin, who was a Constable in the concerned police station and has proved the chik FIR. PW-4 is Akhilesh Tiwari, who was posted as Clerk in the Bank of Baroda, Malkhan Nagar, Aligarh, and has proved the issuance of token against aforesaid five cheques for payment of amounts referred to above.

11. PW-5 is Kuldeep Singh, who was Sub Inspector and was entrusted with the investigation of Case Crime No.633 of 2007. He had prepared first parcha and had recorded statement of PW-1 in the case diary. He had also prepared the site plan. PW-5 had also conducted the inquest etc. He had also proved the various police papers as well as recovery of bloodstained and plain earth. PW-6 is Rajnish Sonkar, who was posted as Senior Managar, Canara Bank. He has not recognized the accused but has merely proved the fact that loan had been availed of by the accused. PW-7 is Raman Kant, who was posted as Chief Manager, Punjab National Bank and proved the fact that an account was opened by the accused appellant on 04.09.2004 and also verified the fact of depositing Rs.16,720/- in her account.

12. PW-8 is Ashok Kumar Gupta, who was posted at Punjab National Bank, Deputyganj, Bulandshahr and has proved the deposit of repayment amount towards education loan in the account of accused on 17.11.2007. PW-9 is Abdul Sagar, who was posted as Branch Manager in the State Bank of India, AMU Branch, Aligarh. This

witness has proved withdrawal of various amounts from the account of deceased Hasan Aziz Farooqi whereafter such amounts apparently were deposited in the Bank of Baroda by clearance of cheques. PW-10 is Arun Kumar Vishnoi, who was posted as Officer in the Bank of Baroda and has proved the release of amounts upon clearing of five cheques issued to the accused appellants from the joint account of the deceased. Testimony of PW-10 is relevant and shall be dealt with in detail later.

13. PW-11 is Dr. Tariq Ahmad, who has proved the postmortem report of the two deceased. As per PW-11 both the deceased died several days prior to conduct of postmortem and decomposition of their bodies had already commenced. Maggots were also found on their bodies. In the opinion of doctor, the death occurred 2-7 days prior to postmortem. He has stated that the time of death of both the deceased is different but it cannot be specified.

14. PW-12 is Laxman Rai, who was the Incharge Inspector in Police Station Civil Line, Aligarh. This witness has stated that he had taken over the investigation of present investigation on 25.11.2007 and had arrested the accused on 26.11.2007. He has proved recovery of two mobile phones from the accused on the date of arrest. As per this witness, the accused confessed her offence and had also explained the manner in which she initially offered poison to the two deceased and later caused their death due to suffocation. He also stated that the accused appellant had informed him that she was residing at Venus Apartment but he made no enquiries about the details or ownership of such house nor he visited Venus Apartment to verify as to when the accused appellant shifted to such address.

15. PW-13 is Uttam Chand, who was posted as Joint Manager of Bank of Baroda and has verified the fact that a total sum of Rs.6,70,000/- has been illegally withdrawn from the joint account of two deceased by utilizing cheque leaflets issued to the accused appellant. This witness has stated that the payment vide five cheques were released on bearer cheques which contained joint signatures of both the deceased on its front and reverse. It is also stated that the cheques contained signatures of one Shahnawaj on the reverse and apparently the amount was received by Shahnawaj himself.

16. PW-14 is Shri Kishan, who was posted as Constable and has proved the document relating to dispatch of recovered material to the Forensic Laboratory at Agra.

17. The accused appellant was confronted with the incriminating material produced by the prosecution against her. She empathetically denied having killed anyone. She has denied the recovery of mobile phone as also other evidence which has been produced against her. With regard to deposit of Rs.45,000/- on 11.07.2007, towards repayment of loan, the accused explained that she deposited her money in the Overseas Bank account and had withdrawn it from bank. Some of the money deposited in the account was from her savings and also from the salary which she received as a teacher. She has empathetically denied having withdrawn any amount from the joint account of the two deceased. Accused appellant also stated that police personnels have falsely implicated her. In reply to the last question, the accused appellant has stated that her cheque book and passbook got stolen regarding which she gave written and oral

information to the bank. With regard to the report of Forensic Laboratory the appellant has stated that she had no knowledge as to who signed on cheque leaflets for withdrawal of amount from the joint account of deceased couple.

18. In defence, the accused appellant has produced Puran Singh as DW-1, who has stated that withdrawal was made from the joint account of the two deceased lastly on 19.11.2007 and on that date the joint account was lastly operated. The withdrawal slip contained signatures of the two deceased whereupon a sum of Rs.896 was actually withdrawn. The defence witness has also stated that he is not aware as to who had withdrawn the amount. However, as per rules the account holder was required to be present for withdrawal of amount and for closure of account. He has proved the bank records in respect of withdrawal of amount from the joint account of the two deceased and its closure.

19. The court below has examined the evidence produced by prosecution as also the defence version and has come to the conclusion that the death of elderly couple was caused by the accused appellant so as to cover up the huge amount illegally withdrawn from their joint account. The court below has found that this was a case based on circumstantial evidence and the circumstances clearly completed the chain such that it led to hypothesis of guilt attributed to the accused appellant. The court below has taken into consideration the fact that accused appellant was residing next to the house of deceased couple and had disappeared soon after their death. The court below has also taken note of the fact that the mobile phone of the deceased had been recovered from the accused appellant. The important circumstance which had been relied upon by the court below to implicate the accused appellant is the use of five cheque leaflets issued to the accused appellant for illegal withdrawal of Rs.6,70,000/- from the joint account of the two deceased. Trial court has also taken note of fact that the relationship between the accused and two deceased was cordial and the deceased couple treated the accused like their daughter. This relationship of trust had been misutilized by the accused appellant to illegally withdraw the huge amount from their joint account and then to cover it up she killed the two deceased. It is with such findings that the court below has convicted the accused appellant and sentenced her vide impugned judgment and order. Aggrieved by it, the accused appellant is before this Court in the present appeal.

20. Sri Prashant Mishra, learned counsel appearing for the appellant submits that this is a case of circumstantial evidence in which the chain of events have not been connected so as to prove the guilt of the accused appellant. It is further submitted that the recovery of mobile phone has not been proved from the accused appellant since the sole independent witness of recovery of mobile phone, namely PW-1, has turned hostile.

21. Learned counsel for the appellant further submits that the accused appellant had already shifted her residence to Venus Apartment and that such fact was clearly mentioned in the bank records relating to issuance of cheque book to her. It is further submitted that the prosecution has not been able to establish that the amount of Rs.6,70,000/- was in fact withdrawn by the accused appellant. It is the case of the appellant that her cheque book and passbook was misplaced on the very day

that it was issued by the bank, in respect of which written and oral information was given to the bank authorities. Learned counsel further argues that it was otherwise not possible for the bank to have released any amount on a cheque leaflets issued to different account holder. The complicity of bank officials is explicit on record, which has been overlooked. Learned counsel further submits that the accused appellant had sufficient means to repay the loan amount of Rs.71,000/- and the prosecution case that for such purposes Rs.6,70,000/- were unauthorizedly withdrawn by the accused appellant is merely an allegation without any proof of it. Learned counsel further submits that neither the withdrawal of amount by the appellant is proved nor her complicity has been established, and therefore, her conviction and sentence is liable to be reversed. Learned counsel also submits that accused appellant otherwise has undergone incarceration of more than 13 years and has been recently enlarged on bail by the Supreme Court.

22. Sri Amit Sinha, learned AGA, on the other hand, contends that there is definite motive attributed to the accused appellant for committing the offence and the fact that cheque leaflets issued to the accused appellant had admittedly been used for withdrawing Rs.6,70,000/- clearly proves the involvement of accused appellant in committing the offence. It is also submitted that the recovery of mobile phone from the accused appellant is clearly established and is a strong circumstance against the accused appellant. Learned AGA further submits that the fact that accused appellant was residing next to the house of the deceased and had shifted soon after death to another location also proves her complicity in offence.

23. We have heard learned counsel for the parties and have carefully perused the records of the present appeal including the lower court records.

24. From the facts placed before the Court, it is apparent that the two deceased died a homicidal death while they were inside her house and the factum of death was brought to light by PW-1 on 24.11.2007. The prosecution case essentially relies upon the confessional statement of the accused as well as recovery of a mobile phone of the deceased from her. Prosecution has also relied upon the fact that 5 cheque leaflets issued to the accused appellant has been utilized for withdrawing a sum of Rs.6,70,000/- from the joint account of the deceased. The circumstance that the accused appellant lived next to the house of the deceased couple and she soon left her place of abode is also a circumstance which is relied upon against her.

25. The records clearly reveal that there is no ocular testimony of the incident. The postmortem report reveals that the deceased died due to shock and haemorrhage on account of respiratory failure caused due to ante-mortem injuries. The viscera was preserved. Report of the forensic laboratory in that regard has been exhibited in which no traces of any poison etc. are found.

26. ed and taking advantage of their immobility caused injuries resulting in their death due to suffocation does not find support from the evidence on record in the form of viscera report. Apart from the confession of the accused appellant, there is no other trace or evidence to show that the two deceased were administered poison. The confession of accused is not before the

Magistrate and even the inadmissible confession made before the Police is not proved. The fact that viscera report does not support administering of poison dents the prosecution case with regard to the manner in which the offence has been committed.

27. This being a case of circumstantial evidence, the prosecution is required to establish that the chain of events are such that it leads to the hypothesis of guilt exclusively attributed to the accused appellant and that there is no alternate hypothesis of innocence of the accused appellant available on record. The evidence in that regard has been minutely scanned by us with the assistance of learned counsel for the parties.

28. First and foremost, we take up the issue relating to recovery of the mobile phone of the deceased from the accused appellant. This recovery is proved vide Ex. K-33. According to the Investigating Officer, mobile phone of the accused appellant alongwith the mobile phone of the deceased was recovered from the accused. PW-12 in his examination-in-chief has stated that the accused appellant disclosed him that one of the mobile phone recovered belonged to the deceased. However, in the cross-examination the Investigating Officer i.e. PW-12 has stated that he could ascertain that the recovered phone was of the deceased on the basis of call detail record. No call detail record, however, has been produced in evidence. There is no certificate under Section 65-B of the Evidence Act. The statement of PW-12 regarding the manner in which he came to know that one of the recovered phone belonged to the deceased is found to be inconsistent. We further find that recovery of mobile phone is established by the testimony of PW-1. PW-1 is the only person, who is said to have signed the recovery memo. When PW-1 has been produced in evidence, he has clearly turned hostile and has not supported the prosecution case with regard to recovery of mobile phone of deceased from the accused appellant. There is no other manner in which the recovery of mobile phone is established. We also find that there is no statement of the accused recorded by the Investigating Officer, which led to such recovery from the accused appellant. The recovery of mobile phone could have been read against the accused appellant only if such recovery was shown to have been distinctly made on the basis of information furnished by the accused, in terms of Section 27 of the Evidence Act. There is admittedly no evidence on record about any information of the accused leading to recovery of the mobile phone. The evidence in that regard is found to be wholly insufficient. The circumstance relating to recovery of mobile phone, therefore, is also not found to have been established.

29. We have perused the judgment of the trial court, which contains a finding that recovery of mobile phone is proved but the evidence noticed above has not been taken note of nor the applicable law has been applied with reference to the statutory scheme before returning such finding. The finding of the court below with regard to recovery of mobile phone having been established from the accused appellant is, consequently, unsustainable and is reversed.

30. The other circumstance relied upon by the prosecution against the accused appellant is that the accused was staying next to the house of the deceased

and she soon left her place of abode after their death. This circumstance is sought to be proved on the strength of testimony of PW-2. PW-2 has supported the prosecution case in this regard but has admitted in his testimony that there was no written agreement of tenancy executed in favour of the accused appellant. PW-2 has not been able to tell as to when she approached him to let out his house and since when she was staying in his premises. He also had no knowledge about the timings of work and when would she return. He has denied the suggestion that there was any demand of increased rent from the accused. PW-2, however, has stated that he had left his house about 20-25 days prior to the incident and had only returned on 21.11.2007. Upon return he noticed no abnormality. He was not informed by anyone that stench was oozing out of the house.

31. The defence has placed heavy reliance upon Ex.Ka-35, which is the recovery of cheque issue register from the Punjab National Bank. The recovery memo clearly contains recital to the fact that when cheque leaflets were issued to the accused appellant, her address was mentioned as F/5-Vth Floor, Venus Apartment. The Investigating Officer of the case i.e. PW-12 has also admitted that he was informed by the accused appellant that sometime prior to the incident accused appellant had shifted to Venus Apartment. PW-12 though admits that such fact was disclosed to him but he made no attempt either to visit Venus Apartment nor made any enquiry as to who was the owner of this house. PW-2 has also stated that the accused appellant informed her that while he had gone out of Aligarh, she had shifted to Venus Apartment. From the evidence placed on record, we find that the defence set up by the accused that she had shifted to Venus Apartment is probablized from Ex.Ka-34 and is otherwise accepted by PW-12 in his testimony. When exactly the accused appellant had shifted to Venus Apartment or when was it taken on rent are issues on which there are no definite evidence produced by the prosecution. Upon evaluation of evidence in this regard, we do not find the circumstance of accused appellant leaving her place of abode soon after the incident to have been established beyond reasonable doubt. On this aspect, we are inclined to grant benefit of doubt to the accused appellant.

32. This takes us to the most important aspect of the present case i.e. utilization of cheque leaflets issued to the accused appellant for withdrawal of Rs.6,70,000/- from the account of the deceased. The evidence has been perused by us and it is not in issue that 5 cheque leaflets, which had been utilized for withdrawal of Rs.6,70,000/-, were in fact issued to the accused appellant. These cheques have been duly exhibited during trial as Ex.Ka-38. The account opening form has also been exhibited and is part of the record. All 5 cheque leaflets contain the signatures of the two deceased. The cheques and the account opening form, both, contain the signatures of the two deceased. The signatures of the deceased are also present on the reverse of all 5 cheques. We have carefully perused the exhibited cheque leaflets and the account opening form containing signatures of deceased. There is apparent variation in the signatures of the deceased on the front and reverse of the cheques even with the naked eye. What is, however, surprising to note is that on the reverse of these 5 cheques, there is a signature of one Shahnawaj. Signatures of Shahnawaj are present in all 5 cheques.

The spelling and signatures of Shahnawaj are distinct on all 5 cheques. We are at a loss to understand as to how payment against a bearer cheque contained additional signatures of Shahnawaj. PW-10 and PW-13 in their testimony have admitted that payments drawn from the account of the deceased have apparently been released to Shahnawaj. This Shahnawaj has neither been identified nor has been made an accused in the case. We also find the signatures on the cheques of the deceased to vary substantially from the admitted signatures contained in the account opening form, which is duly exhibited. What is more striking is that these cheque leaflets had in fact been issued to the accused appellant. Cheque leaflets issued to a particular account holder can be utilized for withdrawal of amount from the concerned account holder only. In the event cheque leaflets issued to the accused appellant was being utilized for withdrawal of amount from the joint account of the deceased, an objection ought to have been raised by the bank officials. No payment could be released in such eventuality. No such objection is apparently raised by any of the bank officials. PW-10 and PW-13 in their testimony have categorically admitted that they never saw the accused appellant withdrawing any amount from the account of the deceased. None of the witnesses have even established the presence of the accused at the bank on the date when these withdrawals were made from the account of the deceased.

33. Bank officials in their testimony have admitted that greater scrutiny is expected to be carried out by the bank officials when bearer cheques are encashed for a sum above Rs.2 lacs. No such scrutiny was in fact done by the bank officials. This fact is admitted to PW-10 and PW-13. PW-13 has also accepted that withdrawal was allowed by PW-10 of sums above Rs.2 lacs by exceeding his jurisdiction. Ordinarily withdrawal of amount from a different account by presenting cheque leaflets of a different account would be impermissible. The manner in which the bank allowed these leaflets to be utilized for withdrawal of sums from a different account remains a matter of serious concern and has been grossly overlooked by the court below. The prosecution has not been able to come up with any explanation in this regard.

34. We also find from evidence on record that the accused appellant had sent a handwritten letter on 15.10.2007 to the Branch Manager of Bank of Baroda clearly stating that she has lost her cheque book containing 20 blank leafs and that any payment from these cheques be stopped. It is the case of the accused appellant that this letter was not accepted by hand, and therefore, he sent it by registered post on 15.10.2007. The receipt of dispatch of this letter by registered post is duly produced vide Paper No.59Kha. The bank officials have been confronted with these documents, and except to state that no letter was received there is no other evidence produced by the bank in the form of letter receiving register etc. to show that such information was actually not received by the bank.

35. The fact that cheque leaflets were already reported by the accused appellant to have been stolen, coupled with the fact that payments were released on these cheque leaflets from a different account, unauthorizedly, by bank officials, who clearly exceeded their jurisdiction in releasing such amount, clearly casts a shadow of doubt upon the role of the bank

officials, which has neither been investigated by the Investigating Officer nor explained either before the trial court or before this Court.

36. So far as the motive attributed to the accused appellant is concerned, the only evidence produced by the prosecution is with regard to return of loan amount availed of by the accused appellant. This amount of loan was of Rs.71,000/-. The accused appellant in her statement has clearly indicated that she had a Savings Bank Account in the Indian Overseas Bank, from which she had withdrawn the amount to repay the loan. It is otherwise indicated that the accused appellant is a qualified teacher and was working when she was implicated in the present case. Accused appellant, therefore, had sufficient means available to her to have repaid the education loan amount.

37. The fact that accused appellant had availed of education loan otherwise indicates that accused appellant came from a family of humble origin and intended to pursue her studies further. We find it difficult to accept the prosecution case that merely for repayment of loan amount of Rs.71,000/-, she would commit the double murder, particularly when the deceased couple treated her like her daughter. If reimbursement of Rs.71,000/- loan was the only purpose, it was possible that the accused appellant would have borrowed or taken such amount from the deceased couple, considering their close relationship. The prosecution witnesses have admitted that the deceased couple treated the accused appellant as their daughter. The deceased couple admittedly had no other issue.

38. A case based upon circumstantial evidence is required to be proved beyond reasonable doubt and standard of proof in this regard stands crystallized in paras 152 and 153 of the judgment of the Supreme Court in Sharad Birdichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622. The proposition of law in that regard has consistently been followed and reiterated in a recent decision of the Supreme Court in Jabir and others Vs. State Of Uttarakhand, 2023 SCC OnLine SC 32, wherein the Supreme Court observed as under in paras 25 and 26:-

"25. 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. These were so stated in Sarad Birdichand Sarda (supra) where the court, after quoting from Hanumant, observed that:

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

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 where the following observations were made : [SCC para 19, p. 807 : SCC (Cri.) p. 1047]

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

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

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

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

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of 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."

26. 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."

39. When the evidence in the present case is minutely scrutinized with reference to the principles of law laid down by the Supreme Court in Sharad Birdichand Sarda (supra) and consistently followed in other decision as well as reiterated in Jabir (Supra), we have no hesitation in coming to the conclusion that the prosecution has utterly failed to connect the chain of events so as to point exclusively to the hypothesis of guilt attributed to the accused appellant. Several aspects including the role of bank officials as well as Shahnawaj, who received the sums withdrawn from the bank, have been left completely overlooked. The accused appellant cannot be held liable for the murder of two elderly couple merely because cheque leaflets issued to her had been misutilized for withdrawal of Rs.6,70,000/- from the joint account of the two deceased.

40. For the reasons, discussions and deliberations held above, we cannot approve the conclusion and finding returned by the court below with regard to guilt of the accused appellant. The conviction and sentence of the accused appellant is, consequently, reversed.

41. Accordingly, this appeal succeeds and is allowed. The impugned judgment and order dated 1.6.2013 is hereby set aside and the appellant is acquitted of the charges levelled against her. Since the appellant has already been released on bail by the Supreme Court, as such, her sureties and

bail bonds shall stand discharged and she shall be set free, unless she is wanted in any other case, subject to compliance of section 437A Cr.P.C.

(2024) 1 ILRA 1082
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.12.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 3524 of 2023

Salman Tanveer ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Mohd. Amir Khan, Surya Prakash

Counsel for the Opposite Parties:
G.A.

Criminal Law - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 3(1)(Da), 3(1)(Dha), 3(2)(V) & 18 - Indian Penal Code, 1860 - Sections 147, 148, 149, 323, 504, 506, 332, 353, 342 & 364 - Code of Criminal Procedure, 1973 - Section 438 - Constitution of India, 1950- Article 21 - Appellant challenged rejection of anticipatory bail in Case Crime No. 433 of 2022 for offences under SC/ST Act and IPC, alleging incident occurred at night inside an electricity office, not in public view. Court held: (1) Section 18 of SC/ST Act bars anticipatory bail, but bar is not absolute; it yields to constitutional protections under Article 21 in exceptional cases (Prathvi Raj Chauhan Vs U.O.I., (2020) 4 SCC 727). (2) Offences under Sections 3(1)(Da), 3(1)(Dha), 3(2)(V) of SC/ST Act require insult or intimidation in public view; private incident inside office at night, without public humiliation, does not attract these provisions (Hitesh Verma Vs St. of Uttarakhand, (2020) 10 SCC 710). (3) IPC offences (Sections 147, 148, 149, 323, 504, 506, 332, 353, 342, 364) may not apply without public element or evidence of assembly, rioting, or assault on public servant; private dispute lacks prima facie criminality (Gopal Mishra Vs St. of U.P., Crl. Misc. Writ Petition No. 16343 of 2020). (4) Trial court erred in mechanically applying Section 18 bar without assessing public view requirement or Article 21 rights (Dataram Singh Vs St. of U.P., (2018) 3 SCC 22). (5) Appellant entitled to anticipatory bail; in event of arrest, released on Rs. 50,000/- bond with conditions for cooperation and non-intimidation. Impugned order set aside; appeal allowed. (Paras 5-13)

Appeal Allowed.

List of Cases cited:

1. Prathvi Raj Chauhan Vs U.O.I., (2020) 4 SCC 727 (Para 7)

2. Gopal Mishra Vs St. of U.P., Crl. Misc. Writ Petition No. 16343 of 2020 (Para 7)

3. Hitesh Verma Vs St. of Uttarakhand, (2020) 10 SCC 710 (Para 7)

4. Dataram Singh Vs St. of U.P., (2018) 3 SCC 22 (Para 10)

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

1. Heard learned counsel for the appellant as well as learned A.G.A. for the State and perused the record.

2. The present appeal has been filed with a prayer to allow the appeal as well as to set aside the judgement and order dated 30.10.2023 passed by learned Special Judge, S.C./S.T. Act, Lucknow in Anticipatory Bail Application No.8326 of 2023, arising out of Case Crime No.433 of 2022, under Sections 147, 148, 149, 323, 504, 506, 332, 353, 342, 364 I.P.C. and Section 3(1)(Da), 3(1)(Dha) and 3(2)(V) of S.C./S.T. Act, Police Station Thakurganj, District Lucknow.

3. The prosecution case in brief is that the complainant is an S.D.O. of Electricity

Department and on the date of incident, the accused alongwith his companions had kidnapped the informant and thereafter, they abused him in caste abusive languages, beaten him and also threatened him to life.

4. Learned counsel for the appellant submits that the entire prosecution story is false and fabricated. No case under the Sections of 3(1)(Da)(Dha) of S.C./S.T. Act is attracted against the appellant. As per the prosecution story, the incident is alleged to have taken place at night inside the electricity office, which is neither a public place nor there was any public view and the instant appellant was not present at the time of the alleged incident. He further submits that even the offence under the provisions of I.P.C. is also not attracted against the appellant. Thus, the entire prosecution story appears to be false and lodged with malafide intention to implicate the entire family of the appellant.

5. He further submits that by means of the impugned order dated 30.10.2023, the application seeking anticipatory bail by the present appellant came to be rejected by learned trial Court on the ground that entertaining such application for anticipatory bail is specifically barred and excluded by virtue of Section 18 of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'Act, 1989').

6. Being germane to the present controversy, Section 18 of SC/ST Act is quoted herein below :

"18. Section 438 of the Code not to apply to persons committing an offence under the Act.?Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

7. He further submits that the aforesaid impugned order dated 30.10.2023 is patently illegal insofar as the same has been passed without considering the law laid down by Hon'ble the Apex Court in **Prathvi Raj Chauhan Vs. Union of India and Other; (2020) 4 SCC 727** and judgment rendered by a Division Bench of this Court in the case of **Gopal Mishra Vs. State of U.P. and Others; Criminal Misc. Writ Petition No.16343 of 2020.** He further submits that the incident does not took place in the public view and public place, therefore, the appellant may be given benefit of judgment rendered by the Hon'ble Supreme Court in the case of **Hitesh Verma Vs. State of Uttarakhand, (2020) 10 SCC 710,** wherein in para 13 and 18, Hon'ble the Supreme Court has opined as under:-

"13. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the Society is subjected to indignities, humiliations and harassment. The assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment. Every citizen has a right to avail their remedies in accordance with law. Therefore, if the appellant or his family members have invoked jurisdiction of the civil court, or

that respondent No.2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that respondent No.2 is member of Scheduled Caste.

18. Therefore, offence under the Act is not established merely on the fact that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out."

8. On the basis of above, he further submits that denial of anticipatory bail on the basis of bar contained in Section 18 of Act, 1989 is not sustainable. Therefore, the appellant is entitled for anticipatory bail.

9. Per contra, learned A.G.A. has vehemently opposed the prayer by submitting that Section 18 of SC/ST Act provides specific bar, in order to prevent and protect atrocities being committed in respect of members belonging to SC/ST Community. Therefore, such enactment should be construed strictly and in this view of the matter, no fault with the impugned order can be found.

10. Considering the arguments advanced by learned counsel for the parties and going through the contents of the impugned order passed by the trial court dated 30.10.2023 and the contents of the F.I.R., as the alleged incident took place at night and also inside the electricity office and not in the public place nor there was any public view, thus, no question arose that there is any public humiliation caused to the appellant for lodging the case under Section 3(1)(Da)(Dha) of S.C./S.T. Act and even there is nothing to show that other Sections of the I.P.C. are also attracted in the case of the appellant and also considering the Section 18 of the Act, 1989 which provides that there is a bar to grant anticipatory bail as well as considering the law laid down by Hon'ble the Apex Court in the case of **Prathvi Raj Chauhan (Supra)** and judgment rendered by a Division Bench of this Court in the case of **Gopal Mishra (Supra)** and further considering the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, reported in (2018) 3 SCC 22 and Hitesh Verma (Supra)**, this Court is of the view that the learned court below has failed to appreciate the material available on record. The order passed by the court below is liable to be set aside.

11. Accordingly, the appeal is allowed. Consequently, the impugned judgment and order dated 30.10.2023 passed by learned Special Judge, S.C./S.T. Act, Lucknow in Anticipatory Bail Application No.8326 of 2023, arising out of Case Crime No.433 of 2022, under Sections 147, 148, 149, 323, 504, 506, 332, 353, 342, 364 I.P.C. and Section 3(1)(Da), 3(1)(Dha) and 3(2)(V) of S.C./S.T. Act, Police Station Thakurganj, District Lucknow, rejecting the anticipatory bail of the appellant, is hereby set aside and reversed.

12. It is directed that in the event of arrest of the appellant, namely, **Salman Tanveer** in Case Crime No.433 of 2022, under Sections 147, 148, 149, 323, 504, 506, 332, 353, 342, 364 I.P.C. and Section 3(1)(Da), 3(1)(Dha) and 3(2)(V) of S.C./S.T. Act, Police Station Thakurganj, District Lucknow, he shall be released forthwith by the Station House Officer of the police station concerned, on his furnishing a personal bond of Rs.50,000/- with the following condition:-

(i) That the accused-appellant shall make himself available for interrogation by police authorities as and when required and will cooperate with the investigation;

(ii) That the accused-appellant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer; and

(iii) That the accused-appellant shall not leave India without the previous permission of the Court.

13. It is made clear that the observation made herein above are only confined to the disposal of the instant criminal appeal i.e. anticipatory bail application only and has no effect on the ultimate merit of the case.

(2024) 1 ILRA 1085
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.11.2023

BEFORE

THE HON'BLE MRS. SADHNA RANI (THAKUR), J.

Criminal Appeal No. 8217 of 2023

Ram Prasad ...Appellant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Appellant:
Pt. S.P. Sharma, Deepika Sharma

Counsel for the Opposite Parties:
G.A., Sri Virendra Singh Patel

Criminal Law - Code of Criminal Procedure, 1973 - Sections 156(3), 200, 202 & 203 - Indian Penal Code, 1860 - Sections 420, 323, 504 & 506 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)(Da) & 3(1)(Dha) - Appellant challenged dismissal of complaint under Section 203 Cr.P.C. for offences under IPC and SC/ST Act, alleging bribery for job placement. Court held: (1) At dismissal stage under Section 203 Cr.P.C., Magistrate must assess prima facie case from complaint, witness St.ments under Sections 200 and 202, and investigation report; no detailed evaluation required (Ghanshyam Singh Vs St. of U.P., 2007 (3) JIC 599 (All)). (2) "Sufficient ground for proceeding" means prima facie satisfaction that complaint is not false or vexatious; Magistrate's discretion is judicial, not substitutable by High Court (Nagawwa Vs Veeranna Shivalingappa Konjalgi, 1976 Law Suit (SC) 189). (3) Appellant's claim of paying Rs. 50,000/- for job lacked supporting evidence (e.g., bank St.ments); age (42 years) disqualified him from contract job (Chandra Deo Singh Vs Prakash Chandra Bose, AIR 1968 SC 117). (4) Witnesses' St.ments were vague; no proof of public humiliation for SC/ST Act applicability; simple injuries insufficient for offences (Nirmaljit Singh Hoon Vs St. of West Bengal, (1973) 3 SCC 753). (5) Dismissal order reflected prima facie evaluation; no error warranting interference (Dilip Kumar Vs Brajraj Srivastava, Criminal Appeal No. 561 of 2012). Appeal dismissed. (Paras 7-25)

Criminal Appeal Dismissed.

List of Cases cited:

1. Ghanshyam Singh Vs St. of U.P., 2007 (3) JIC 599 (All) (Para 7)

2. Nagawwa Vs Veeranna Shivalingappa Konjalgi, 1976 Law Suit (SC) 189 (Para 8)

3. Chandra Deo Singh Vs Prakash Chandra Bose, AIR 1968 SC 117 (Para 9)

4. Nirmaljit Singh Hoon Vs St. of West Bengal, (1973) 3 SCC 753 (Para 10)

5. Dilip Kumar Vs Brajraj Srivastava, Criminal Appeal No. 561 of 2012 (Para 11)

6. SW Palanitkar Vs St. of Bihar, 2001 Law Suit (SC) 1408 (Para 21)

(Delivered by Hon'ble Mrs. Sadhna Rani (Thakur), J.)

1. Heard learned counsel for the appellant, Sri Vibhav Anand Singh, learned A.G.A. for the State, learned counsel for the opposite party no.2 and perused the record.

2. This appeal has been filed against the judgment and order dated 31.07.2023 passed by Special Judge (SC/ST) Act, Jhansi summoning the appellant in Criminal Case No. 55 of 2023 CNR No. UPJS01-002845-2023 (Ram Prasad Vs Alok Shndilya and others), under Sections 420, 323, 504, 506 I.P.C. and Section 3(1) Da, Dha of SC/ST Act, Police Station Sipri Bazar, District Jhansi.

3. By the impugned order the complaint of complainant was dismissed under Section 203 Cr. P.C.

4. As per fact of the case, an application under Section 156(3) Cr. P.C. dated 08.05.2023 was moved by the appellant before the trial court with the allegation that he is the person belonging to SC/ST community. As the parties were known to each other. The opposite party no.1 lured him to arrange a job for him on contract basis and in this regard, the opposite party no.1 demanded Rs. 50,000/- from the appellant. On 15.07.2022, 01.02.2023 and 03.02.2023 the appellant withdrew Rs. 20,000/-. Rs. 20,000/- and Rs. 10,000/- respectively from the Account No. 3373315131 of his wife Poonam and handed over the same to opposite party no.1-Alok Shndilya in front of his wife namely Poonam. He was promised by the opposite party no.1 to arrange a job for him within one month. But neither the job was arranged for the appellant nor his amount was returned back. On 15.04.2023 at 12.00 hours in the Noon, the opposite party no.1 Alok Shndilya along with two other unknown persons met him, all of them hurled abuses and caste based words, they also thrashed him with kick,fist and the belt. He was further given threat of life if he demands his money back. Sudhir Purohit and Charan Singh witnessed the incident and saved the appellant. On the same day, he got himself medically examined at the District Hospital Male, Jhansi and went to the police station but his report was not written. On 17.04.2023 he sent a registered letter to the Senior Superintendent of Police, Jhansi along with copy of the pass book and injury report, but no action was taken.

5. The application under Section 156 (3) Cr. P.C. of the appellant is said to have been registered as a complaint. The trial court after perusing the statements under Section 200 and 202 Cr. P.C. of the appellant/applicant and the witnesses respectively and other evidence on record dismissed the complaint of the appellant under Section 203 Cr. P.C.

6. It is argued by the learned counsel for the appellant that the version of the complaint is supported by the statements of

complainant and the witnesses recorded under Sections 200 and 202 Cr. PC. respectively. The medical examination report of the appellant from the District Hospital, of the same day, is appended with the paper book, thus the version of the complaint fully discloses a cognizable offence against opposite party no2. hence prayer is made accordingly.

7. Learned counsel for the appellant has placed reliance on judgement ***Ghanshyam Singh Versus State of U.P. and others 2007(3) JIC 599 (All) and NAGAWWA Versus Veeranna Shivalingappa Konjalgi 1976 Law Suit (SC) 189*** and argued that Court cannot evaluate the evidence at this stage of Section 203 Cr. P.C., as it was finally deciding the case, non consideration of the documents produced by the accused at this stage is proper procedure.

8. Attention of this court is again drawn towards the judgement is ***SW Palanitkar Versus State Bihar 2001 Law Suit (SC) 1408*** wherein the phrase "sufficient ground for proceeding" used in Section 203 Cr. P.C. has been explained that at the stage of issue of process against the accused the words sufficient ground for proceeding means only a prima facie satisfaction that, complaint is either false or vexatious or intended only to harass the accused. The court need not be satisfied that, whether trial court will result into conviction.

9. Judgment in ***Chandra Deo Singh Versus Prakash Chandra Bose alias Chabi Bosd other 1963 0 Supreme (SC) 11*** is also placed before the Court wherein the Apex Court held that for determining the question whether any process is to be issued or not, the Magistrate has to be satisfied whether there is "sufficient ground for proceedings" and not whether there is sufficient grounds for conviction.

10. Again judgment in ***Nirmaljit Singh Hoon Versus The State of West Bengal and another (1973)3 Supreme Court Cases 753*** is placed before the court wherein the Apex court held that for issue of process sufficient cause for proceeding must exist.

11. In case of ***Dilip Kumr Versus Brajraj Srivastava and another decided on 26.07.2023 in Criminal Appeal No. 561 of 2012*** the Apex Court held that before dismissing the complaint under Section 203 Cr. P.C., the Magistrate has to consider the statement of the complainant and his witnesses.

12. On the basis of the above judgements, the learned counsel for the appellant submitted that for issuing process the evidence of witnesses and complainant must not be evaluated as the case was being decided finally. On the basis of the statement of the complainant and statements of the witnesses and medical report on record, learned counsel for the appellant further prayed for his application under Section 156(3) Cr. P.C. to be allowed.

13. Learned counsel for the opposite party no.2, however, opposed the prayer and submitted that medical report filed by the appellant is not readable. It is also argued that the trial court has specifically recorded its finding in para no. 9 of the order. This order does not need any interference, hence prayer is made accordingly.

14. To decide the matter it is apposite to mention **Section 203 of Cr. P.**C. which reads as under:-

"If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the enquiry of investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

15. Thus as per this section, sufficient ground for proceeding further must be there. It is clearly mentioned in the order that after considering the statement on oath of the complainant and other witnesses and the result of the enquiry or investigation under Section 203 Cr. P.C., if the Magistrate is of the opinion that there is no sufficient ground for proceeding he shall dismiss the complaint, and in every such case he shall record the brief reason for doing so.

16. If we go through the impugned order, the trial court has clearly opined therein that appellant himself is a person of 42 years of age who has given illegal gratification for securing job for him. No receipt of payment to the opposite party no.2 was placed. The trial court also found that how the witnesses who belonged to other place arrived at the spot is also not made clear by the complainant. If three persons intentionally thrashed the appellant, in the opinion of the trial court, the first informant would have certainly suffered grievance injuries, while injuries sustained by the appellant are simple in nature. Hence the trial court did not find any sufficient ground to summon the accused person, hence the complaint of the complainant was dismissed under Section 203 Cr. P.C.

17. If we further go through the judgement in the case of ***Ghanshyam Singh (supra),*** the Apex Court found therein that the Magistrate has to satisfy himself that there is sufficient evidence to proceed against the accused. In the present case trial court did not find any sufficient evidence to proceed against the accused, hence the appellant cannot take benefit of the aforesaid judgements.

18. In the case of ***NAGAWWA Versus Veeranna Shivalingappa Konjalgi (supra)*** it has been clearly opined by the Apex Court that Magistrate has been given undoubted discretion in the matter and this discretion has to be judicially exercised by him. Apex Court further opined that once the Magistrate has exercised its discretion, it is not for the High Court or the Apex Court, to substitute its own discretion for that of Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.

19. In the present case the Magistrate concerned by using its discretion did not find sufficient ground to proceed with the complaint.

20. In the case of ***Chandra Deo Singh (supra)***, Apex Court has given the same finding that there must be sufficient ground for proceeding and not sufficient ground for conviction.

21. Thus in both these judgements ***SW Palanitkar and Chandra Deo Singh,*** the Apex Court has pressed upon sufficient ground for proceeding i.e. prima facie satisfaction that complaint is neither false or vexatious nor intended only to harass the accused.

22. In case of ***Nirmaljit Singh Hoon (supra)*** the Apex Court held that there must

be sufficient cause for proceeding and the trial court vide order dated 31.07.2023 did not find any sufficient ground for proceeding further.

23. So far as judgement in the case of ***Dilip Kumar*** (supra) is concerned, the facts of that case are different from the facts of the present case, in that case the Magistrate did not consider the statement of the complainant and his witnesses, as the witnesses were not examined in that case but the case in hand the position is different. The statements of the witnesses have been recorded and considered by the trial court, hence the appellant cannot take benefit of this judgement also.

24. From the perusal of the complaint, it is clear that appellant is said to have paid Rs. 50,000/- as illegal gratification to the opposite party no.2 for securing a job for him. On one hand he has done a job which is against the law, at the same time, he has not placed before the Court any statement of account or evidence that this amount was ever withdrawn by the appellant from the bank and was paid by him to the opposite party no.2. A person of 42 years of age does not fulfill the criteria for getting a job on contract basis, as services on contract basis are given in the Government Department to a person upto, a certain age. A person being 42 years of age, cannot be given a government job on contract basis also. Thus the basis of allegation that the amount was paid to the opposite party no.2 as illegal gratification for arranging a job for him, is neither proved nor it can be considered lawful.

25. In the opinion of the Court neither the facts mentioned in the complaint can be said to be the sufficient cause of action for proceeding further nor this Court has any sufficient ground to interfere with the discretion exercised by the Magistrate to substitute its own discretion. The appeal is liable to be dismissed.

26. The appeal is thus ***dismissed***.

(2024) 1 ILRA 1089
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 561 of 1996

Smt. Mamta Shukla ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri L.P. Singh, Sri Rajiv Lochan Shukla, Sri Ramanuj Yadav

Counsel for the Opposite Parties:
Govt. Advocate, Sri A. Kumar Srivastava, Sri A.K. Singh

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision , Section 372 - No appeal to lie unless otherwise provided, Section 378 - Appeal in case of acquittal , Right to appeal is a substantive right and it is not a mere matter of procedure - If a judgment of acquittal had been passed on or after 31.12.2009 only then an appeal can be preferred otherwise only a revision can be preferred in case of a judgment and order of acquittal. (Para - 10,11,15)

Offence committed before 31.12.2009 - acquittal order passed on 07.03.1996 - Accused persons acquitted - aggrieved - informant preferred criminal revision under Section 397/401 CrPC on 15.04.1996 - revisionist moved an application on 04.12.2019 - to convert revision into criminal appeal under Section 372

CrPC - amendment in Code of Criminal Procedure**. (Para-2,15)**

HELD: -Revision preferred against an order of acquittal passed prior to 31.12.2009 cannot be converted into an appeal. Present revision not liable to be converted into an appeal. Criminal revision before appropriate Bench. **(Para-16,20)**

Application to convert criminal revision into an appeal rejected. (E-7)

List of Cases cited:

1. Mallikarjun Kodagali (Dead) through L.R. Vs St. of Karn. & ors. , 2018 0 Supreme (SC) 983.

2. Baldev Sharma Vs Gopal & anr., 2017 0 Supreme (Raj) 1649.

3. T.S.L. Vs Atma Tube Products Ltd. & ors. , 2013 LawSuit (P&H) 1375.

4. In Re: Provision of Section 14A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 Vs Nil, 2018 0 Supreme (All) 1007 (All) (FB).

5. D. Sudhakar Vs Panapu Sreenivasulu @ Evone Water Sreenivasulu & ors., 2012 SCC OnLine AP 416.

6. John Vs Shibu Cherian, (2011) 4 KLJ 25.

7. Bhisam Prasad Bareth Vs Dinesh Mahant & ors. , 2012 SCC OnLine (Chh) 240.

8. Atma Tube Products Ltd. & ors. Vs Dhiraj Kumar, 2013 (2) RCR (Cri) 1005

9. D. Sudhakar Vs Panapu Sreenivasulu @ Evone Water Sreenivasulu & ors., 2012 SCC OnLine AP 416

10. Andhra Pradesh High John Vs. Shibu Cherian, (2011) 4 KLJ 25

11. Bhisam Prasad Bareth Vs Dinesh Mahant & ors. , 2012 SCC OnLine (Chh) 240

12. N.C.W. Vs St. of Delhi & anr., (2010) 12 SCC 599

13. Atma Tube Products Ltd. & ors. Vs Dhiraj Kumar, 2013 (2) RCR (Cri) 1005

14. Baldev Sharma Vs Gopal & anr., 2017 0 Supreme (Raj) 1649

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

1. Heard Sri Rajiv Lochan Shukla, learned counsel for the revisionist, Sri Mithilesh Kumar, learned AGA for the State, Sri A. Kumar Srivastava, learned counsel for the opposite party nos.2 to 8 and perused the record.

2. At present, before this Court, the application dated 04.12.2019 moved on behalf of the revisionist to convert the present revision into criminal appeal is pending for disposal with an affidavit against which the accused persons have strong objection that at the time of institution of this revision and when cause of action arises to the informant, there was no provision to prefer an appeal against an order of acquittal passed by the Sessions Judge.

3. In brief, facts of the case are that the Sessions Judge, Hamirpur acquitted all the accused persons under the charges under Sections 148, 352, 302 read with Section 149 IPC by the judgment and order dated 07.03.1996. Being aggrieved, the informant preferred this criminal revision under Section 397/401 CrPC on 15.04.1996. During the pendency of the instant criminal revision, learned counsel for the revisionist has moved an application dated 04.12.2019 to convert this revision into criminal appeal under Section 372 CrPC with the allegations that the deponent Smt. Mamta Shukla has been advised to state that by virtue of amendment in the Code of Criminal Procedure, now the

victim has right to prefer a criminal appeal against the order of acquittal under Section 372 CrPC.

4. The deponent had preferred a criminal revision in the year 1996 for the remedy as existed at that relevant point of time. However, now due to legislative changes which is beneficiary in nature, a better right to file a criminal appeal is available to the deponent which she prays and she may be allowed to convert the revision into an appeal otherwise the revisionist shall suffer irreparable loss and injury. Therefore, this Court may graciously be pleased to allow the application and convert this criminal revision into criminal appeal as maintainable on behalf of the victim under Section 372 CrPC otherwise the applicant shall suffer irreparable loss and injury.

5. In Chapter XXX of the Code of Criminal Procedure, the provisions regarding the criminal revision has been mentioned in Sections 395 to 405 CrPC. The relevant sections for the purpose of the matter are Sections 397 and 401 CrPC which are as under:-

*"**397. Calling for records to exercise powers of revision**.—(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself; to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling, for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement that he be released on bail or on his own bond pending the examination of the record.*

Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

x x x x x

***401. High Court's powers of revision**.—(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307, and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.*

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had

an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of Justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

6. The provisions regarding criminal appeals have been provided in Chapter XXIX of the Code of Criminal Procedure. The relevant sections for the purpose of the present matter are Sections 372 and 378 CrPC which are as under:-

"372. No appeal to lie unless otherwise provided*.—No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code by any other law for the time being in force:*

Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.

x x x x x

378. Appeal in case of acquittal.*—(1) Save as otherwise provided in sub-section (2), and subject to the provisions of sub-sections (3) and (5),—*

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal—

(a) to the Court of Session, from an order of acquittal passed by a

Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.

(3) No appeal to the High Court under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2)."

7. Following judicial pronouncements have been relied on by the parties:-

(i) Mallikarjun Kodagali (Dead) through legal representatives Vs. State of Karnataka and others, 2018 0 Supreme (SC) 983.

(ii) Baldev Sharma Vs. Gopal and another, 2017 0 Supreme (Raj) 1649.

(iii) Tata Steel Ltd. Vs. Atma Tube Products Ltd. and others, 2013 LawSuit (P&H) 1375.

(iv) In Re : Provision of Section 14A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 Vs. Nil, 2018 0 Supreme (All) 1007 (All) (FB).

(v) D. Sudhakar Vs. Panapu Sreenivasulu @ Evone Water Sreenivasulu and others, 2012 SCC OnLine AP 416.

(vi) John Vs. Shibu Cherian, (2011) 4 KLJ 25.

(vii) Bhisam Prasad Bareth Vs. Dinesh Mahant and others, 2012 SCC OnLine (Chh) 240.

(viii) Atma Tube Products Ltd. and others Vs. Dhiraj Kumar, 2013 (2) RCR (Cri) 1005.

8. In **Re: provisions of Section 14A of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Amendment Act, 2015** (supra) is concerned, it is not dealing with the present matter in which the second proviso to Section 14A(3) of the Act it is violative of both Articles 14 and 21 of the Constitution of India. It has also been held that the constitutional and inherent powers of the High Court are not ousted by Section 14A of the Act, 2015. It has also been held that the applicability of Section 14A will not depend of date of commission of offence.

One of the determinative factors would be the date of order of Special Court or Exclusive Court.

9. According to this Court, the aforesaid judgment is not helpful to the revisionist as in this case the impugned judgment of acquittal had been passed on 07.03.1996 when there was provision of preferring a revision by the informant if he is aggrieved by the judgment and order of acquittal passed by the lower court.

10. In **Mallikarjun Kodagali** (supra) it has been held that the proviso to Section 372 has come into force on 31.12.2009 and in case of a judgment and order of acquittal, the relevant date would be the date of judgment and order of the trial court. The date of occurrence would not be material. It has also been held that the right to appeal is a substantive right and it is not a mere matter of procedure. The Apex Court held that the judgment of Andhra Pradhesh High Court in **D. Sudhakar Vs. Panapu Sreenivasulu @ Evone Water Sreenivasulu and others, 2012 SCC OnLine AP 416, the Andhra Pradesh High** Court has wrongly concluded that since the order of acquittal was passed on 30.11.2011 and the offence had been committed prior to 31.12.2009, hence, revision would lie. Similarly, the judgment of the learned single Judge in **John Vs. Shibu Cherian, (2011) 4 KLJ 25,** decided on 05.08.2011 by the Kerala High Court has also been held **to be no good law.** The Apex Court also found the judgment in **Bhisam Prasad Bareth Vs. Dinesh Mahant and others, 2012 SCC OnLine (Chh) 240,** decided on 15.03.2012 to be no good law which had been pronounced on the basis of the judgment of the Apex Court in **National Commission of Women Vs. State of Delhi and another, (2010) 12 SCC 599**. In this regard paragraph-72 of the judgment is relevant which is as under:-

"72. It was also submitted by learned counsel for the accused that in the present fact situation, if we were to hold that Kodagali was entitled to file an appeal against the acquittal of the accused, then we would be giving retrospective effect to the proviso to Section 372 of the Cr.P.C. It was submitted that if Parliament intended to confer a statutory right of appeal on a victim with retrospective effect, it would have specifically said so. Since the proviso to Section 372 of the Cr.P.C. was not specifically given retrospective effect, it must operate prospectively and the crucial date in a case such as the present would be the date of the alleged offence."

11. From the aforesaid judgment it is clear that the Apex Court has held that if a judgment of acquittal had been passed on or after 31.12.2009 only then an appeal can be preferred otherwise only a revision can be preferred in case of a judgment and order of acquittal.

12. In **Atma Tube Products Ltd. and others Vs. Dhiraj Kumar, 2013 (2) RCR (Cri) 1005,** it has been held that the proviso to Section 372 to prefer an appeal in case of a judgment of acquittal is prospective in application and only those orders which have been passed on or after 31.12.2009, irrespective of date of occurrence or registration of FIR or filing of complaint shall be appealable at the instance of a victim under the aforestated proviso. The Full Bench of Punjab and Haryana High Court has finally concluded that a revision preferred against an order of acquittal passed prior to 31.12.2009 cannot be converted into an appeal and shall be decided accordingly.

13. In **Baldev Sharma Vs. Gopal and another, 2017 0 Supreme (Raj) 1649,** the Full Bench of Rajasthan High Court framed five questions out of which question no.2 relates with this matter which is as under:-

"(ii) Whether the proviso to Section 372 as introduced by the amending Act No.5 of 2009 which has been brought into effect on 31.12.2009 can be given effect to in cases where the offence occurred prior to 31.12.2009 and thereby given the right of appeal to the victim in the event; (a) whether the court below has acquitted the accused or (b) has convicted the accused for a lesser offence or (c) has imposed inadequate compensation. Though the judgment in such cases may have been passed by the court below after 31.12.2009."

14. In paragraphs-3 to 6 of the aforesaid judgment this question has been answered which is as under:-

"3. As regards point No.2, the date wherefrom right accrues to a victim to seek leave to appeal, in the decision reported as (2011) 6 SCC 739, Thirumalai Chemicals Ltd. v. Union of India, the Supreme Court clearly held that the 'right of appeal being a substantive right always acts prospectively. It is trite law that every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation.' This is a consistent position of law, and has been affirmed by the Supreme Court in numerous cases, such as AIR 1994 SC 2623, Hitendra Vishnu Thakur v. State of Maharashtra, (2005) 4 SCC 480, Kailash v. Nanhku & Ors., and (2014) 5 SCC 219, H.P. State Electricity Regulatory Commission v. H.P. SEB,

4. This has also been the view of most of the High Courts, with respect to this question. The Punjab and Haryana High Court, in the decision reported as (2014) 1 PLR 1, CRM-790-MA-2010, Tata Steel v. Atma Tube Projects, , held :

"Since right to appeal is a substantive right and it cannot be inferred by implication unless the Statute expressly provides so, the only inescapable conclusion would be to hold that the right to appeal given to a 'victim' under proviso to Section 372 of the Code is prospective and has become enforceable w.e.f. December 31, 2009 only. A 'victim' is entitled to prefer appeal in respect of any type of order referred to in the proviso to Section 372 if such order has been passed on or after December 31, 2009 irrespective of the date of registration of FIR or the date of occurrence etc. To be more specific, it is clarified that it is the date of passing of the order to be appealed from and not any other fact situation, which shall determine the right to appeal of a 'victim'."

5. Similarly, in the decision reported as 2014 Crim. Law Journal 1046, Parmeshwar Mandal Vs. The State of Bihar, the Patna High Court held:

"...the said proviso contains both substantive part, creating right in the victim to prefer an appeal, and procedural part, by identifying the forum for filing such an appeal. It is not in dispute that the substantive part of law operates prospectively.....it has to be concluded that the right of victim, to prefer an appeal in terms of said proviso to Section 372, became available to the victim(s) of all cases in which orders were passed by any criminal court acquitting the accused or convicting him for a lesser offence or

imposing inadequate compensation, on or after 31st of December, 2009. In other words, date of judgment of a criminal court has to be necessarily treated as the relevant date for applying the test of maintainability of appeal by the victim under three contingencies laid down under the proviso to Section 372 of the Code, irrespective of the date of occurrence, institution of the case, cognizance or commitment."

6. Thus, the effective date is 31.12.2009. Judgments passed on or after said date are the ones in respect whereto, irrespective of the date of the offence, the victim can avail the right to file an application seeking leave to appeal."

15. From the perusal of the above judgments and principles laid down by the Apex Court and different High Courts it is very much clear that if an order or judgment of acquittal has been passed on or after 31.12.2009 only then an appeal can be preferred against such order by the victim or the injured otherwise he can file revision only. In this case the offence had been committed prior to 31.12.2009 and the order and judgment of acquittal was also passed on 07.03.1996 against which the informant has already preferred revision which can be decided as per existing rules and law.

16. According to this Court, considering the facts and circumstances of the case in hand, the present revision is not liable to be converted into an appeal.

17. This revision is pending since 1996 and the learned counsel for the revisionist never tried to get the revision decided. Even this revision was once dismissed for want of prosecution which was later on restored. Had the argument been advanced after institution of the revision, the same would have been decided much earlier. In case the revision would have been allowed, the trial court would have been directed to decide the sessions trial afresh within stipulated period prescribed by this Court.

18. Thus, this Court is of the view that the application with the prayer to convert this criminal revision into an appeal is devoid of merit which has no force and is liable to be rejected.

O R D E R

19. Accordingly, the application dated 04.12.2019 moved by the revisionist to convert the present revision into criminal appeal is hereby rejected.

20. List this criminal revision on 18.01.2024 in the additional cause list for disposal before the appropriate Bench.

(2024) 1 ILRA 1096
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.12.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Revision No. 1484 of 1998

Kharak Singh ...Revisionist
Versus
Krishna Pal & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Dileep Kumar, Sri Rajeev Gupta, Sri Tarun Agarwal

Counsel for the Opposite Parties:

Govt. Advocate, Sri Ghanshyan Joshi, Sri N.K. Sharma

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 397/401 - Revision against judgment and order of acquittal, Indian Penal Code, 1860 - Section 304B - Dowry death, Section 498A - Husband or relative of husband of a women subjecting her to cruelty , The Dowry prohibition Act, 1961 - Section 2, 3, 4, The Indian Evidence Act, 1872 - Section 113B - presumption against accused - regard to offence committed under Section 304B IPC, Section 106 - burden of proving fact especially within knowledge - dowry can be demanded before the marriage, at the time of marriage or after the marriage - any demand of dowry after the marriage is also a demand of dowry punishable under Section 3 of the Act. (Para - 37,38)

(B) Criminal Law - The Dowry prohibition Act, 1961 - Section 8-A - Burden of proof in certain cases - if death of a wife is within 7 years of marriage in abnormal circumstances and demand of dowry - cruelty is established the onus to revert the presumption to demand of dowry shifts to the defence - not been discharged by the accused persons in this case.(Para - 43)

Trial court misinterpreted evidence and acquitted all accused - Prosecutors prove case beyond reasonable doubts - no delay in filing FIR - Court acquits accused based on conjunctures and surmises - FIR anti-timed and manipulated - Findings deemed illegal, perverse, and liable for reversal.(Para - 2)

HELD:-Trial court misread evidence - made an incorrect finding - stating that an unnatural death occurred within two years of marriage - prosecution had already discharged the initial burden - defense had a duty to explain the circumstances under Section 106 of the Evidence Act - Failure to do so would become a strong militating circumstance against the accused. Acquittal order set aside. Ordered to hear both parties and issue appropriate legal orders within three months, based on available evidence. **(Para -45,49)**

Revision allowed. (E-7)

List of Cases cited:

1. Pawan Kumar Vs St. of Har., (1998) CrLJ 1144 SC

2. St. of Punj. Vs Iqbal Singh & ors., AIR 1991 SC 1532

3. Sher Singh Vs St. of Har., 2015 (1) Scale 250

4. Vidya Devi Vs St. of Har., (2004) 9 SCC 476

5. St. of A.P. Vs Raj Gopal Asawa, (2004) 4 SCC 470

6. M. Narayan Vs St. of Karn., (2015) 6 SCC 465

7. Bachni Devi Vs St. of Har., AIR 2011 SC 1098

8. Balram Prasad Agrawal Vs St. of Bihar, (1997) 9 SCC 338

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

1. This criminal revision has been preferred against the judgment and order of acquittal dated 12.06.1998 passed by the Additional Sessions Judge-IV, Meerut under Section 304B, 498A IPC and Section 3/4 of the DP Act.

2. The revisionist informant has taken ground that the judgment and order passed by the lower court is wholly illegal. The trial court has completely misread and misappreciated the evidence on record and recorded the finding of acquittal in favour of all the accused persons. The prosecution has proved this case beyond all reasonable doubts even then the trial court has acquitted the accused from all the charges on the basis of conjunctures and surmises. There is no delay in lodging the FIR and if

there is any delay, the same has been explained by the complainant even though the trial court has acquitted all the accused persons holding that the FIR is an anti-timed document. The trial court has held without any material evidence that the FIR in question has been subsequently manipulated and changed. The finding given by the trial court in this respect is wholly illegal, perverse and is liable to be set aside.

3. It is well settled law that there is a presumption against the accused under Section 113B of the Indian Evidence Act, 1872 with regard to the offence committed under Section 304B IPC. In the present case, even though the accused persons have failed to revert the presumption drawn against them under Section 113B of the Evidence Act, the trial court without any basis or material has recorded the finding of acquittal, which is wholly illegal and is liable to be set aside. The prosecution has completely proved the charges under Sections 304B and 498A IPC by fulfilling all the ingredients of dowry death, even though the trial court has illegally recorded the finding of acquittal in favour of the accused persons.

4. The prosecution has proved beyond all the reasonable doubts that the deceased was killed by administering poison and the FSL report also corroborates the same but the trial court ignored this important fact in its judgment. Hence, this revision be allowed and the aforesaid judgment and order of acquittal dated 12.06.1998 passed by the ASJ-IV, Meerut be set aside and a suitable order be passed.

5. In brief, facts of the case are that Kharak Singh lodged an FIR Ex.Ka-1 at Police Station Baleni, District Meerut on 01.03.1994 at 09:30 p.m. with the allegations that his daughter Anita was married to Krishan Pal in the year of 1992. At the time of marriage sufficient dowry was given but Krishan Pal and his family members were not satisfied with the dowry, hence they started harassing Anita for bringing more dowry. His son Pawan Kumar had gone to meet Anita at her in-laws' house two months prior to the festival of Sankranti where all the accused persons made a demand of scooter or Rs.21,000/- cash. Anita also repeated this version to his brother that accused persons are demanding the same. Thereafter the informant's another son Rajendra went to her in-laws' house on 14.01.1994. At that time also all the four accused persons repeated the same demand. After coming back Rajendra told that Anita is being harassed by the accused persons in respect of dowry. The informant and other villagers went to village Dolcha and they explained and pacified the matter regarding demand of dowry saying that the informant has already provided sufficient dowry as per his capacity. At that time the accused persons promised not to harass any more on account of dowry but they continued to repeat their demand. On 01.03.1994 Basanta son of informant's maternal uncle resident of Balena came to home at 06:00 p.m. and told that he had gone to village Dolcha in a marriage ceremony and informed that Anita has been murdered. Hearing this news the complainant and other villagers reached their and found Anita to be dead. The informant went to police station and submitted the written complaint on which basis chik FIR Ex.Ka-15 was prepared by Head Moharrir, Brijendra Singh and the same was entered into GD Rapat no.29 (Ex.Ka-16) for an offence under Section 304B IPC and Section 3/4 DP Act at Crime No.28 of 1994. The investigation was

handed over to CO Faqir Chand Azad who started the investigation. He reached on the spot and recorded the statement of the informant; prepared site plan Ex.Ka-2 and collected the broken pieces of bangles and prepared recovery memo Ex.Ka-3. He recorded the statement of the witnesses Kripal, Chander Pandit, Jaipal, Satyapal, Roop Chand, Mangeram and Khajan Singh under Section 161 CrPC. On 02.03.1994 the SDM Hargyan Singh Pundir got prepared panchayatnama (Ex.Ka-8) of the dead body of the deceased in the hand writing of Sub-Inspector. The allied papers namely Form-13 Ex.Ka-9, sketch of the dead body of the deceased Ex.Ka-10 and 11, letter to CMO Ex.Ka-12 and letter to RI, Police Line, Meerut Ex.Ka-13 were also got prepared. The dead body was sealed and was handed over to the Constable Vijai Bahadur and Constable Chunnu Lal for being taken to Head Quarter, Meerut for postmortem. Accused Krishan Pal and Smt. Omwati were arrested and brought to police station and relevant entries were made in the GD under rapat no.21 Ex.Ka-17 at 05:35 p.m. The investigating officer (IO) recorded the statement of Mool Chandra, Ramesh, Smt Radha, Rajindra Singh, Pawan, Basanta, Satyavir and Krishan Pal under Section 161 CrPC on 06.03.1994. He collected the postmortem report Ex.Ka-14 and sent the viscera for chemical examination. The autopsy of the dead body of the deceased was conducted by Dr. SP Jindal on 02.03.1994 at 05:00 p.m. with the help of Dr. OP Chaddha at PL Sharma Hospital, Meerut and following injuries were found:-

(i) on external examination of the dead body of the deceased the doctor found that the lips, nails, tongue and face were cyanosed. There was one abrasion in an area of 6cm x 1cm on left side front of the upper part of the neck.

(ii) on internal examination the brain, lungs, mucus, membrane, liver, spleen and kidneys were found congested. The viscera was preserved for chemical examination as the cause of death could not be ascertained. The doctor prepared the postmortem examination report Ex.Ka-4.

6. The IO after completion of the investigation, submitted the charge-sheet against all the accused persons. Subsequent to filing of charge-sheet in the court, the Dy. SP Sri Inder Deo Singh wrote the additional parcha of case diary (Ex.Ka-6) and sent with the FSL report (Ex.Ka-7) to the court. The accused persons were charged under the aforesaid sections from which they denied and sought trial.

7. Following witnesses had been examined in support of the prosecution:-

1	PW-1	Ramesh
2	PW-2	Kharak Singh
3	PW-3	Pawan Kumar, son of informant
4	PW-4	IO, Dy. SP, Fakeer Singh Azad
5	PW-5	Hargyan Singh Pundir, the then SDM, Baghpat
6	PW-6	Dr. SP Jindal
7	PW-7	Brajendra Singh, HCP

8. The statement of the accused persons were recorded under Section 313 CrPC on 14.03.1997 in which they denied the charges and alleged that no demand of dowry was made by them and they have been falsely implicated in the case.

9. Dr. SP Jindal was recalled on oath by the court on 21.04.1998 in respect of FSL report submitted later on in the court. The court also examined Dr. Suresh Chand, the Chemical Examiner, Agra as CW-1 who proved it. After these two evidences the additional statement of the accused persons were recorded under Section 313 CrPC on 28.05.1998 in which the accused persons again denied the charges.

10. Defence witness – DW-1, Satyavir, the evidence of this witness is discussed later on.

11. The description of the accused persons is that the accused Krishan Pal was the husband; accused Ompal was the brother-in-law (devar); accused Omwati was the mother-in-law; and accused Bhure was the father-in-law of the deceased.

12. In brief, the statements of the witnesses are reproduced herein below:

(i) PW-1, Ramesh has deposed that the marriage was solemnized as the marriage of a farmer's daughter. After departure of the deceased, accused persons started demanding dowry. When they went for her send off, they started demanding scooter or in place of scooter cash of Rs.21,000/-. They insisted that they are capable of providing scooter. After few days of the marriage when son of Khadag Singh visited Aneeta, they again demanded dowry. Aneeta also stated to provide scooter otherwise, the accused persons would kill her and when they went there to pacify the matter, Pooran Singh assured not to demand scooter in future. But after few days when son of Khadag Singh went with Sakrant (Khichadi), the accused persons threatened to provide them scooter. After few days, they came to know that the accused persons have killed the deceased. When Basana was informed about the death of the deceased, they alongwith villagers went to her in-laws house and found that Aneeta was lying dead. Thereafter, F.I.R. was lodged. This witness has given similar statement in his cross-examination.

(ii) PW-2, Khadag Singh, father of the deceased, has deposed that marriage of Aneeta was solemnized with Krishna Pal Singh of village Dolcha. He had provided sufficient dowry. He had also provided sufficient ornaments. The accused persons were demanding a scooter or Rs.21,000/- cash which was conveyed to her by the deceased when after 10 days of the marriage, the deceased came to the house. After getting information of her death at 06:00 P.M. by Basanta, they reached the spot and found that Aneeta was lying dead in the house of Pooran. The accused persons had killed the deceased for dowry. The report was reduced in writing by Kishan Pal on his dictation and he had signed it. He proved his signature on it and deposed that police had recorded his statement.

This witnesses has also given similar statement in his cross-examination. He has further deposed in his cross-examination that accused persons were not present at the house. It is wrong to say that the mother-in-law Smt. Omwati was there and remained till morning. There were injuries on the person of the deceased. There were contusion on her neck. Fearing that the relationship would get spoiled, he had not lodged the F.I.R. earlier. This witness denied that the accused persons had informed about the death of the deceased to him. He had also denied that the deceased died a natural death.

(iii) PW-3, son of the informant has deposed that his father spent more than his capacity in the marriage of the deceased. When he had gone to bring her sister back, the accused persons had demanded scooter or Rs.21,000/- cash. The deceased had informed that they used to beat her on account of demand of scooter. He had informed this fact to his father who said that he will talk about this. When his elder brother went with Sakrant (Khichadi), the deceased had also informed him that accused persons used to demand scooter. When his father, Khadag Singh, and Ramesh went Doleha to pacify this matter, they assured not to repeat the same and for this a Panchayat was also held, thereafter accused persons kept her sister for 16-17 days. After 5-6 days of the incident, the police had come to his house and had interrogated him. The witness has given similar statements in his cross-examination and reiterated that Aneeta had complained him about the beating by the accused persons, she also used to show her injuries. When it was complained to Krishna Pal, he said that they will not beat the deceased anymore if Rs.21,000/- cash is provided. As it was a matter of relationship, therefore, no complaint was made anywhere. This witness denied that the deceased had died of an unnatural death and that the accused persons had not demanded dowry.

(iv) PW-4, Fakeer Chand Azad, the then C.O, has deposed that he had started an investigation after receiving related papers from the police station. He reached on the spot and inquired about the informant, Khadag Singh and recorded his statement in which he supported the prosecution case. On his pointing a site plan was prepared. The witness proved the site plan, Ex.Ka-2. He also collected broken pieces of bangles and prepared a recovery memo, Ex.Ka-3, in the handwriting of S.I. Charan Singh Tomar and proved it. He also recorded the statements of witnesses Krishna Pal, Jai Pal, Mangeram and Khajan Singh, who supported the version of the prosecution. On 03.03.1994 on his direction/order, the accused, Krishna Pal and Smt. Omwati were arrested and it was entered in G.D. On 6.3.1994. The statements of witnesses Mool Chand, Pawan, Basanta and Kishan Pal were recorded. On 7.3.1994 the accused Ompal, Pooran surrendered in the Court which was entered in the case-diary. After receiving the inquest and postmortem report, he entered it in the G.D. Viscera was sent for chemical examination by his order, Ex Ka-4. On 22.3.1994, he recorded the statements of witnesses to the inquest and after completion of investigation, he submitted charge-sheet Ex.ka-4, on 22.4.1994. After his transfer, his successor, Dy. S.P. Indra Pal Singh had received the F.S.L. report and entered it in C.D. The witness proved it as secondary evidence which is exhibited as Ex. Ka-6. The F.S.L. report was also exhibited as Ex. Ka-7. In cross-examination this witness admitted that there was no eye witness of the death. This witness deposed that he had not seen the ornaments on the person of the deceased.

(v) PW-5, Hargyan Singh, the then S.D.M., deposed that on 12.03.1994 he had prepared an inquest report and had prepared Form-13, two papers of photo lash, a letter to C.M.O. and a letter to R.I., which are exhibited as Ex.Ka-8 to Ex.Ka-13. He further deposed that the dead body was sealed on the spot and was sent for postmortem through constable Vijay Bahadur and constable Chunni.

In the cross-examination, the witness admitted that he had signed on the last page of the inquest as it was prepared by sub inspector on his dictation. He further deposed that he had received information in the morning of 2.3.1994. He could not say whether Omwati was there or not. He had seen the injury on the extreme side of the neck. This witness denied that there was any injury on the thigh of the deceased.

(vi) PW-6, Dr. S.P. Jindal, has deposed that in the evening of 02.03.1994 at 05:00 P.M. he conducted an autopsy of the dead body in the presence of Dr. O.P. Chadda and with the assistance of P.C. Sharma and found that there was rigor mortis on the whole body. Lip, eye membrane and face were bluish with ecchymosis. Eyes were open and there was contusion in an area of 6 cm. x 1 cm. on the front-left side of neck and on the outer left side of the neck. In the internal examination, it was found that the brain was congested and reddish, both the lungs were congested. There was 200 ml. of semi digested food in her intestine, the surface was reddish. Liver and spleen were also reddish and congested. The uterus was empty. Since the cause of death could not be ascertained, hence, viscera was preserved. This witness proved the postmortem report, Ex. Ka7 to be in his own handwriting and signature.

The witness was recalled and re examined after receipt of the F.S.L. report in which he deposed that the brain, liver, spleen and lungs were congested due to organochloro insecticides poison and alcohol. This witness has given similar statement in his cross-examination and has supported the prosecution version.

(vii) PW-7, Head Constable, Brijendra Singh, has deposed that on 1.3.1994, he lodged the F.I.R. at crime no. 29 of 1994 u/s 304-B, I.P.C. and section ¾ D.P. Act and had prepared chick F.I.R. Ex. Ka-15 which is in his handwriting and signature. He had also entered it in G.D. in his handwriting and signature and proved its carbon copy Ex. Ka-16. He further deposed that on 2.3.1994 when accused Krishan Pal and Smt. Omwati were arrested, it was entered by report no. 21 at 5:35 P.M. and sealed truss of broken pieces of bangles of the deceased, which contains 17 pieces was also proved as material Ex.1.

This witness has further deposed that the concerned G.D. is in his handwriting and signature. It also contains signature of S.O. He has proved certified copy as Ex. Ka-17. In his cross-examination this witness has supported the prosecution version.

13. After the conclusion of prosecution evidence, the statements of the accused persons were recorded, wherein all the accused persons denied the demand of dowry and also the allegation of the prosecution and have deposed that the husband of the deceased Krishna Pal had informed the police about the death of the deceased.

14. From the side of the defence, D.W.-1, Satyaveer Singh has been examined, who deposed that on 12.3.1994 the marriage of his daughter was solemnized with Krishna Pal Singh in village Dalohi, to which he had invited his relatives. He does not know Basanta s/o Lobi was invited or not.

15. In cross-examination, this witness expressed ignorance that the daughter of

Basanta has been married in his village. He admitted that Krishna Pal belongs to Yadav community. He had not participated in the marriage of Krishna Pal. He expressed ignorance about whether Basanta participated in the marriage or not.

16. Dr. Suresh Chandra, Scientist at F.S.L. Agra, C.W.-1, has proved that Kamal Singh Khatri, an employee of F.S.L. Agra, had received the sealed bundle from constable Om Pal. He had proved the signature of Kamal Singh Khatri as Ex. C.1. The witness further deposed that he had examined the material and had prepared his report Ex. Ka-7 in his hand writing and signature and he had found organochloro insecticide poison and alcohol in the sample which was sent to ascertain the cause of death.

17. The witness has given similar statement in his cross-examination.

18. After deposition of C.W.-1, the statements u/s 313 Cr.P.C. of the accused persons were recorded, in which all the accused persons stated that no material was sealed before them and no examination was conducted before them.

19. According to this Court, the accused persons were not present at the postmortem house. This plea can not be taken that the sample for chemical examination was not sealed before them. Similarly, the examination was conducted in Agra and there is no rule or law that examination should be conducted before the accused persons.

20. After the conclusion of the trial and after hearing the arguments, the learned IV Addl. Sessions Judge recorded the judgment and order of acquittal. Being aggrieved, the informant has preferred this revision.

21. **This revision is being decided as under:**

22. In this case, the incident occurred on 01.03.1994 at about 04:00 p.m. and after receiving information about the incident, the informant with family members and villagers reached on the spot and thereafter lodged the FIR same day at 09:30 p.m. which is reduced in the handwriting of Brijpal Yadav, son of Sri Raghuvir Singh, which has also been signed by the informant PW-2.

23. The learned trial court has expressed doubt about it, stating that Basanta who had informed the informant about the incident has not been examined. As per prosecution story, Basanta son of maternal uncle of the informant visited village Dolcha on 01.03.1994 in connection of marriage and when he came to know about the incident he went to the house of the informant at about 06:00 p.m. and informed about the incident, that the accused persons had killed Anita. Thereafter informant, his family members and villagers proceeded there where they found Anita was lying dead. Therefore, there is no delay in lodging the FIR.

24. The Additional Sessions Judge has opined that one written complaint had also been written by one Krishnapal. Certainly, in the statement of the informant, the name of Krishnapal has been mentioned as a scribe, but it is also noteworthy that he has said himself to be the son of Raghuvir Singh, therefore, it appears that the name of the scribed has been written in the statement wrongly. Krishnapal is the accused and his father's name is Pooran

Ahir, he cannot be a scribe. Thus, it appears that the learned Additional Sessions Judge has given the benefit of doubt only on account of wrong name of the scribe, which is insignificant in the aforesaid circumstances.

25. Another ground has been taken by the learned ASJ to discredit the FIR that PW-1, Ramesh has deposed in cross-examination that next day on 02.03.1994 the report had been written in the village by the government officials. Several persons were sitting and one person was writing. According to this Court, this witness was a rustic, uneducated villager. The inquest report was prepared on the spot next day on 02.03.1994. Virtually, he is giving statement about preparation of the inquest report and not about writing of the written complaint on behalf of the informant. It is very clear from the examination-in-chief of PW-1 that when they reached her in-law's house, they found Anita lying dead. He remained there, Kharak Singh and one other person went to the concerned police station to inform them about the incident where Kharak Singh got the FIR registered. Thus, it is very clear that the first and only one FIR has been lodged by the informant, PW-2 same day and this witness has given statement in cross-examination in misconception of the inquest report that the FIR had been written next day in the village.

26. Another ground has been taken by the learned ASJ to record the judgment of acquittal that the scribe has not been examined. According to this Court, there is no law that the scribe must be examined. In certain cases where the informant would have died, there might be need of examination of scribe. Here, when the informant PW-2 has already proved his signature on the written complaint, there was no need to examine the scribe. Hence, the ground taken by the learned ASJ that two FIRs were written and one was concealed and the FIR was not written and lodged on 01.03.1994 is incorrect and such findings have been given only for the purpose to acquit the accused persons.

27. The inquest had started at 08:00 a.m. on 02.03.1994, injuries were noted on the left side of the neck and on both the thighs contusions were found on which no explanation has been given by the defence. Hence, it cannot be said that soon before the death the deceased was not tortured. So far as postmortem report is concerned an abrasion in an area of 6cm x 1cm on the left side of the neck was noted, which was on the upper part of the neck. Since the cause of death could not be ascertained, hence the viscera was preserved and later on as per FSL report it was found that there was alcohol and organochloro insecticide poison which caused death of the deceased. According to this Court, if the poison would have administered by the deceased herself, the empty bottle or pouch would have been there. Since it was not found there, therefore, it can easily be presumed that it would have been administered by the accused persons, which was later on removed from the place of occurrence or from the entire house.

28. At the very outset it is also noteworthy that it is not the case of the defence that the deceased had herself administered the poison due to some reason but the defence is that she died of natural death. According to this Court, when contusions were found on the person of the deceased and the deceased had died due to alcohol and organochloro insecticide poison and when the deceased was only 22

years old and a healthy lady and was not suffering from any disease, it cannot be said that she died of natural death. It is noteworthy that the marriage of the deceased had been solemnized with the accused Krishnapal in the year of 1992 and she died an unnatural death within two years of her marriage, therefore, the presumption under Section 113B of the Indian Evidence Act, 1872 would arise in favour of the prosecution. The deceased had died in the house of the accused persons and it has also been proved from the evidence that accused persons had left their house and fled away. Hence, a burden under section 106 of the Evidence Act would also arise upon the accused persons to explain the facts especially in their knowledge as to how only a 22 years young and healthy bride died of unnatural death.

29. According to the defence, the deceased's mother-in-law, Omwati, was in the house though it is also denied by the prosecution but running away leaving the dead body of the deceased by the rest of the accused persons also creates doubt when the incident was not reported by them to the concerned police station. There is no evidence that the accused persons had informed about the incident at the concerned police station. It has also not been proved that the accused persons or any of their family members or collaterals participated in the last rituals of the deceased.

30. Another ground has been taken by the learned Additional Sessions Judge that the inquest was not conducted by the concerned DSP (investigating officer) but by SDM. According to this Court, generally in cases of dowry death, SDM or Tehsildar or Naib-Tehsildar or any Executive officer gets the inquest conducted in presence of the police. If the inquest report was prepared by the concerned SDM, it is not going to disprove the inquest report or its procedure.

31. From the above discussion, it has been proved that the deceased Anita died of unnatural death on account of injury and poison while she was a healthy lady of 22 years and was not suffering from any disease which may have caused her death. Hence, the presumption under Section 113B of the Indian Evidence Act arises which reads as under:-

"113-B. When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand to dowry, the court shall presume that such person had caused the dowry death.

Explanation: For the purpose of this section, 'dowry death' shall have the same meaning as in section 304-B of Indian Penal Code."

32. At this juncture it would be appropriate to reproduce Section 304 B IPC which is as under :-

304B. Dowry death *- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry*

death", and such husband or relative shall be deemed to have caused her death.

Explanation- For the purpose of this sub-section, "dowry" shall have the same meaning. as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

33. In ***Pawan Kumar Vs. State of Haryana, (1998) CrLJ 1144 SC,*** there was a demand of scooter and fridge after the marriage which were not made by the parents of the bride, lead to her harassment and ill treatment by husband and his relatives. It was held that such demand constitutes a "dowry demand" which is punishable under Section 2 of the Dowry Prohibition Act, 1961 and Section 304B IPC.

34. In ***State of Punjab Vs. Iqbal Singh and others, AIR 1991 SC 1532,*** the Apex Court held that since the dowry deaths are generally committed in the privacy of residential homes, it is not easy to get direct evidence in such cases.

35. In ***Sher Singh Vs. State of Haryana, 2015 (1) Scale 250***, the Apex Court observed "we would prefer to interpret the word 'soon' which finds place in Section 304B, not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, instead it should be a continuing cause for the death under Section 304B IPC or the suicide under Section 306 IPC. Once the presence of these concomitant are proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by guilt of the accused, thereby transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt beyond reasonable doubt".

36. It has been proved from the prosecution evidence that the accused persons used to demand scooter or Rs.21,000/- in lieu of a scooter as dowry and for which she had been subjected to physical and mental cruelty. It is not necessary that just soon before death, the deceased should have been subjected to physical or mental cruelty, but here, soon before her death, the prosecution has been successful in proving the physical and mental cruelty with the deceased causing injuries and administering poison to the deceased, is an apparent and direct example of physical and mental torture by the accused persons soon before her death.

37. Another ground has been taken by the learned Additional Sessions Judge that no demand of dowry would have been made as no demand of dowry was made at the time of marriage. According to this Court it is a wrong notion. A dowry can be demanded before the marriage, at the time of marriage or after the marriage. In this regard, Sections 2, 3, 4 and 8A of the Dowry Prohibition Act can be looked into which read as under:-

*"**2. Definition of 'dowry'**.—In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly—*

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, either, to either party to the marriage or to any other person,

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include] dower or mahr in the case or persons to whom the Muslim Personal Law (Shariat) applies.

Explanation II—The expression "valuable security" has the same meaning as in section 30 of the Indian Penal Code (45 of 1860).

***3. Penalty for giving or taking dowry.**—(1) If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be less than [(Note: Subs. by Act 43 of 1986, Sec.3) five years, and with fine which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more:*

Provided that the Court may, for an adequate and special reasons to be recorded in he judgment, impose a sentence of imprisonment of a term of less than [(Note: Subs. by Act 43 of 1986, Sec.3) five years.

(2) Nothing is sub-section (1) shall apply to, or in relation to,—

(a) presents which are given at the time of a marriage to the bride (without any demand having been made in that behalf):

(b) presents which are given at the time of a marriage to the bridegroom (without any demand having been made in that behalf):

Provided that such presents are entered in a list maintained in accordance with the rules made under this Act.

Provided further that where such presents are made by or on behalf of the bride or any person related to the bride, such presents are of a customary nature and the value thereof is not excessive having regard to the financial status of the person by whom, or on whose behalf, such presents are given."

***4. Penalty for demanding dowry.**—If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees:*

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.

***8-A. Burden of proof in certain cases.**—Where any person is prosecuted for taking or abetting the taking of any dowry under Section 3, or the demanding of dowry under Section 4, the burden of proving that he had not committed an offence under those sections shall be on him.*

38. In this regard following judicial pronouncements are relevant in which it has been held that any demand of dowry after the marriage is also a demand of

dowry punishable under Section 3 of the Act.

39. In ***Vidya Devi Vs. State of Haryana, (2004) 9 SCC 476*** it has been held that any demand subsequent to marriage is also covered under " Dowry".

40. In ***State of Andhra Pradesh Vs. Raj Gopal Asawa, (2004) 4 SCC 470*** it has been held that since the definition of dowry in section 2 of the Act by Amendment includes not only the period before and at the marriage but also the period subsequent to the marriage. Hence, the same would be punishable.

41. In ***M. Narayan Vs. State of Karnataka, (2015) 6 SCC 465*** it has been held that any money or property or valuable security demanded by any of the persons mentioned in Section 2 of the Act, at or before or at any time after the marriage which is reasonably connected to the death of a married women, would necessarily be in connection with or in relation to the marriage unless the facts of a given clearly and unequivocally point otherwise.

42. In ***Bachni Devi Vs. State of Haryana, AIR 2011 SC 1098*** it is held that the definition of "Dowry" given in Section 2 of the Act would show that the term is defined comprehensively to include properties of all sorts as it takes within its fold "any property or valuable security" given or agreed to be given in connection with marriage either directly or indirectly.

43. From the perusal of Section 8A it is very much clear that if death of a wife is within 7 years of marriage in abnormal circumstances and demand of dowry and cruelty is established the onus to revert the presumption to demand of dowry shifts to the defence which has not been discharged by the accused persons in this case.

44. The Additional Sessions Judge has also acquitted the accused persons due to non-examination of Basanta. In this regard, DW-1 has also been examined who has deposed that he does not know Basanta and he had not invited him in the marriage of his daughter. According to this Court, it is not the case of the prosecution that Basanta was invited by DW-1, Satyavir, in his daughter's marriage. He may have participated in the marriage of Satyavir from the side of her in-laws or any other marriage held at the concerned village. In the cross-examination, DW-1, Satyavir has deposed that he does not know whether Basanta had participated in barat or not. In such a situation, on the basis of the evidence of DW-1, Satyavir it cannot be concluded that Basanta had not participated in the marriage of DW-1, Satyavir's daughter and after knowing about death of the deceased he had not informed the informant about death of the deceased. There might be another marriage in village Dolcha on 01.03.1994 as the marriage of the daughter of DW-1, Satyavir was solemnized on 02.03.1994. When it has not been proved by any evidence from the side of the defence that they informed the family members of the deceased about the incident and they reached on the spot same day just after few hours of the incident, it is immaterial as to how the informant came to know about death of his daughter. The accused persons were arrested next day. They had left the dead body of the deceased unclaimed in an unsafe position.

45. In view of the above discussion, this Court is of the view that the learned Additional Sessions Judge has misread the evidence and has given an incorrect finding

when it is proved beyond the reasonable doubt that an unnatural death within two years of marriage had taken place and when the initial burden had already been discharged by the prosecution and the presumption under Section 113B of the Evidence Act could not be removed by the defence and when there is also burden upon the defence to explain the circumstances under Section 106 of the Evidence Act, there was no occasion to record the finding of acquittal by the trial court. Section 106 costs duty to discharge the burden and explain the facts especially within the knowledge of the in-laws as to how the bride died. If the accused does not throw light on a fact which is within his knowledge his failure to offer any explanation would become a strong militating circumstance against him.

46. In ***Balram Prasad Agrawal Vs. State of Bihar, (1997) 9 SCC 338*** a housewife was drowned to death in the well, in the court-yard of the house of her in-laws who were the only people present in the house at that time. Cruelty by the in-laws for over years was also an established fact. The Supreme Court held that the burden lies upon the accused in-laws to show what happened during the night which brought about her death.

47. On the basis of the above discussion, this Court is of the view that the revision deserves to be allowed and a fresh judgment and order should be passed after affording the opportunity of hearing to both the parties.

48. The revision is, accordingly, allowed.

49. The impugned judgment and order of acquittal dated 12.06.1998 passed by the Additional Sessions Judge-IV, Meerut is hereby set aside. The Additional Sessions Judge-IV, Meerut, is directed to hear both the parties and again pass appropriate orders in accordance with law within three months on the basis of evidence available on the record and in light of the observations made in this judgment.

45. Let a copy of this judgment alongwith the original record be sent back to the court concerned forthwith for necessary compliance.

(2024) 1 ILRA 1109
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2023

BEFORE

THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Revision No. 3028 of 2023

'X'- Victim, Banda ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Amit Kumar Dixit

Counsel for the Opposite Parties:
Govt. Advocate, Sri Raj Narayan, Sri Sanjeev Kuamr Saxena

(A) Criminal Law - The Juvenile Justice (Care and Protection) Act-2015 - Section 102 - Revision , Indian Penal Code, 1860 - Sections 376, 504 & 506 - The Protection of Children From Sexual Offences Act, 2012 - Section 4 - Punishment for penetrative sexual assault, the Evidence Act , 1872 - Section 35 - Relevancy of entry in public [record or an electronic record]made in performance of duty (Para -)

(B) Criminal Law - The Juvenile Justice (Care and Protection) Act-2015 - Section 94 - Presumption and determination of age - Section 94 (2) (iii) - in absence of (i) and (ii), the age shall be determined by an *ossification test* or any other medical age determination test conducted on the orders of the Committee or Board - where birth certificates are available as indicated in sub-section (i) and (ii), the medical age determination test cannot be preferred. (Para - 7)

Opposite party's first admission made on 08.07.2010 in Government Primary School - birth date as 10.07.2003 - passed first examination - admitted in class 2nd on 1.07.2011 - changing his birth date to 02.04.2005 - Revisionist was a victim of rape by opposite party - declared juvenile - based on his academic record from class 1st to 10th - filed different academic record from opposite party - discarded by board - appeal - dismissed by court - academic record not manipulated - hence revision. (Para - 3,11)

HELD:-First attending school of opposite party no. 2 was Government Primary School where he took admission on 08.07.2010 in class 1st and date of birth was mentioned as 10.07.2003, on the basis of which his age comes on the date of occurrence i.e. 23.06.2022, 19 years, 3 months and 19 days i.e. more than 18 years and he was major . J.J. Board and Appellate Court's Juvenility Decision based on subsequent academic record. Not based on material on record and law conformity. Requires Court's interference. Order set aside.**(Para - 11,12,13)**

Revision allowed. (E-7)

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

1. Heard Sri Amit Kumar Dixit, learned counsel for revisionist, Sri Sanjeev Kumar Saxena, learned counsel for opposite party no. 2 as well as learned A.G.A. and perused the record.

2. The present criminal revision has been preferred by the revisionist through her father under Section 102 of the Juvenile Justice (Care and Protection) Act-2015 (hereinafter referred to as "J.J. Act, 2015) to allow the present revision and set aside the judgment and order dated 24.11.2022 passed by learned Additional Session Judge/Special Judge (POCSO Act), Banda in Criminal Appeal No. 29 of 2022 as well as order dated 28.09.2022 passed by Juvenile Justice Board, Banda in Case Crime No. 161 of 2022 under Sections 376, 504, 506 I.P.C. and Section 4 Protection of Child From Sexual Offence Act, Police Station Girvan, District Banda.

3. Fact in brief are that the revisionist is victim and rape was committed with her by the opposite party no.2. The accused was declared to be juvenile by the learned J.J. Board vide order dated 28.09.2022 on the basis of academic record from class 1st to class 10th. During the course of inquiry the revisionist/victim filed previous academic record of the opposite party no. 2 from Primary School where his admission was taken in class 1st and his date of birth was different from that of the school record produced by the opposite party no. 2. Learned Board decided the age of the opposite party no. 2 in accordance with the date of birth as mentioned in the academic record produced by him but discarded the date of birth which was shown in the previous academic record of class 1st in the Primary School and also the voter list entry, showing him to be major on the date of occurrence. Being aggrieved with the order passed by learned Board, an appeal was preferred before the learned court of Sessions which was also dismissed vide order dated 24.11.2022 on the ground that the academic record filed by the opposite party no. 2 was not said to be manipulated.

4. It is submitted by learned counsel for the revisionist that the opposite party

no. 2 first attended Primary School Devrar, Circle Mahua, District Banda on 08.07.2010 where his date of birth was entered as 10.07.2003 in scholar register at Serial No. 1888 and after passing class 1st his admission was made in class 2nd in the same school on 01.07.2011 but without taking school leaving certificate, he took admission in the private school namely, Brahmand Gyan Ashram, Vasi by showing his date admission on the same date i.e. 08.07.2010 in class 1st at Serial No. 1828 of the scholar register of the school. Later on, he took admission in class 6th in Brahmand Gyan Ashram, Purva Madhyamik Vidhyalaya, Vasi Circle Girwa, District Banda and then in class 9th in Pt. Jawaharlal Nehru Inter College, Girwa, District Banda from where he passed matriculation. In this way, the date of birth as mentioned in the first attending school was reliable and the age of opposite party no. 2 was to be determined on that basis but the learned Board as well as learned appellate court did not consider this fact and discarded the date of birth as mentioned in first attending school and accepted the date of birth which was entered in the subsequent school by adding two years more i.e. 02.04.2005 which cannot be said to be lawful. Further submitted that request to the learned Board was made that the age of the opposite party no. 2 be determined either on the basis of date of birth entered in first attending school or getting it determined on the basis of ossification test by medical board but this request was also not considered either by the learned Board or the learned appellate court. In this way, the order passed by the learned J.J. Board as well as learned Appellate Court cannot be said to be in conformity with law and material on record, therefore, request to set aside the orders in question and allow the revision and to direct the learned J.J. Board to determine the age of the opposite party on the basis of age as determined by the Medical Board.

5. Learned counsel for opposite party no. 2 as well as learned A.G.A. opposed the prayer as aforesaid and contended that in this case, the opposite party no. 2 took admission in Brahmand Gyan Ashram, Vasi, District Banda where he completed his studies from class 1st to 5th and then class 6th to 8th. In class 9th he took admission in Pt. Jawaharlal Nehru Inter College, Girwa from where he passed 10th slandered examination. In the record of the schools, his date of birth was recorded as 02.04.2005 which was proved by examining teachers of the concerned school and genuineness of these papers was not disputed by the revisionist either before the learned Board or the appellate court, therefore, the date of birth as mentioned in the academic record from class 1st to 10th cannot be discarded and no recourse to the medical opinion in relation to determination of age of the juvenility be taken as per provisions as contained under Section 94 of the Act. Further contended that the revisionist manipulated birth certificate from Primary School, Devrar where at Serial No. 1888 of the admission register, date of birth of the opposite party no.2 was got entered as 10.07.2003 and his entry in class 1st and 2nd was shown by the teacher of the school concerned. In this way, the learned Board as well as the Appellate Court did not rely on the date as entered in Primary School, Devrar but acted upon the date of birth which was entered into the record from where he passed class 1st to class 8th i.e. Brahmand Gyan Ashram, Purva Madhyamik Vidhyalaya, Vasi Circle Girwa, District Banda and subsequent school record related

to class 9th and 10th where his date of birth was entered as 02.04.2005. In this way, learned Board as well as learned Appellate Court did not commit any illegality or impropriety in determining the claim of junenility of opposite party no. 2. On the basis of academic record and not seeking the opinion of the medical board regarding determination of his age. The orders passed by learned courts below are sound and based on material on record. There is no any illegality but present revision being devoid of merit is liable to be dismissed.

6. **Section 94 of the Act provides that:**

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining --

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person.

7. From the language used in Section 94 (2) (iii), it is clear that in absence of (i) and (ii), the age shall be determined by an ossification test or any other medical age determination test conducted on the orders of the Committee or Board. Thus where birth certificates are available as indicated in sub-section (i) and (ii), the medical age determination test cannot be preferred.

8. From the perusal of record, it appears that in this case there are two first attending school, one in which the opposite party no. 2 took admission in class 1st i.e. Brahmand Gyan Asharm and got his date of birth entered as 02.04.2005 and later on, he continued his studies in Brahmand Gyan Ashram, Purva Madhyamik Vidhyalaya,

Vasi Circle Girwa, District Banda and also in Pt. Jawaharlal Neharu Inter College, Girwa from where he passed his high school examination. In this school he took admission on **08.07.2010** in class 1st as per entry in scholar register and also as per statement made by P.W. 5 Awadh Bihari, Head Master Brahmand Gyan Ashram, Purva Madhyamik Vidhyalaya, Vasi Circle Girwa, District Banda. On the other hand, birth certificate was produced on the part of the revisionist before the learned J.J. Board which was issued by the head master, Primary School, Devrar Circle Mahua, Banda where his date of birth was recorded as 10.07.2003 at Serial No. 1888 of the scholar register and admission was made on 08.07.2010 in class 1st . This entry was proved by the P.W. 6, Head Master of the aforesaid primary school on the basis of record kept in office of the Government Primary School and also certificate of the admission register was filed by the revisionist before the learned J.J. Board during the course of inquiry.

9. On the basis of record, it cannot be said that the entry made in the scholar register of Government Primary School i.e. Primary School, Devrar regarding admission and date of birth was managed or manipulated by the revisionist for contradicting the claim of juvenility as made on the part of the opposite party no. 2 before the learned Board and also Head Master of the aforesaid school deposed before the learned J.J. Board falsely. There is nothing on record to show that this entry was made subsequently by the head master or any other teacher in the school record and his admission was shown fraudulently to give unfair advantage to the revisionist because entry made by a public servant in the discharge of his official duty in the ordinary course of business cannot be said to be irrelevant in view of Provisions of Section 35 of the Evidence Act unless it is proved otherwise. In this way, the entry regarding date of birth of opposite party no. 2 i.e. 10.07.2003 cannot be said to manipulated and it can also not be said that the admission of opposite party no. 2 was not taken in that school on 08.07.2010 in class 1st and he passed, then his admission was made in class 2nd on 1.7.2011 and he continued his studies in that school.

10. On the other hand, he took admission in Brahmand Gyan Ashram, Vasi Circle Girwa, District Banda in class 1st where his date of birth was entered as 02.04.2005 after completing studies up to class 5th he was admitted in Brahmand Gyan Ashram, Purva Madhyamik Vidhyalaya, Vasi Circle Girwa, District Banda from where he completed his education from class 6th to 8th and then class 9th to 10th from Pt. Jawaharlal Nehru Inter College where his date of birth was entered on the basis of previous academic record i.e. from Brahmand Gyan Ashram, Purva Madhyamik Vidhyalaya, Vasi Circle Girwa, District Banda. The entries regarding admission and date of birth were proved by head master of the school Awadh Bihari as P.W. 5 during the course of inquiry before the learned Board and certified copy of the record were also filed. This entry was also not said to be manipulated or got entered subsequent for giving unfair advantage to the opposite party no. 2. In this way, the entries made in the academic record from the school i.e. Brahmand Gyan Ashram, Purva Madhyamik Vidhyalaya, Vasi Circle Girwa, District Banda and Pt. Jawaharlal Neharu Inter College can also not be said to be irrelevant in view of provisions as contained under section 35 of the Evidence Act. It is also to note in this regard that

admission in Brahmand Gyan Ashram, Vasi Circle Girwa, District Banda was also shown to be taken on 08.07.2010 in class 1 that is the same date on which his admission was shown to be taken in Government Primary School Devarar, Circle Mahua, District Banda

11. It shows that first admission of the opposite party no. 2 was made on 08.07.2010 in Government Primary School Devrar where his date of birth was entered as 10.07.2003 and after passing class 1st examination, he was admitted in class 2nd on 1.07.2011 and then without taking school leaving certificate from aforesaid Government Primary School, he again took admission in Brahmand Gyan Ashram, Vasi Circle Girwa, District Banda in class 1st showing the same date of admission i.e. 08.07.2010 and changing his date of birth from 10.07.2003 to 02.04.2005. Accordingly he continued his subsequent studies in Brahmand Gyan Ashram, Purva Madhyamik Vidhyalaya, Vasi Circle Girwa, District Banda and Pt. Jawaharlal Nehru Inter College, Girwa. It is clear from the above that first attending school of the opposite party no. 2 was Government Primary School Devrar, Circle Mahua but this fact was concealed by him while taking admission in Brahmand Gyan Ashram, Vasi Circle Girwa, District Banda and showing the admission on the same date got the date of birth entered as 02.04.2005. In such a situation this Court is of the considered view that the first attending school of opposite party no. 2 was Government Primary School Devrar where he took admission on 08.07.2010 in class 1st and date of birth was mentioned as 10.07.2003, on the basis of which his age comes on the date of occurrence i.e. 23.06.2022, 19 years, 3 months and 19 days i.e. more than 18 years and he was major.

12. Learned J.J. Board as well as learned Appellate Court did not consider all these facts while deciding the claim of juvenility of the opposite party no. 2 but based its order on subsequent academic record which cannot be said to be based on material on record and in conformity with law, therefore, it warrants interference by this Court.

13. Accordingly, this criminal revision has force and is hereby allowed. The orders passed by learned J.J. Board dated 28.09.2022 and learned Appellate Court dated 24.11.2022 are set aside.

14. Copy of this order be transmitted to the Court concerned for necessary compliance.

(2024) 1 ILRA 1114
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2023

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

First Appeal No. 922 of 2023

Anil Yadav & Anr. ...Appellants
Versus
Smt. Puttul Devi @ Dulari Devi & Ors. ...Respondents

Counsel for the Appellants:
Sri Arvind Kumar Kushwaha, Ms. Pooja

Counsel for the Respondents:

A. Civil Law - Civil Procedure Code,1908-Section 96- The Indian Succession Act,1925-Section 299-rejection-application for deletion of the issue no. 2 which had been framed earlier-whether said order made by District Judge during

the course of probate proceedings, would be amenable to an appeal before this Court under section 299-any order of interlocutory nature passed by the District Judge during course of probate proceedings or letters of administration, cannot be held to be an adjudication of a nature which conclusively determines the right of the parties and therefore would not be a 'decree' therefore the same cannot be held to be appealable under section 299 nor it would attract the provisions of section 96 of the code-the appeal is not maintainable- hence, dismissed.

The appeal is dismissed. (E-6)

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

1. Heard Sri Arvind Kumar Kushwaha, learned counsel for the appellants.

2. This is a first appeal filed under Section 299 of the Succession Act, 19251 read with Section 96 of the Code of Civil Procedure, 19082, directed against an order dated 15.07.2023 passed by the Additional District Judge, Court No. 13, Varanasi, in Probate Case No. 73 of 2019, rejecting the application 34C dated 16.05.2022, in terms of which the appellants herein had sought deletion of Issue No. 2, which had been framed earlier.

3. The aforesaid order dated 16.05.2022 rejecting the application for deletion of the issue would be referable to the provisions of Order XIV Rule 5 C.P.C, and in view of the same a question would arise as to whether the said order can be held to be amenable to an appeal under Section 299 of the Act read with Section 96 of the Code.

4. Counsel for the appellants has sought to contend that every order made by a District Judge in probate proceedings would be appealable under Section 299 of the Act.

5. The question which therefore requires consideration is, as to whether every order made by a District Judge during the course of probate proceedings, would be amenable to an appeal before this Court under Section 299. The relevant provisions of the Act, are being extracted below:

"**268. Proceedings of District Judge's Court in relation to probate and administration.**—The proceeding of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908.

295. Procedure in contentious cases.—In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

299. Appeals from orders of District Judge.—Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High Court in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals."

6. There is no dispute with regard to the fact that the Succession Act, 1925 is a special Act and Section 299 of the said Act provides a forum of appeal against every order made by a District Judge by virtue of the powers thereby conferred upon him, before the High Court, in accordance with provisions of the Code, as applicable to appeals.

7. Section 268 provides that the proceedings of the court of the District Judge in relation to the granting of probate proceedings and letters of administration, shall be regulated by the Code so far as the circumstances of the case permits.

8. The provisions under Section 295 goes to show that in contentious cases, the proceedings shall take as nearly as may be the form of a regular suit, according to the provisions of the Code.

9. In a case where a probate proceeding is registered, and is treated as a suit after it becomes contentious and the Court is required to proceed for settlement of issues, a question would arise as to what would be the procedure to be followed. The Act being silent on the procedure to be followed, as of necessity, and in view of Section 268, the provisions under Order XIV of the Code with regard to settlement of issues, would become applicable.

10. In the case at hand, in terms of the order dated 16.05.2022, passed by the Additional District Judge in the probate proceedings, which is sought to be made subject matter of the present appeal, the application (34C) seeking deletion of issue no.2, as had been framed earlier by the Court, has been rejected.

11. The appellants herein having chosen to invoke the remedy of appeal under Section 299 against the aforesaid order rejecting the application seeking deletion of an issue, it would be required to be seen as to whether the remedy of appeal under Section 299 would be available in the given circumstances.

12. Counsel for the appellants has sought to lay emphasis on the expression 'every order' under Section 299, to urge that in terms of the section every order made by a District Judge is subject to an appeal, and therefore the order rejecting the application for deletion of an issue would also be appealable under the said provision.

13. The aforesaid contention, would have to be tested in terms of the conditions laid down under Section 299 of the Act for exercise of the appellate powers.

14. A close reading of the language under Section 299 would indicate that the word 'every' does not govern the word 'order', but it qualifies the entire phrase 'order made by a District Judge by virtue of the powers hereby conferred upon him'. The consequence that follows would be that not every order made by a District Judge would be amenable to appeal under Section 299; only an order made by a District Judge by virtue of the powers conferred by the provisions of the Act shall be subject to an appeal under the section.

15. The expression 'hereby conferred' used would have to be understood as meaning 'conferred by the provisions of the Act'. Applying this construction, the words 'made by virtue of the powers hereby conferred', would have to be necessarily held to mean by virtue of the powers conferred by the express provisions under the Act.

16. For testing the appealability of an order under Section 299, the order in question must be traceable to a provision under the Act. Only in a situation where the order can be traced to a specific provision under the Act, it would be held to be appealable under the section. In other words, there must be a provision under the Act conferring power to make the order;

otherwise the said order would not be appealable.

17. It would not be sufficient to show that the order which is sought to be appealed against, has some legal sanction or authority; the authority must be traceable to some provision under the Act.

18. An order which has been made not under any provision under the Succession Act, but draws its authority from some other statute, the provisions of which have been made applicable to proceedings under the Succession Act, would not be an order made by virtue of the powers conferred by the Act. It would be an order exercisable under the provisions of another Act, which in a given set of circumstances, have been made applicable to proceedings under the Succession Act.

19. The proceedings for grant of probate or letters of administration is governed by the provisions of Succession Act, and in a situation where the case is contentious, Section 295 gets attracted in terms whereof it is provided that that proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code. The District Judge, in such circumstances, may be called upon to make various kinds of orders, which may not be traceable to any power under the Succession Act but would be referable to powers under the Code.

20. An order made not in exercise of a power conferred by the Succession Act, but by a power referable to another statute the provisions of which have been made applicable in the proceedings, would not be an order made by virtue of the powers conferred by the Succession Act, simply because a provision under it makes the other statute applicable. The order passed in such a situation would be by virtue of powers conferred only by the other statute.

21. The proceedings for grant of probate and letters of administration being governed by the provisions of the Code, in certain situations, which confer powers for making of various kinds of orders; any of such orders when made by the District Judge may be said to be an order made by virtue of the powers conferred by the Code but cannot be said to be an order made by virtue of the powers conferred by the Succession Act.

22. The Succession Act being a special Act, an order made thereunder may be said to be an order made under the Code, in a situation where the Code regulates the proceedings under the special Act but the converse situation cannot be readily inferred and an order made exercising powers under the Code cannot be held to have been made by virtue of the powers under the Succession Act.

23. Section 268 which provides that the proceedings of the court of the District Judge in relation to granting of probate or letters of administration shall be regulated by the Code, cannot lead to an inference that an order passed by the District Judge, referable to the provisions under the Code, would be appealable under Section 299.

24. The language of the statute makes it clear that the legislature did not intend to make every order made by the District Judge appealable under Section 299, the restriction having been provided by

employing the words 'made by a District Judge by virtue of the powers hereby conferred'.

25. The right of an appeal under Section 299 of the Act provided against every order made by District Judge by virtue of powers conferred, would therefore have to be held, to be available only against orders made by the District Judge by virtue of powers conferred under the Act and the said right of an appeal would not be available against an order which has been passed not in exercise of powers conferred by the Succession Act, but in exercise of powers made available under the provisions of the Code.

26. It may also be noted that in a contentious case although the procedural provisions of the Code have been made applicable, the proceedings are not to be treated as a regular suit and upon determination of the issues raised therein, a decree is not to follow. The expression 'in accordance with the provisions of Code of Civil Procedure, 1908' finding place in Section 299 of the Act, is not indicative of substantive rights of the parties, but only refers to the procedural aspect.

27. Any order of interlocutory nature passed by the District Judge during the course of proceedings in a case seeking grant of Probate or Letters of Administration, cannot be held to be an adjudication of a nature which conclusively determines the rights of the parties and therefore would not be a 'decree', so as to be amenable to an appeal under Section 96 of the Code.

28. The order against which the appeal has been preferred having been passed by the District Judge exercising powers referable to Order 14 Rule 5 of Code, the said order cannot be said to be an order made by the District Judge by virtue of powers conferred upon him under the Succession Act and therefore the same cannot be held to be appealable under Section 299 thereof. The order would also not be covered under the description of the term 'decree' so as to attract the provisions of Section 96 of the Code, and be subject to an appeal under the said provision.

29. The present appeal having therefore been held to be not maintainable, **stands dismissed.**

30. It would be open to the appellants to seek appropriate legal remedy, as they may be advised.

(2024) 1 ILRA 1118
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.10.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 1083 of 2006

The New India Assurance Co. Ltd. ...Appellant
Versus
Arjun Gaur & Ors. ...Respondents

Counsel for the Appellant:
Sri Rakesh Bahadur

Counsel for the Respondents:
Sri Vashistha Tewari

First Appeal From Order – Dismissal of Insurance Company's Challenge – The appellant-insurance company challenged the Motor Accident Claims Tribunal's award dated 06.01.2006, granting Rs.7,25,404/- with 7.5% interest for the death of Indravati Devi in a

motor accident – Held, the Tribunal's findings on negligence and driving licence were upheld, and the appeal was dismissed for lack of merit. (Paras 2, 29)

B. Negligence of Driver – Tribunal's Finding Upheld – The Tribunal held that the accident was caused by the rash and negligent driving of the driver of Tempo No. U.P.-52-F-0451, based on the testimony of eye-witness P.W.2 – Held, the FIR and charge sheet alleging negligence of the other vehicle (Tempo No. U.P.-56-T-0054) could not override the eye-witness testimony, and in a case of composite negligence, claimants could choose to claim from either tortfeasor. (Paras 5, 11, 14, 15)

C. Composite Negligence – Claimant's Right to Choose Tortfeasor – The accident involved a head-on collision between two tempos – Held, as per *Khenyei Vs New India Assurance Co. Ltd.*, in cases of composite negligence, claimants can claim compensation from either tortfeasor, and the insurance company may pursue recovery from the other vehicle's owner separately. (Paras 11, 15)

D. Burden of Proof on Driving Licence – Insurance Company's Responsibility – The Tribunal held that the insurance company failed to prove the driver of Tempo No. U.P.-52-F-0451 lacked a valid driving licence – Held, as per *National Insurance Co. Ltd. Vs Swaran Singh*, the burden lies on the insurance company to prove both the breach of policy and deliberate negligence by the owner, which the appellant failed to establish. (Paras 6, 16, 20, 25)

E. Per Incuriam Ruling – Non-Binding Precedent – The appellant relied on *United India Insurance Co. Ltd. Vs Rajesh Kumar Tripathi* to argue the burden was on the owner to prove a valid driving licence – Held, this case was per incuriam for not considering *Swaran Singh*, and the latter's ruling that the insurance company bears the burden remains binding. (Paras 23, 24, 27)

Appeal Dismissed.

List of Cases cited:

1. National Insurance Co. Ltd. Vs Swaran Singh, (2004) 3 SCC 297

2. Pappu Vs Vinod Kumar Lamba, 2018 (1) TAC 360 (SC)

3. United India Insurance Co. Ltd. Vs Rajesh Kumar Tripathi, 2023 (3) TAC 32 (All.)

4. Khenyei Vs New India Assurance Co. Ltd., (2015) 9 SCC 273

5. Rana Pratap Singh Vs St. of Uttar Pradesh, (1996) All LJ 301

6. Punjab Land and Recreation Corporation Ltd. Vs Presiding Officer Labour Court, (1990) 3 SCC 682

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

1. Heard learned counsel for the appellant and learned counsel for the respondents.

2. The present appeal has been preferred by the appellant-insurance company challenging the award dated 06.01.2006 passed by the Motor Accident Claims Tribunal/Special Judge (SC/ST Act), Court No.3, Deoria (hereinafter referred to as 'Tribunal') in M.A.C.P. No.224 of 2004 whereby Tribunal has awarded Rs.7,25,404/- along with 7.5% interest as compensation to the claimants/respondents.

3. The claimants/respondent nos.1 to 4 instituted the claim petition for the death of one Indravati Devi who died in an accident on 28.06.2004. According to claimants/respondent nos.1 to 4, deceased-Indravati Devi was traveling on Tempo No.U.P.-52-F-0451 and when the said tempo reached near Khukhund crossing, it met with an accident with delivery Tempo No.U.P.-56-T-0054. Indravati Devi

suffered injuries in the said accident and died.

4. The Tribunal framed as many as four issues. The appeal has been filed challenging the finding of the Tribunal on the issue nos.1 & 2.

5. On the issue no.1 with regard to occurrence of the accident and negligence of the driver of tempo, the Tribunal considered necessary evidence and material on record and found that deceased died in the accident due to rash and negligent driving of driver of Tempo No.U.P.-52-F-0451.

6. On the issue no.2 in respect of driving licence of driver of Tempo No.U.P.-52-F-0451, Tribunal held that no driving licence was filed on record, and burden was upon the appellant-insurance company to prove that driver of the Tempo No.U.P.-52-F-0451 was not holding a valid driving licence, and since insurance company failed to prove that driver of the Tempo No.U.P.-52-F-0451 was not holding a valid driving licence, therefore, the said tempo was being driven by the driver holding a valid driving licence.

7. Challenging the aforesaid award, learned counsel for the appellant has contended that the F.I.R. has been lodged by Arjun Gaur husband of the deceased in respect to the alleged accident wherein it is stated that the accident had taken place due to rash and negligent driving of driver of Tempo No.U.P.-56-T-0054, therefore, Tribunal has erred in law in holding that the accident had taken place due to rash and negligent driving of driver of Tempo No.U.P.-52-F-0451. It is contended that P.W.2-Jai Prakash Mishra was a planted witness and there is nothing on record clarifying under which circumstances the husband of the deceased in F.I.R. stated that the accident had taken place due to rash and negligent driving of driver of Tempo No.U.P.-56-T-0054. It is further contended that admittedly, both the vehicles involved in the accident were coming from opposite direction and it was a case of head on collision between two vehicles, therefore, drivers of both the vehicles were negligent in driving the vehicles. Consequently, it is submitted that Tribunal should have apportioned the negligence of both the drivers equally in the accident and should have accordingly, fixed the liability upon the owner of both the vehicles.

8. It is further contended that the Tribunal has erred in law in holding that burden is upon the insurance company to prove that Tempo No.U.P.-52-F-0451 was being driven by a person not holding a valid driving licence. It is submitted that no driving licence was filed on record and in such an event, it was not possible for the insurance company to verify the driving licence of the driver of Tempo No.U.P.-52-F-0451. Therefore, it is submitted that the burden was upon the owner of Tempo No.U.P.-52-F-0451 to prove that the Tempo No.U.P.-52-F-0451 was being driven by a person having a valid driving licence, and after the owner of the Tempo No.U.P.-52-F-0451 has discharged its burden, the burden would shift upon the insurance company to prove that the Tempo No.U.P.-52-F-0451 was being driven by a person not holding a valid driving licence.

9. In support of the case, learned counsel for the appellant has placed reliance upon the judgement of Apex Court in the case of ***Pappu and Others Vs. Vinod***

Kumar Lamba and Another 2018(1) T.A.C. 360 (SC) and judgement of this Court in the case of ***United India Insurance Company Ltd. Vs. Rajesh Kumar Tripathi and Another 2023(3) T.A.C 32 (All.).***

10. Accordingly, it is submitted that the appellant is entitled to right of recovery. It is also urged that insurance company in paragraph 14 of the written statement has categorically stated that owner of the Tempo No.U.P.-52-F-0451 intentionally and deliberately entrusted the vehicle to a driver not having a valid driving licence. Thus, it is contended that in the instant case, twin condition that driver of the Tempo No.U.P.-52-F-0451 was not holding a valid driving licence at the time of the accident, and breach of policy was committed by the owner deliberately which are necessary for the insurance company to establish in order to avoid its liability on the ground of breach of policy are fulfilled, therefore, Tribunal has erred in law in fixing the liability upon the appellant-insurance company to pay compensation and not giving right of recovery to it.

11. Per contra, learned counsel for the respondents would contend that admittedly, in the instant case, the deceased was travelling in Tempo No.U.P.-52-F-0451. It is submitted that the Tribunal has placed reliance upon the testimony of P.W.2, who was the eye witness of the accident and who categorically stated that the accident had taken place due to rash and negligent driving of driver of Tempo No.U.P.-52-F-0451, and there is no evidence in rebuttal to the testimony of P.W.2, therefore, Tribunal has rightly held that the accident was the result of sole negligence of driver of Tempo No.U.P.-52-F-0451 as record of criminal cases cannot be given precedence over the testimony of an eye witness. He further contends that in the instant case, deceased was traveling in Tempo No.U.P.-52-F-0451, therefore, it was a case of composite negligence qua deceased, and it is the choice of the claimants/respondents to claim compensation from either of the tortfeasors, and if insurance company is of the view that there was negligence of driver of other vehicle i.e. Tempo No.U.P.-56-T-0054, the insurance company may lay separate claim against the owner of Tempo No.U.P.-56-T-0054 and recover the awarded amount paid by it to the extent of negligence of driver of Tempo No.U.P.-56-T-0054.

12. So far as the issue of driving licence is concerned, it is submitted that the law is settled that since the plea of breach of insurance policy is set up by the insurance company, therefore, burden is upon the insurance company to prove that the driver of Tempo No.U.P.-52-F-0451 was not holding a valid driving licence. Thus, it is submitted that appeal is devoid of merit and is liable to be dismissed.

13. I have considered the rival submissions of the parties and perused the record.

14. So far as the question of negligence of driver of other Tempo No.U.P.-56-T-0054 is concerned, this Court may note that claim petition has been instituted by the claimants/respondents alleging that the accident had taken place due to rash and negligent driving of driver of Tempo No.U.P.-52-F-0451. The claimants/respondents also produced P.W.2, who was the eye witness of the accident and who categorically stated that the driver of Tempo No.U.P.-52-F-0451 was driving the tempo rashly and

negligently due to which, the accident had taken place. There is no evidence in rebuttal to the testimony of eye witness P.W.2. Though, learned counsel for the appellant has placed heavy reliance upon the allegations made in the F.I.R. wherein it is stated that the accident had taken place due to rash and negligent driving of driver of Tempo No.U.P.-56-T-0054 and charge sheet has also been filed by the police against the driver of Tempo No.U.P.-56-T-0054, but it is settled in law that contents of F.I.R. and charge sheet cannot be given precedence over the testimony of P.W.2, who was the eye witness of the accident.

15. In such view of the fact, this Court does not find any illegality committed by the Tribunal in holding that the accident had occurred due to rash and negligent driving of driver of Tempo No.U.P.-52-F-0451. Even otherwise, it is a case of composite negligence, the Apex Court in the case of ***Khenyei Vs. New India Assurance Company Limited and others (2015) 9 SCC 273*** has held that in a case of composite negligence, it is the choice of the claimant to claim compensation from either of the tortfeasors.

16. Now, so far as the issue of driving licence is concerned, the law on the point that in order to avoid its liability on the ground of breach of policy, the burden is upon the insurance company to prove the breach of policy. The insurance company further has to prove that breach of policy committed by the owner was deliberate.

17. In the present case, the insurance company had set up a plea that liability of the insurance company is subject to condition that driver of the offending vehicle i.e. Tempo No.U.P.-52-F-0451 was holding a valid driving licence at the time of the accident. In other words, the plea that insurance company is liable to pay compensation only if offending vehicle was being driven by a person holding a valid driving licence has been set by the insurance company.

18. In the case of ***National Insurance Company Ltd. Vs. Swaran Singh & Others (2004) 3 SCC 297,*** several awards were assailed by the insurance company denying its liability on the ground of breach of policy by the owner wherein it was contended that burden is upon the owner to prove that offending vehicle was being driven by a person having a valid driving licence, and thereafter, burden would shift upon the insurance company to prove that the driver of the offending vehicle was not holding a valid driving licence. In other words, it was contended that in case owner has failed to discharge its burden to prove that driver of offending vehicle was holding a valid driving licence, the owner of the offending vehicle has committed breach of policy and insurance company cannot be held liable to pay compensation. The Apex Court has summarized the finding in paragraph 110 of the judgement after considering the defence provided to the insurer under Section 149(2)(a)(ii) of the Motor Vehicles Act. Paragraph 110 of the judgement is reproduced herein below:-

"*110. The summary of our findings to the various issues as raised in these petitions is as follows:*

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance

coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a) (ii) of the said Act.

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish "breach" on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The Claims Tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the Tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to

decide dispute inter se between the insurer and the insured. The decision rendered on the claims and dispute inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the Tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover the amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

19. In the case of ***Pappu (supra)*** the Apex Court has also considered the judgement of ***Swaran Singh (supra)*** in paragraph 14 of the judgement and has reproduced paragraph 110 of the judgement of ***Swaran Singh (supra)*** in the said case.

20. Now, perusal of the paragraphs 110 (iii) & (iv) of the judgement in the case of ***Swaran Singh (supra)***, extracted above, reveals that the insurance company in order to avoid its liability must not only establish the available defence raised in the said proceedings, but also must establish 'breach' on the part of the owner of the vehicle was deliberate, and the burden of proof was upon the insurance company.

21. In the case of ***Pappu (supra)***, the Apex Court has considered a case where the Tribunal after recording a finding that the owner has committed breach of insurance policy absolved the insurance company and directed the owner to pay the compensation. The appellant-Pappu who was claimant preferred an appeal before the High Court seeking modification of the award in view of the law laid down in the case of ***Swaran Singh (supra).*** Accordingly, he prayed that the award may be modified and the insurance company may be directed to pay the award and thereafter, recover it from the owner which prayer was allowed by the Apex Court. In the said case, there was no direct issue on whom the burden to prove that that the

offending vehicle was being driven by a person not holding a valid driving license would lie was involved.

22. This Court is of the view that the Apex Court in the case of ***Pappu (supra)*** in altogether different factual backdrop made an observation that the burden is upon the owner to prove that the driver of offending vehicle was having a valid driving licence at the time of accident, the law laid down by the Apex Court in the case of Swaran Singh (supra) is still a good law and is binding precedent which is also evident from the fact that the Apex Court has also considered the judgement in the case of ***Swaran Singh (supra)*** and placing reliance upon the same, it modified the award in the case of ***Pappu (supra)***.

23. Now, coming to the judgement of this Court in the case of ***Rajesh Kumar Tripathi (supra)*** wherein this Court in paragraph 10 has held as under:-

"*10. This takes this Court to this issue of driving license of the driver being not valid and electricity company being not made party. Here the decision in Pappu and others (Supra) will come to aid of the appellant as it was for the owner and driver to prove that the vehicle was being plied by the driver having valid driving license and only after the driving license is filed, the Insurance Company would be under an obligation to prove otherwise.*"

24. This Court in deciding the case of ***Rajesh Kumar Tripathi (supra)*** did not consider the law laid down by the Apex Court in the case of ***Swaran Singh (supra)*** in paragraph 110 (iii) & (iv) of the judgement, extracted above.

25. As per paragraph 110 (iii) & (iv) of the judgement of Apex Court in the case of ***Swaran Singh (supra)***, the insurance company has to establish the twin condition in order to avoid its liability to pay compensation.

26. It is also pertinent to note that a judgement can be said to be per incuriam when it has been delivered by the Court in ignorance of the relevant statutory provisions and or the binding decision of a Court of co-ordinate jurisdiction or that of a higher Court. In this connection the Full Bench of this Court in Rana Pratap Singh… v. State Of Uttar Pradesh…, (1995) 1 All CJ 200: (1996 All LJ 301) has laid down as under (at p. 308 of All LJ):-

"*This is what now brings us to what constitute the parameters of the per incuriam rule. As the Supreme Court in Punjab Land and Recreation Corporator Ltd. v. Presiding Officer Labour Court, (1990) 3 SCC 682 explained, "the Latin expression per incuriam means through inadvertance. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a precious decision of this Court". Further "in England a decision is said to be given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords."*

27. In the instant case, the law postulated by the Apex Court in the case of ***Swaran Singh (supra)*** has not been considered by the Co-ordinate Bench of this Court in the case of ***Rakesh Kumar***

Tripathi (supra) and thus, it is not a binding precedent on this Court.

28. It is also urged by the learned counsel for the appellant that appellant has proved that owner deliberately committed breach of policy, this Court may note that though, insurance company in paragraph 14 of the written statement has stated that owner deliberately handed over the offending vehicle to a driver who did not have a valid driving licence, but the insurance company did not get any issue framed on the said point nor led any evidence on record to prove the averments made in paragraph 14 of the written statement. Mere assertion is not sufficient unless the assertions made in the written statement are proved by leading cogent evidence. In such view of the fact, the aforesaid submission of learned counsel for the appellant is also misconceived and is hereby rejected.

29. Thus, for the reasons given above, the appeal lacks merit and is hereby ***dismissed*** with no order as to costs.

(2024) 1 ILRA 1126
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2023

BEFORE

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

First Appeal From Order No. 1455 of 2008

Mohd. Raseed Khan ...Appellant
Versus
Nagar Palika Parishad, Jhansi & Anr. ...Respondents

Counsel for the Appellant:
Sri B.N. Agarwal, Sri Sanjay Agrawal
Counsel for the Respondents:
Sri Pankaj Srivastava

First Appeal From Order – Remand Order Set Aside – The plaintiff challenged the Lower Appellate Court's order dated 19.02.2008, which set aside the Trial Court's decree and remanded the suit for fresh trial on Issue No. 1 – Held, the remand was unwarranted as both parties had adduced all evidence consciously, and the Lower Appellate Court was directed to decide the appeal on merits within three months. (Paras 13, 30)

B. Incorrect Framing of Issue – No Prejudice to Parties – The Trial Court framed Issue No. 1 incorrectly as "Whether the constructions are an encroachment on Nagar Palika land?" placing the burden on the defendants – Held, despite the misframing, both parties led evidence fully aware of each other's case, and the error did not prejudice the defendants, rendering remand unnecessary. (Paras 16, 17, 21)

C. Burden of Proof – Academic in Presence of Full Evidence – The Lower Appellate Court held that the burden to prove title and possession should have been on the plaintiff – Held, as per *Bhairab Chandra Nandan Vs Ranadhir Chandra Dutta* and *P. Purushottam Reddy Vs Pratap Steels Ltd.*, incorrect burden placement does not vitiate findings when parties consciously adduce all evidence. (Paras 18, 19, 20)

D. Scope of Remand – Limited Under Order XLI CPC – The Lower Appellate Court remanded the suit under Order XLI Rule 23-A CPC – Held, as per *Shivakumar Vs Sharanabasappa* and *Nadakerappa Vs Pillamma*, remand is inappropriate when sufficient evidence exists to decide the case on merits, and courts must avoid prolonging litigation. (Paras 24, 26, 27)

E. Direction for Expeditious Disposal – The Court set aside the remand order and restored the appeal (Civil Appeal No. 67 of 2006) to the Lower Appellate Court – Held, the appellate court was directed to decide the appeal on a day-to-day basis within three months to ensure speedy justice. (Paras 30, 31)

Appeal Allowed.

List of Cases cited:

1. Bhairab Chandra Nandan Vs Ranadhir Chandra Dutta, (1988) 1 SCC 383

2. P. Purushottam Reddy Vs Pratap Steels Ltd., (2002) 2 SCC 686

3. Nagubai Ammal Vs R. Shama Rao, AIR 1956 SC 593

4. Shivakumar Vs Sharanabasappa, (2021) 11 SCC 277

5. Nadakerappa Vs Pillamma, 2022 SCC OnLine SC 387

6. Arvind Kumar Jaiswal Vs Devendra Prasad Jaiswal Varun, 2023 SCC OnLine SC 146

7. Mohan Kumar Vs St. of M.P., (2017) 4 SCC 92

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

1. This is a plaintiff's appeal arising out of an order of remand passed by the Lower Appellate Court setting aside the decree made in the suit and ordering a fresh trial, upon Issue No.1.

2. Original Suit No.194 of 2001 was instituted by Mohd. Raseed Khan against the Nagar Palika Parishad and the Executive Engineer of the said Nagar Palika, arrayed as the two defendants, claiming a permanent prohibitory injunction to the effect that the defendants be restrained from taking possession of and demolishing the existing constructions or otherwise interfering in the plaintiff's peaceful possession of Plot No.1897 *(minjumla)*, the boundaries whereof are set out at the foot of the plaint and situate in Mauza Dadiapura, Andar Sagar Khidki, Jhansi.

3. The facts in brief leading to the action are:

The plaintiff claims to be the *zamindar*-owner in possession of Arazi No.187, admeasuring 0.202 hectares, boundaries whereof are set forth at the foot of the plaint and bearing *Khata Khewat* No.1/2, Mohal Shamlaat, *Mauza* Dadiapura, Andar Sagar Khidki, Jhansi, which is popularly known as 'Jogiana'. The said property shall hereinafter be referred to as 'the suit property'. According to the plaintiff, the suit property houses a shop vending grit, stones etc., described as *Patthar Ki Taal Dukaan*, a thatched roofed structure described as a '*tapra*' and a house etc. The suit property is located in the midst of a populated area. A part of the suit property was encroached upon by one Ghanshyam unlawfully, who raised some construction thereon. The plaintiff instituted O.S. No.572 of 1995 against Ghanshyam for the relief of mandatory injunction, ordering the encroacher to remove his wall and tin-shed/ encroachments, and upon failure to do so, cause its removal through the process of Court. The suit aforesaid came to be decreed *vide* judgment and decree dated 06.03.1999 passed by the Civil Judge (Jr. Div.), Jhansi. Some local mafiosi then attempted to grab the suit property that led the plaintiff to institute O.S. No.59 of 2001 in the Court of the Civil Judge (Sr. Div.), Jhansi against Vishnu Garg, seeking a permanent injunction restraining the defendant of that suit and his associates from forcibly occupying the suit property, carving plots out of it, raising constructions thereon or selling it out to third parties. The learned Civil Judge *vide* his order dated 22.01.2001 passed an order of ad interim injunction directing parties to maintain *status quo*. This led persons, whose designs had been thwarted to forcibly occupy the suit property, to cause the employees of the Nagar Palika *mala fide* and the elected

representatives there, by offering them the allurement of political support, to join them in the enterprise of dispossessing the plaintiff from the suit property and demolishing his construction.

4. It is the plaintiff's case that the defendants, that is to say, the Nagar Palika Parishad are neither the owner nor in possession of the suit property. However, defendant No.2, acting in concert with the private encroachers, caused a notice to be issued under the Uttar Pradesh Municipalities Act, 1916 (for short, 'the Act of 1916') requiring the plaintiff to remove his constructions within three days and further saying that in the event of default, it would be demolished by force. It is pleaded by the plaintiff that the notice is absolutely bad, illegal and without jurisdiction, which does not oblige the plaintiff. But, if acting on the notice, the constructions standing on the suit property were demolished and construction of a park etc. done, the plaintiff would suffer irreparable loss and injury. Accordingly, the plaintiff instituted the present suit claiming exemption from the requirement of serving a notice under Section 326 of the Act of 1916.

5. A written statement was filed on behalf of the defendants on 02.04.2002, where Paragraph No.1 of the plaint was not denied. In the additional pleas, it is averred that in the survey plan of the Nagar Palika Parishad, the suit property appears as Nagar Palika property and no one has a right to be in its possession or exercise any right in relation to it. The plaintiff's so called possession and constructions are absolutely illegal, which the Nagar Palika have every right to remove. It is also averred that the demolition notice has been lawfully served, which the Nagar Palika have a right under the law to do. It is also pleaded that before action to remove encroachment is taken, the Nagar Palika always issue notice to the encroacher. The next plea that is urged is that against the notice an appeal lies under Section 318 of the Act of 1916. The present suit is not maintainable.

6. On the pleadings of parties, the Trial Court framed the followings issues (translated into English from Hindi):

"1. Whether the constructions are an encroachment on the Nagar Palika land?

2. Whether the Court has jurisdiction to try the suit?

3. To what relief is the plaintiff entitled?"

7. The plaintiff in support of his case examined three witnesses, to wit, PW-1 Mohd. Raseed Khan, Ram Swaroop Gupta, PW-2 and Khaliluddin, PW-3. In his documentary evidence, the plaintiff produced Paper No.10-Ga, copy of the Khewat Chausala relating to *Mohala Shamlaat* for the Fasli Year 1405-1408. There is further on record an extract of the non-Z.A. Khatauni for the *Fasli* Year 1408, paper No.12-Ga, copy of a registration certificate for the plaintiff's shop dated 05.03.1994 issued by the Chief Inspector, Shops and Commercial Establishment, paper No.13-Ga, a copy of the judgment passed in O.S. No.572 of 1999, Paper No.14-Ga, a copy of the order passed in O.S. No.59 of 2001, paper No.15-Ga being copy of a notice sent to the defendants under Section 326 of the Act of 1916, Paper No.16-Ga, copy of the registered postal receipt relative to the dispatch of the said notice, Paper No.17-Ga, copy of the demolition notice served by the defendant Nagar Palika under Section 211 of the Act

of 1916. Through another list Paper No.33-Ga, four documents were filed, to wit, a map bearing Paper No.34-Ga, *Khasra Bandobast* for the year 1346F bearing Paper No.36-Ga, and a copy of the judgment and order dated 20.07.1993 passed by the Ex-Court of Munsif, Jhansi in O.S. No.43 of 1989.

8. The defendants produced a solitary witness in support their case, Dharamjeet Singh, former Draftsman in the employ of the Nagar Palika Parishad, Jhansi. No documentary evidence was produced on behalf of the defendants.

9. The Trial Court while deciding Issue No.1 did say in the opening remark that the burden to prove it lay upon the defendants, but as the findings proceed, it is apparent that both parties went to trial on the issue conscious of each other's case where the plaintiff's evidence comprising the Khewat and the non-Z.A. Khatauni, the other documentary evidence and the oral testimony, was considered to return a finding that the plaintiff is the owner in possession of the suit property. The testimony of DW-1 was considered by the Trial Court to note that the witness has acknowledeged the fact that the plaintiff was in possession of the suit property and has his constructions there, including his shop. The Trial Court has remarked that the witness has never said that the Nagar Palika has not given permission to raise the constructions.

10. In his cross-examination, DW-1, the witness has admitted the fact that the plaintiff has not constructed any projection etc. on the suit property. It has, particularly, been recorded by the learned Trial Judge that the witnesses has admitted that the plot housing the suit property is not entered in the Nagar Pakika Property Register. The Trial Judge has also noted that DW-1 has said that he has not brought the survey plan to Court. Considering that the entire case of the defendant is based on the fact that the property is their's, because it is included in the survey plan, the survey plan, which ought to have been, has not been produced or proved in Court. DW-1 has also been noticed to have said that he did not have with him the Register to show that the plot comprising the suit property is public property. All that he could rely upon was the survey plan. The Court has remarked that the defendants witness is considering the property to be the public property on the basis of the survey plan. A finding has been returned by the Trial Judge that from the aforesaid testimony of defendant's witness, it appears that the suit property is entered in the defendant's survey plan, but not in their property register, and the survey plan has not been proved in Court. It has been observed that while the plaintiff has produced documentary evidence supported by oral testimony to show that he is in possession of the suit property, the defendants have not produced any evidence about their ownership or possession. The plaintiff has been held by his evidence to have proved both his title and possession to the suit property, whereas by acknowledging the fact that the suit property is not entered in their property register, the defendants have failed to establish that the plaintiff has encroached upon Nagar Palika Property, to wit, the suit property. The issue was, accordingly, decided in terms that the plaintiff is the owner in possession of the suit property, not the defendants, and further that the plaintiff has not encroached upon th

11. Issue No.2 has been decided against the defendants and in favour of the

plaintiff holding that the notice of demolition issued under Section 211 of the Act of 1916 is without jurisdiction, because it is a notice issued completely beyond the provisions of Section 211, which envisage the Municipality's power by notice to require the owner or occupier of a building to remove or alter a projection or structure overhanging or projecting into or encroaching a street, drain, sewer or aqueduct. The Nagar Palika have no power to direct demolition of construction, claiming it to be the Nagar Palika land under Section 211. It is for the said reason that the remedy of appeal under Section 318 of the Act of 1916 would not at all be available to the plaintiff.

12. The third issue has also been answered in favour of the plaintiff and the suit decreed in terms that the defendants have been restrained from interfering in the plaintiff's peaceful possession over the suit property or his constructions perpetually.

13. Aggrieved by the judgment and decree dated 22.08.2003 passed by the Trial Judge, an appeal was carried by the defendants to the District Judge of Jhansi, that was numbered on the file of the learned Judge as Civil Appeal No.67 of 2006. The appeal upon assignment, came up for determination before the Additional District Judge, Court No.3, Jhansi on 19.02.2008. The Lower Appellate Court has allowed the appeal holding the finding of the Trial Court to be vitiated on Issue No.1 on ground that burden has wrongly been placed upon the defendant for reason that the issue has been wrongly framed. The suit has been remanded to the Trial Court for trial afresh on Issue No.1 in accordance with law.

14. Aggrieved by the order of remand passed by the Lower Appellate Court, the plaintiff has preferred this appeal under Order XLIII Rule 1(u) of the Code of Civil Procedure, 1908 (for short, 'the Code').

15. Heard Mr. Sanjay Agrawal, learned Counsel for the plaintiff and Mr. Pankaj Srivastava, learned Counsel appearing on behalf of the respondents.

16. The Lower Appellate Court has opined that the plaintiff has brought this action on the basis of title and possession, and the cause of action shown is the statutory notice issued by the defendants calling upon him to remove the encroachment made on the Nagar Palika property, to wit, the suit property. In the written statement, the defendants have claimed the suit property to be in the Nagar Palika's ownership and said that the plaintiff's possession, as well as the standing constructions, are illegal. In the opinion of the Lower Appellate Court, the plaintiff, therefore, had the burden of proving both title and possession. The Lower Appellate Court says that on the case of parties, the issue that ought to have been framed should be: *Whether the plaintiff is the owner in possession of the suit property?* It is then remarked by the Lower Appellate Court that the learned Trial Judge has committed an error in framing the relevant issue in the terms: *Whether the plaintiff's construction is an encroachment on Nagar Palika land*? In the opinion of the Lower Appellate Court, this wrong framing of the issue has thrown burden upon the defendants to prove that the plaintiff has not encroached upon their land. This is not in accordance with the parties' case, as held by the Judge in the Lower Appellate Court.

17. Upon a close scrutiny of the records, the judgment impugned, including that passed by the Trial Court and hearing learned Counsel for the parties, what we find is that the Lower Appellate Court may be right in saying that the issue ought to have been framed in terms suggested by the Judge in appeal, and if it were done, certainly the burden and onus both would be differently placed. Both would fall upon the plaintiff in case this issue were framed, as it ought to have been. But, this error in framing the issue and casting the onus and burden upon the defendants, does not make any material difference. This is so for that reason that where parties go to trial conscious of the real issue that arises between them and lead all evidence that they can, it matters little that the issue has been incorrectly framed or the onus and burden placed on the wrong shoulders.

18. It may, in certain cases, make a difference of some consequence to the outcome, if the finding rendered is founded entirely on who had the burden, but could not discharge it. This could be more true of cases that are disposed of conducting a proper trial, where the relevant issues are decided on the point of onus under Section 102 of the Evidence rather than burden of proof under Section 101. Where, however, all evidence has been led by parties, with no case that one party or the other could not produce evidence that he wished to do, a mere ill-framing of issue and the consequent incorrect placing of burden, would not vitiate the result. It would all the more not vitiate the result where both parties have led all evidence that they desired, and, the Court has rendered a wholesome judgment, considering the entire evidence; not merely disposing of issues in the suit, in the rather out of vogue manner on the point of evidential burden alone, and passing judgment on that basis.

19. What we have said above endorses the principle that once both parties have led evidence, fully conscious of the other's case, the mere non-framing of the relevant issue or a wrong framing of it, would not affect the validity of the finding returned. In this connection, reference may be made to the decision of the Supreme Court in **Bhairab Chandra Nandan v. Ranadhir Chandra Dutta, (1988) 1 SCC 383**, where it was held:

"6. Learned Counsel for the respondent submitted that the appellant has another house situate in Ismail Madan Lane and, therefore, the appellant was not left without alternate accommodation and, as such, the appellant has not satisfied the requirements of Section 13(ff) for seeking possession of the leased portion for his own occupation. The house situate in Ismail Madan Lane is said to be more than three miles away from the suit house as per statement of counsel made at the bar. Moreover, the house is not lying vacant. The appellant's witness Mukhtar Ahmed examined as PW 2 has deposed that he is a tenant in the house in Ismail Madan Lane and that the entire house is in the occupation of tenants and no portion is lying vacant. Apart from this, it has also to be pointed out that this is a case where the appellant's (sic family) is occupying a portion of the house and wants possession of the leased portion only by way of additional accommodation. To such a case the condition imposed by Section 13 that "a landlord should not be in possession of any reasonably suitable accommodation" may not be strictly attracted. Otherwise, it would lead to a landlord being asked to

disrupt the family and providing accommodation for the members of his family at different places. The respondent's counsel submitted that since no issue has been raised on the question of alternative accommodation being available, the appeal may be remanded to the appellate court for evidence being taken and a finding rendered on the question whether the house in Ismail Madan Lane would meet the requirement of the appellant. We do not find any merit in this submission. Though formally no issue was framed, the parties went to trial and adduced evidence with this issue in mind and have drawn the attention of the court to the existence of another house belonging to the appellant in Ismail Madan Lane and the said house being not vacant. There is, therefore no need for the appeal being remanded for a finding on the question whether alternate suitable accommodation is available for the appellant."

(emphasis by Court)

20. To the same effect is the holding of the Supreme Court in **P. Purushottam Reddy and another v. Pratap Steels Ltd., (2002) 2 SCC 686,** where it was observed:

"12. Assuming that there was any deficiency in the pleadings and also an omission on the part of the trial court to frame a specific issue, the present one is a case where the applicability of the law laid down by this Court in Nagubai Ammal v. R. Shama Rao [AIR 1956 SC 593] was squarely attracted. In Nagubai case [AIR 1956 SC 593] this Court was called upon to examine if the plea of lis pendens was not open to the plaintiff on the ground that it had not been raised in the pleadings. Neither the plaint nor the reply statement of the plaintiff contained any averment that the sale was affected by the rule of lis pendens. There was no specific issue directed to that question. However, evidence was adduced by the plaintiff on the plea of lis pendens and not objected to by the defendants. The question was argued and tested by taking into consideration the evidence that the proceedings were collusive in character with a view to avoid operation of Section 52 of the TP Act. This Court felt satisfied that the defendants went to trial with full knowledge that the question of lis pendens was in issue, had ample opportunity to adduce their evidence thereon and fully availed themselves of the opportunity. This Court formed the opinion that in the circumstances of the case, absence of a specific pleading on the question was a mere irregularity which resulted in no prejudice to the defendants. After having noticed the rule of pleadings as applicable to civil law that "no amount of evidence can be looked into upon a plea which was never put forward", this Court held: (AIR p. 598, para 12)

"The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto.""

21. In this case what is noteworthy is that there is no grievance made or one that can possibly be made that because of the incorrect framing of the issue, the parties were not conscious of the case, on which

they went to trial. Also, there is no grievance that because of the manner in which Issue No.1 was framed by the Trial Court, the parties did not have opportunity to lead evidence. If one were to look at Issue No.1, bearing in mind the fact that this issue by its phrasing had incorrectly thrown burden upon the defendants, the logical consequence is that much more evidence on behalf of the defendants would be led than if the issue had been framed the way the Lower Appellate Court has suggested, and which, we do not find to be faulty. The mistake that the Trial Court committed in framing the issue and a fortiori misorienting the burden ought to have led the defendants to produce the maximum of evidence that they could, to prove their case of title and possession. Unfortunately, that has not been done.

22. No evidence has been produced by the defendants on the issue, except for a solitary witness, DW-1. Therefore, this is not remotely a case where the defendants can be said to have been prejudiced in the matter of producing their evidence on the issue about title and possession to the suit property, on account of the way it was phrased. In the opinion of this Court, therefore, the Lower Appellate Court was wrong to think about a remand after appropriately framing Issue No.1 for the trial of that issue afresh. This brings the Court to the other question, which the learned Counsel Counsel for parties have mooted at great length. This relates to the matter of remand.

23. It is urged on behalf of the plaintiff that given the fact that the parties had adduced all evidence that they could on the first issue, the Lower Appellate Court ought not have remanded. Instead, on the available evidence, the Lower Appellate Court should have rendered judgment in the appeal on merits.

24. It is true that with the introduction of Rule 23-A in Order XLI of the Code, the scope of remand has been enlarged to cover even those cases where the Trial Court has rendered judgment on merits; not merely those covered by Rule 23, where the suit has been disposed of by the Trial Court on a preliminary issue. However, the way the exercise of power to remand has been guided by high authority, the unmistakable principle is that if there is sufficient evidence on record to dispose of the suit finally, there ought not to be a remand. This is in keeping with the salutary principle that the policy of the law is to avoid protraction of litigation and uncertainties that come with it. The principle is a facet of speedy justice, where all courses that foment delays are to be eschewed.

25. Here, it must be remarked that what would be meant by evidence sufficient to dispose of the suit, or for that matter, a particular issue arising in the suit, means all evidence that has been led by parties conscious of each other's case, which they wish to do. It does not mean that if one party, despite being conscious of the other's case, has chosen to produce no evidence, or scanty, insufficient, unreliable and undependable evidence, a remand is to be ordered to assist that party to fill up the lacunae, it had opportunity at the trial to take care of.

26. For these principles, endorsing a course that avoids remand, reference may be made to the decision of the Supreme Court in **Shivakumar v. Sharanabasappa, (2021) 11 SCC 277,** where it has been held:

"26.2. Rule 23-A came to be inserted in Order 41 CPC by way of the Code of Civil Procedure (Amendment) Act, 1976. Prior to this amendment, it was generally accepted by the Courts that although under Rule 23, an order of remand could be made only on reversal of a decree disposing of suit on a preliminary point but, the appellate court has the inherent power of remanding a case where it was considered necessary to do so in the interest of justice. Some of the High Courts had made similar provisions by way of their respective amendments. Insertion of Rule 23-A in Order 41 by the amending Act of 1976 makes it explicit that even when the suit has been disposed of otherwise than on a preliminary point and the decree is reversed in appeal, the appellate court shall have the power of remand, if a retrial is considered necessary. [Such powers of remand, as provided in Rules 23 and 23-A of Order 41, are different than the power of the appellate court to remit an issue for findings under Rule 25. The power of remitting is ordinarily to be resorted to when the trial court has omitted to try any material issue or to determine any question of fact. In other words, the proper procedure in a case where the trial court, while disposing of the suit on merits, had failed to determine one or more of the material issues/questions, is to remit the issue/question(s) under Rule 25 and not to remand the whole case for retrial. Ordinarily, in the case of an order under Rule 25 of Order 41, the matter is retained on the file of the appellate court and only the issue/question(s) are remitted to the trial court for findings. On the other hand, when an order of remand is made under Rule 23 or Rule 23-A, the whole case goes back for decision to the trial court except on the point on which the appellate court has returned concluded finding, if any. While making a remand under Rule 23 or Rule 23-A, the judgment and decree of the trial court is required to be set aside but it is not necessary to set aside the impugned judgment and decree when taking recourse to Rule 25 of Order 41.]

26.3. A comprehension of the scheme of the provisions for remand as contained in Rules 23 and 23-A of Order 41 is not complete without reference to the provision contained in Rule 24 of Order 41 that enables the appellate court to dispose of a case finally without a remand if the evidence on record is sufficient; notwithstanding that the appellate court proceeds on a ground entirely different from that on which the trial court had proceeded.

26.4. A conjoint reading of Rules 23, 23-A and 24 of Order 41 brings forth the scope as also contours of the powers of remand that when the available evidence is sufficient to dispose of the matter, the proper course for an appellate court is to follow the mandate of Rule 24 of Order 41 CPC and to determine the suit finally. It is only in such cases where the decree in challenge is reversed in appeal and a retrial is considered necessary that the appellate court shall adopt the course of remanding the case. It remains trite that order of remand is not to be passed in a routine manner because an unwarranted order of remand merely elongates the life of the litigation without serving the cause of justice. An order of remand only on the ground that the points touching the appreciation of evidence were not dealt with by the trial court may not be considered proper in a given case because the first appellate court itself is possessed of jurisdiction to enter into facts and appreciate the evidence. There could, of

course, be several eventualities which may justify an order of remand or where remand would be rather necessary depending on the facts and the given set of circumstances of a case.

26.4.1. The decision cited by the learned counsel for the appellants in Mohan Kumar [Mohan Kumar v. State of M.P., (2017) 4 SCC 92 : (2017) 2 SCC (Civ) 368] is an apt illustration as to when the appellate court ought to exercise the power of remand. In the said case, the appellant and his mother had filed the civil suit against the Government and local body seeking declaration of title, perpetual injunction and for recovery of possession in respect of the land in question. The trial court partly decreed the suit while holding that the plaintiffs were the owners of the land in dispute on which trespass was committed by the respondents and they were entitled to get the encroachment removed; and it was also held that the Government should acquire the land and pay the market value of the land to the appellant. Such part of the decree of the trial court was not challenged by the defendants but as against the part of the decision of the trial court which resulted in rejection of the claim of the appellant for allotment of an alternative land, the appellant preferred an appeal before the High Court. The High Court not only dismissed [Mohan Kumar v. State of M.P., FA No. 3 of 1998, order dated 24-1-2005 (MP)] the appeal so filed by the appellant but proceeded to dismiss the entire suit with the finding that the appellant-plaintiff had failed to prove his ownership over the suit land inasmuch as he did not examine the vendor of his sale deed. In the given circumstances, this Court observed that when the High Court held that the appellant was not able to prove his title to the suit land due to nonexamination of his vendor, the proper course for the High Court was to remand the case to the trial court by affording an opportunity to the appellant to prove his title by adducing proper evidence in addition to what had already been adduced. Obviously, this Court found that for the conclusion reached by the High Court, a case for retrial was made out particularly when the trial court had otherwise held that the appellant was owner of the land in dispute and was entitled to get the encroachment removed as also to get the market value of the land. Such cases where retrial is considered necessary because of any particular reason and more particularly for the reason that adequate opportunity of leading sufficient evidence to a party is requisite, stand at entirely different footings than the cases where evidence has already been adduced and decision is to be rendered on appreciation of evidence. It also remains trite that an order of remand is not to be passed merely for the purpose of allowing a party to fill-up the lacuna in its case.

26.5. It gets perforce reiterated that the occasion for remand would arise only when the factual findings of the trial court are reversed and a retrial is considered necessary by the appellate court.

26.6. The present case had clearly been the one where the parties had adduced all their evidence, whatever they wished to; and it had not been the case of the appellant-plaintiffs that they were denied any opportunity to produce any particular evidence or if the trial was vitiated because of any alike reason. As noticed, there had been several suspicious circumstances surrounding the will in question, some of which were noticed by the trial court but

were brushed aside by it on untenable reasons. The High Court has meticulously examined the same evidence and the same circumstances and has come to a different conclusion that appears to be sound and plausible, and does not appear suffering from any infirmity. There was no reason or occasion for the High Court to consider remanding the case to the trial court. The contention in this regard is required to be, and is, rejected."

(emphasis by Court)

27. Endorsing the same principle is **Nadakerappa v. Pillamma, 2022 SCC OnLine SC 387,** it was held by their Lordships of the Supreme Court:

"25. The Division Bench, without assigning any cogent reasons, has set aside the order of the learned Single Judge and has remanded the matter to the Land Tribunal. It is settled law that the order of remand cannot be passed as a matter of course. An order of remand cannot also be passed for the mere purpose of remanding a proceeding to the lower court or the Tribunal. An endeavour has to be made by the Appellate Court to dispose of the case on merits. Where both the sides have led oral and documentary evidence, the Appellate Court has to decide the appeal on merits instead of remanding the case to the lower court or the Tribunal. We are of the view that, in the instant case, the Division Bench has remanded the matter without any justification."

28. The principle finds echo in a more recent decision of the Supreme Court in **Arvind Kumar Jaiswal v. Devendra Prasad Jaiswal Varun, 2023 SCC OnLine SC 146,** where it has been observed:

"3. An order of remand prolongs and delays the litigation and hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account.1 Where evidence has already been adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential. The first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court."

29. In this case, as already said, there is all evidence led by parties, which they wished to lead and the matter was tried before the Court of first instance with parties conscious of each other's case. All evidence is there on record sufficient to dispose of the suit finally. In these circumstances, therefore, the course of action adopted by the Lower Appellate Court to remand on the point of burden of proof, which in this case is largely academic, cannot be countenanced.

30 . In the result, this appeal succeeds and is **allowed**. The impugned order passed by the Lower Appellate Court is set aside and the appeal is restored to its original number on the file of the Lower Appellate

Court, which shall now proceed with the appeal on a day-to-day basis and decide the same in all eventualities within three months of the date of receipt of a copy of this judgment. Costs of this appeal shall abide the event before the Lower Appellate Court.

31. Let a copy of this judgment be communicated through the learned District Judge, Jhansi to the Court, that would now be *in seisen* of the appeal.

(2024) 1 ILRA 1137
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 2417 of 2007

Smt. Sushma Devi & Ors. ...Appellants
Versus
Shadra Prasad Yadav & Anr. ...Respondents

Counsel for the Appellants:
Sri Ram Singh, Sri Amit Kumar Sinha, Deepali Srivastava Sinha

Counsel for the Respondents:
Sri Aditya Singh Parihar, Sri Pavan Kumar Mishra, Sri Arvind Kumar

A. First Appeal From Order – Partly Allowed, Tribunal's Award Modified – The appellants challenged the Motor Accident Claims Tribunal's award holding 50% negligence of the deceased and reducing compensation – Held, the Tribunal erred in relying on an unproven site plan, and the appeal was partly allowed, setting aside the 50% contributory negligence finding and modifying compensation calculations. (Paras 2, 16, 21)

B. Negligence Determination – Site Plan Not Reliable – The Tribunal relied on an unproven site plan to attribute 50% negligence to the deceased – Held, as per *Jiju Kuruvila Vs Kunjujamma Mohan*, *Kumari Kiran Vs Sajjan Singh*, and *National Insurance Co. Ltd. Vs Chamundeswari*, an unproven site plan cannot override eyewitness testimony (PW-1 and PW-2), and the accident was solely due to the rash and negligent driving of the truck driver. (Paras 3, 8, 12, 13, 14, 15, 16)

C. Future Prospects – Entitlement Granted – The Tribunal did not award future prospects – Held, as per *National Insurance Co. Ltd. Vs Pranay Sethi*, the appellants were entitled to a 40% increase in compensation for future prospects based on the deceased's age. (Paras 4, 17)

D. Deduction for Personal Expenses – Modified – The Tribunal deducted 1/3rd of the deceased's income for personal expenses – Held, as per *Sarla Verma Vs Delhi Transport Corporation*, with six dependents, only 1/4th should be deducted, and the award was modified accordingly. (Paras 4, 18)

E. Multiplier Correction and Interest – The Tribunal applied a multiplier of 16 – Held, as per *Sarla Verma*, the correct multiplier was 15 based on the deceased's age, and the enhanced compensation was to carry 6% simple interest from the date of the claim petition until payment. (Paras 6, 19, 20)

Appeal Partly Allowed.

List of Cases cited:

1. Jiju Kuruvila Vs Kunjujamma Mohan, (2013) 9 SCC 166

2. Kumari Kiran Vs Sajjan Singh, 2014 (4) TAC 684 (SC)

3. National Insurance Co. Ltd. Vs Chamundeswari, 2021 (0) SC 533

4. National Insurance Co. Ltd. Vs Pranay Sethi, 2017 (16) SCC 680

5. Sarla Verma Vs Delhi Transport Corporation, 2009 (6) SCC 121

6. Oriental Insurance Co. Ltd. Vs Premlata Shukla, 2007 AIR SCW 3591

7. Nishan Singh Vs Oriental Insurance Co. Ltd. (cited in Chamundeswari, not fully referenced)

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

1. Heard learned counsel for the appellants and learned counsel for the respondents.

2. The claim petition has been instituted by claimants/appellants praying for compensation for the death of one Shubhash Chandra Shukla who was driving a Maruti Car No.MH 002L/3533 and met with an accident with Tata 207 DI truck No.UP70 Y/9264.

3. Challenging the award, learned counsel for the appellants has contended that the Tribunal has erred in law in holding 50% negligence of the deceased in the accident. It is submitted that the claimants/appellants proved the accident by producing PW-1 Shushma Devi and PW-2 Sri Ram Ji Shukla who were eyewitnesses of the accident and deposed before the Tribunal that the accident was the result of the rash and negligent driving of the driver of truck No. UP70 Y/9264, therefore, the Tribunal has erred in law in holding the negligence of the deceased on the basis of the site plan of the accident which was not proved in accordance with the law. It is further contended that in the absence of any evidence in rebuttal to the testimony of PW-1 and PW-2, the Tribunal has erred in law in placing reliance upon the site plan of the accident to conclude 50% negligence of the deceased in the accident. In support of the said contention, learned counsel for the appellants has placed reliance upon the judgment of the Apex Court in the cases of ***Jiju Kuruvila and Ors. Vs. Kunjujamma Mohan and Ors., (2013) 9 SCC 166, Kumari Kiran through her father Harinarayan Vs. Sajjan Singh and others, 2014 (4) TAC 684 (SC)*** and ***National Insurance Company Ltd. Vs. Chamundeswari and Ors, 2021 (0) SC 533.***

4. He further contends that no amount towards future prospect has been awarded to the claimants/appellants whereas they are entitled to 40% towards future prospect in view of the judgment of Apex Court in the case of ***National Insurance Company Limited Vs. Pranay Sethi and Others 2017 (16) SCC 680***. It is further submitted that there were six dependents upon the deceased, therefore, considering the judgment of the Apex Court in the case of ***Sarla Verma and others Vs. Delhi Transport Corporation and others 2009 (6) SCC 121,*** Tribunal should have deducted 1/4th towards personal expenses of the deceased instead of 1/3rd.

5. Per contra, learned counsel for the respondent insurance company would contend that in the instant case, the site plan was filed by the claimants/appellants, and once they relied upon the site plan to prove the accident, they cannot resile and say that the site plan could not be read in evidence to determine the negligence of the deceased in the accident. It is further submitted that the law is well settled that if a party brings a document on record, then that document has to be read in evidence as a whole and the party who brings the document on record, cannot take a plea that a part of document which supports his case can be read but the other part adverse to him may be ignored. Accordingly, it is submitted that the Tribunal has not committed any illegality in relying upon the site plan of the accident to conclude

50% negligence of the deceased in the accident. In support of his case, he has placed reliance upon the judgment of Apex Court in the case of ***Oriental Insurance Company Ltd. Vs. Premlata Shukla and Ors., 2007 AIR SCW 3591.***

6. He has further contended that the Tribunal has erred in law in applying the multiplier of 16 whereas considering the age of the deceased, the Tribunal should have applied the multiplier of 15 to compute the compensation.

7. I have heard learned counsel for the parties and perused the record.

8. The deceased was driving the Maruti Car No.MH 002L/3533 which met with the accident with truck No.UP70 Y/9264. PW-1 Shushma Shukla and PW-2 Sri Ram Ji Shukla were eyewitnesses of the accident and deposed before the Tribunal that the accident had taken place due to rash and negligent driving of the driver of truck NoUP70 Y/9264. The insurance company did not produce any evidence in rebuttal to the testimony of PW-1 & PW-2.

9. It is pertinent to note that the accident was alleged to have taken place on 22.06.2005 whereas the site plan was prepared after 2 days from the date of the accident i.e. on 24.06.2005. Though the site plan did contain signature, the identity of the person who prepared the site plan had not been disclosed. The site plan was not proved in accordance with the law. The correctness of the site plan cannot be determined in the absence of the testimony of the person who prepared it. In other words, the site plan cannot be relied unless the person who prepared it appears before the Tribunal and deposes that it was correctly prepared, and thereafter an opportunity is provided to the claimant to rebut the testimony of the person who prepared it to enable the claimant to prove that the site plan is not prepared correctly.

10. The submission of learned counsel for the respondent that once the site plan had been filed by the appellants, they cannot urge that the site plan proved the accident, but it could not be relied upon to adjudicate negligence of the deceased in the accident on the strength of the judgment of the Apex Court in the case of ***Premlata Shukla (supra)*** does not stand to merit in the instant case for the following reason.

11. There is no dispute to the proposition that once a document has been filed by a party and relied upon by it, the said document has to be read as a whole for the purpose of evidence, and the party who produces the same cannot insist that only that part of the document which benefits him may be read and other part of the document which is against him may be ignored.

12. However, in the instant case, it is not only the site plan which had been filed by the appellants, but the appellants also produced eyewitnesses of the accident PW-1 & PW-2 who categorically deposed that the accident was the result of the negligence of the driver of the truck. The appellants discharged their burden by producing PW-1 & PW-2 to prove the negligence of the driver of the truck in the accident, and in such an event, the burden was shifted upon the insurance company to prove by leading the cogent evidence on record that the deceased was also negligent in the accident which the insurance company in the instant case did not discharge.

13. At this stage, it would be apt to refer to the judgments relied upon by learned counsel for the appellants in the case of ***Jiju Kuruvila (supra)*** in which it has been held that the site plan does not give substantial proof in respect of the rash and negligent driving of the drivers involved in the vehicle. Paragraph No.24 of the judgment is reproduced below:

"*24. The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual."*

14. In the case of ***Kumari Kiran (supra)***, the Apex Court found that there was no evidence on record in respect of the negligence of the deceased in the accident, consequently, it set aside the judgment of the High Court. Paragraph No.13 of the judgment is reproduced below:

"13. With regard to the apportionment of contributory negligence at 25% on the part of the appellant-father and 75% on the driver of the offending tractor as determined by the High Court, we refer to the judgment of this Court in Juju Kuruvila and Ors. v. Kunjujamma Mohan and Ors., (2013)9 S.C.C. 166: 2013 (3) T.A.C. 369, as it is applicable to facts of the case on hand. In the above case, Joy Kuruvila (the deceased) had a head-on collision with a bus approaching from the opposite side. Joy Kuruvila sustained serious injuries and died on the way to the hospital. The Tribunal found that the accident occurred due to the rash and negligent driving of the bus driver. It apportioned the contributory negligence between the driver and the deceased in the ratio of 75:25%. On the basis of the pleadings and evidence on record, in the above said case, this Court has held thus on the negligence of the driver of the bus:-

The mere position of the vehicles after accident, as shown in a scene mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction, etc. depends on a number of factors like the speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident was caused, but in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.

The post mortem report, Ext. A-5 shows the condition of the deceased at the time of death. The said report reflects that the deceased had already taken meal and

his stomach was half-full and contained rice, vegetables and meat pieces in a fluid with strong smell of spirit.

The aforesaid evidence, Ext.A-5 clearly suggests that the deceased had taken liquor but on the basis of the same, no definite finding can be given that the deceased was driving the car rashly and negligently at the time of the accident. The mere suspicion based on Ext. B-2 "scene mahazar" and Ext. A-5 post-mortem report cannot take the place of evidence, particularly, when the direct evidence like PW3 (independent eye-witness), Ext. B-1 (FI statement) are on record."

The observations made by this Court in the case of Juju Kuruvila (supra) surely apply to the fact situation on hand. Upon thorough examination of the facts and legal evidence on record in the present case, it cannot be said that the appellant-father was rash and negligent just on the assumption made by the Tribunal that the collision occurred in the middle of the road since the two vehicles were approaching from opposite directions of the road. However, the only aspect of the case on hand that we can reasonably assume is that the appellant-father would have taken sufficient caution while riding the motorcycle since he was travelling with his two minor children (appellant-minors). Further, upon examining the evidence produced on record, there is no proof showing negligence on the part of the appellant-father. Thus in our view, the contributory negligence apportioned by the High Court at 25% on the appellant-father and 75% on the driver of the offending tractor is erroneous keeping in view the legal principles laid down by this Court on this aspect in the above referred case. Thus, we are of the firm conclusion that the negligence is wholly on the part of the driver of the offending tractor since he was driving the heavier vehicle. Therefore, we set aside the 25% contributory negligence on the part of the appellant-father as apportioned by the High Court."

15. The Apex Court in the case of ***Chamundeswari (supra)*** also considered the case of ***Premlata Shukla (supra)*** relied upon by learned counsel for the respondent and held that if any evidence contrary to the contents of the First Information Report has been filed or produced before the tribunal, the evidence which is recorded before the Tribunal has to be given weightage and precedence over the contents of First Information Report. Paragraph No.8 of the judgment is reproduced below:

"8. It is clear from the evidence on record of PW-1 as well as PW-3 that the Eicher van which was going in front of the car, has taken a sudden right turn without giving any signal or indicator. The evidence of PW-1 & PW-3 is categorical and in absence of any rebuttal evidence by examining the driver of Eicher van, the High Court has rightly held that the accident occurred only due to the negligence of the driver of Eicher van. It is to be noted that PW-1 herself travelled in the very car and PW-3, who has given statement before the police, was examined as eye-witness. In view of such evidence on record, there is no reason to give weightage to the contents of the First Information Report. <u>If any evidence before the Tribunal runs contrary to the contents in the First Information Report, the evidence which is recorded before the Tribunal has to be given weightage over the contents of the First Information Report. In the judgment, relied on by the appellant's counsel in the</u>

case of Oriental Insurance Company Limited v. Premlata Shukla and Others, (supra), this Court has held that proof of rashness and negligence on the part of the driver of the vehicle, is therefore, sine qua non for maintaining an application under Section 166 of the Act. In the said judgment, it is held that the factum of an accident could also be proved from the First Information Report. In the judgment in the case of Nishan Singh and Others v. Oriental Insurance Company Limited, (supra), this Court has held, on facts, that the car of the appellant therein, which crashed into truck which was proceeding in front of the same, was driven negligently by not maintaining sufficient distance as contemplated under Road Regulations, framed under Motor Vehicles Act, 1988. Whether driver of the vehicle was negligent or not, there cannot be any straitjacket formula. Each case is judged having regard to facts of the case and evidence on record. Having regard to evidence in the present case on hand, we are of the view that both the judgments relied on by the learned counsel for the appellant, would not render any assistance in support of his case."

16. Given the law enunciated by the Apex Court in the judgments relied upon by learned counsel for the appellants, this Court finds substance in the submission of learned counsel for the appellants that the Tribunal has erred in law in relying upon the site plan of the accident to conclude that there was negligence of the deceased in the accident. Accordingly, the finding of the Tribunal holding 50% negligence of the deceased in the accident and reducing the compensation by 50% for the negligence of the deceased is set aside. Consequently, it is held that the accident was the result of rash and negligent driving of the driver of the truck No.UP70 Y/9264.

17. The submission of learned counsel for the claimants/appellants in respect of future prospect has got force in view of the judgment of Apex Court in the case of **Pranay Sethi (supra)** and thus, following the aforesaid judgement of Apex Court and considering the age of the deceased, claimants/appellants are entitled to 40% towards future prospect.

18. The submission of learned counsel for the claimants/appellants with regard to the deduction of 1/4th towards personal expenses of the deceased because of the judgement of Apex Court in the case of **Sarla Verma (supra)** has substance. Thus, considering the dependents upon the deceased, it is provided that 1/4th should be deducted towards the personal expenses of the deceased instead of 1/3rd from the income of the deceased for computation of compensation.

19. The submission of learned counsel for the respondents in respect of the wrong application of multiplier has also got substance in view of the judgment of Apex Court in the case of **Sarla Verma (supra)**. Thus, it is provided that compensation should be computed by applying the multiplier of 15 instead of 16.

20. It is also provided that the enhanced amount of compensation shall carry 6% simple interest from the date of institution of the claim petition till the date of its payment.

21. For the reasons given above, the appeal is partly ***allowed*** and the award of the Tribunal is modified to the extent indicated above. The insurance company is directed to pay the enhanced amount of compensation to the claimants/appellants within three months from the date of

production of the certified copy of this order. There shall be no order as to cost.

(2024) 1 ILRA 1143
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SIDDHARTH , J.

S.C.C. Revision no. 55 of 2023

Bhure Khan Warsi ...Revisionist
Versus
Mohd. Israr ...Respondent

Counsel for the Revisionist:
Sri Iqbal Ahmad

Counsel for the Respondent:
Sri Ashish Agarwal

Civil Law - Civil Procedure Code,1908 (U.P. Amendment) – Order XV Rule 5 - Landlord-Tenant Relationship Dispute – The revisionist challenged the Trial Court's order striking off his defence under Order XV Rule 5 Civil Procedure Code,1908 for non-deposit of rent, denying the landlord-tenant relationship – Held, the court must first determine the existence of a landlord-tenant relationship if disputed, as the obligation to deposit rent under Order XV Rule 5 applies only to admitted rent or when the relationship is established, following *Kunwar Baldevji Vs XI A.J., Bulandshahr*. (Paras 7, 11, 23, 30, 31)

Revisional Jurisdiction – Scope and Limits – The revisionist argued that the Trial Court erred in striking off the defence without adjudicating the landlord-tenant relationship – Held, the court's revisional jurisdiction is limited to correcting jurisdictional errors or misinterpretations of law, and the Trial Court's failure to address the disputed relationship before applying Order XV Rule 5 warranted scrutiny, as per *Asha Rani Gupta Vs Vineet Kumar* and *Budhu Mal Vs Mahabir Prasad*. (Paras 4, 19, 30, 31)

Denial of Landlord-Tenant Relationship – Effect on Rent Deposit – The revisionist denied being a tenant, claiming ownership through an agreement to sell – Held, a bona fide denial of the landlord-tenant relationship, supported by evidence, requires adjudication before enforcing rent deposits under Order XV Rule 5; a mere denial simpliciter does not absolve the defendant from depositing rent, but substantial evidence of title dispute may lead to plaint return under Section 23 of the Provincial Small Cause Courts Act, 1887. (Paras 3, 12, 14, 19, 30, 31)

Civil Procedure Code,1908 - Order XV Rule 5 – Admitted Rent – The plaintiff argued that rent must be deposited regardless of the denial of the landlord-tenant relationship – Held, Order XV Rule 5 mandates deposit of "admitted rent" only; the term "monthly amount due" refers to rent at the admitted rate, and no deposit is required if the relationship is genuinely disputed, contradicting *Pradyuman Jee Vs Special/A.J., Ballia*. (Paras 9, 11, 17, 29, 30, 31)

Provincial Small Cause Courts Act, 1887 – Section 23 - Title Disputes – The revisionist claimed the property was purchased under an agreement to sell, disputing the plaintiff's title – Held, if a serious title dispute arises, the Small Cause Court may return the plaint to a court with jurisdiction to determine title, as per *Budhu Mal Vs Mahabir Prasad* and *Rameshwar Dayal Vs Banda*, ensuring adjudication of the dispute before applying Order XV Rule 5. (Paras 12, 13, 14, 30, 31)

Reference Answered Interim Order to Continue Until Revision Decided.

<u>List of Cases cited:</u>

1. Kunwar Baldevji Vs XI A.J., Bulandshahr, (2003) 51 ALR 758

2. Asha Rani Gupta Vs Vineet Kumar, 2022 8 ADJ 572 (SC)

3. Budhu Mal Vs Mahabir Prasad, (1988) 4 SCC 194

4. Rameshwar Dayal Vs Banda, (1993) 1 SCC 531

5. Nirmal Jeet Singh Hoon Vs Irtiza Hussain, (2010) 14 SCC 564

6. Krishna Kumar Gupta Vs Manoj Kumar Sahu, 2017 All.C.J. 1415

7. Pradyuman Jee Vs Special/A.J., Ballia, 2008 (71) ALR 892

8. Maya Devi Vs Vipin Kumar Kushwaha, 2016 (3) ARC 474

9. Maqsood Ali Vs Shamsher Khan, Civil Revision No. 1363 of 1975, decided on 03.01.1979

10. Thakur Prasad @ Bhola Nath Vs Gur Prasad, Civil Revision No. 1134 of 1978, decided on 12.01.1979

11. Ashma Bibi Vs Ahsan Ali, Civil Mis. Writ Petition No. 8631 of 1984, decided on 07.02.1990

12. Jai Chandra Gangwar Vs IIIrd A.J., Farrukhabad, Civil Mis. Writ Petition No. 4822 of 1991, decided on 29.09.1994

13. Ram Chandra Srivastava Vs VIIth A.J., Barabanki, 2011 (2) ADJ 777

14. Sri Ram Agarwal Vs Smt. Sheela Devi, 2015 (1) AWJ 874

15. Dinesh Enameled Wire Industries Pvt. Lt Vs M/s Swastik Udyog, 2012 (3) ADJ 298

16. Mahboob @ Challa Vs Mohammad Hussain, 1983 ARC 651

17. Haider Abbas Vs A.J., 2006 (1) ADJ 197

18. Shrimant Shanrao Suryavanshi Vs Pralhad Bhairoba Suryavanshi, (2002) 3 SCC 676

19. Bal Krishna Vs Ramanand Dixit, 1996 (2) ARC 285

20. Bimal Chand Jain Vs Gopal Agarwal, (1981) 3 SCC 486

21. Vineet Kumar Vs Upper District Judge, Court No. 4, 2018 Suppl. ADJ 464

22. Mukesh Singh Vs Ramesh Chand Solanki, 2011 (3) ARC 592

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Siddharth, J.)

1. When the learned Single Judge had referred the matter for being placed before a Larger Bench on 18.5.2023, Hon'ble the Chief Justice placed the case before this Court. Following is the question which the learned Single Judge had referred:-

"1) In case of disputing the landlord-tenant relationship by the revisionist-defendant upon the application under Order XV Rule 5 CPC (U.P. Amendment), as to whether it is required on the part of the SCC Court to decide the landlord-tenant relationship first or not, before proceeding to pass final order on the application."

2. Heard the learned counsel for the applicant in the Revision Sri Iqbal Ahmad and the counsel for the respondent-opposite party Sri Ashish Agrawal.

3. Briefly stated facts of the case are that a Suit being S.C.C. Suit No. 10 of 2017 was filed by the plaintiff-respondent on the ground that there were arrears of rent which had not been paid by the defendant and, therefore, a prayer was made that the defendant be evicted from the premises, the boundaries of which were given at the bottom of the plaint. Further prayer was that the tenant be directed by a mandatory decree to deposit Rs. 1,51,333/- with the plaintiff-respondent as arrears of rent. There were other reliefs also prayed for in the plaint. The defendant-applicant in the Revision filed a written statement and denied the fact that the defendant-

revisionist was ever a tenant of the plaintiff. He had further stated that there was no agreement between the plaintiff and defendant with regard to tenancy of the property in question and had stated that the burden of proving that the relationship of landlord and tenant existed between the parties was on the plaintiff. He had also denied the fact that any rent was ever paid by the defendant to the plaintiff. He had further stated that the property numbered as M.M.I.G. No. A-222 situate at Ekta Vihar North Moradabad was constructed by the defendant from his own income. Still further, it was stated that the property in question was purchased by the plaintiff on 7.10.2009 from the actual owner Sri Faizan Khan son of Babban Khan and the plaintiff, thereafter with an intention to sell the property to the defendant had entered into an agreement with him that the property would be sold to the defendant for Rs. 8,94,927/- and that at the time of the execution of the agreement for sale Rs. 2,10,000/- were paid to the plaintiff and, thereafter, the plaintiff had put the defendant into actual and physical possession where he was staying ever since the year 2011 peacefully. The defendant had further stated in the written statement that the payment which the defendant had made at the time when the agreement to sell was entered into was of Rs. 2,10,000/- and that was only a part payment. This meant that Rs. 6,84,927/- were still payable. The defendant has further stated that the remaining amount was also in fact paid off subsequently. In the written statement, it had been stated that malafidely despite the fact that the complete payment was made and despite the fact that the defendant had asked for the execution of the sale deed on various occasions the plaintiff had dishonestly filed the Suit in question treating the defendant a tenant. During the pendency of the suit, when almost 5 years had passed, an application under Order XV Rule 5 of the C.P.C. was filed by the plaintiff/opposite party on 24.1.2023 (paper no. 51ga), to which the applicant-defendant had objected on 13.2.2023. To prove the fact that the defendant had paid to the plaintiff various amounts as sale consideration, the applicant-defendant had also filed a statement of account of the Account No. 16257300000104 as an evidence in the case.

4. The Trial Court / Additional District Judge, Court No. 5, Moradabad, when had allowed the application under Order XV Rule 5 of the C.P.C. and **had struck off the defence of the defendant/applicant in the Revision** by his order dated 29.3.2023, the instant S.C.C. Revision No. 55 of 2023 was filed in this Court.

5. Before the learned Single Judge there were 4 decisions which were placed by the counsel for the defendant/revisionist, namely, **Civil Revision No. 1363 of 1975: Maqsood Ali Vs. Shamsher Khan,** decided on 03.01.1979, **Civil Revision No. 1134 of 1978: Thakur Prasad alias Bhola Nath Vs. Gur Prasad,** decided on 12.01.1979, **Civil misc. Writ Petition No. 8631 of 1984: Ashma Bibi Vs. Ahsan Ali and another,** decided on 07.02.1990 and **Civil Misc. Writ Petition No. 4822 of 1991: Jai Chandra Gangwar Vs. IIIrd Additional District Judge, Farrukhabad and others**, decided on 29.09.1994, stating that the Judge Small Causes Court had first to decide, the issue whether the relationship of landlord-tenant existed, which had to be decided at the first instance when the relationship was denied by the defendant.

6. The counsel appearing for the plaintiff-opposite party had, however, relied upon the judgements reported in **2015 0 Supreme (All) 3530 : Maya Devi**

and Anr. vs. Vipin Kumar Kushwaha and Anr; 2008 (71) ALR 892 : Pradyaman Jee v. Special/Additional District Judge, Ballia and others, 2011 (89) ALR 655 : Mukesh Singh and another vs. Ramesh Chand Solanki and 2012 (92) ALR 526 : Yusuful Haq @ Yusuf and others vs. Smt. Ghayyur Fatma and others, wherein it was held that whether the landlord -tenant relationship was accepted or denied by the defendant, it was essential on the part of the defendant to deposit the rent from month to month as per the Order XV Rule 5 of the C.P.C. and the question with regard to the relationship of landlord and tenant was to be looked into at the time of the final hearing of the Suit. Since there were contrary views taken in the two sets of decisions, the learned Single Judge had made the reference.

7. Learned counsel for the applicant in the Revision/defendant has submitted that a bare perusal of the provisions of Order XV Rule 5 of the C.P.C. as were applicable in the State of U.P., it was clear that when any suit by a lessor for the eviction of a lessee was filed after the determination of lease for the eviction of the lessee and for the recovery of arrears of rent from him, then only all the "admitted rent or compensation" for use and occupation of the premises had to be deposited by the defendant at or before "the first hearing of the Suit". This amount would include the arrears admitted by him along with the interest thereon at the rate of 9 per cent per annum.

8. He had further submitted that the order XV Rule 5 of the C.P.C. very clearly had stated that whether or not there was an admission on the part of the tenant that any amount was due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual. Learned counsel for the revisionist-applicant had also stated that in the event there was any default in the making the deposit of the entire amount due or the monthly amount due, then the Court had to, after considering any representation made by the defendant as per Clause 2 of the Order XV Rule 5 of the C.P.C., strike off the defence of the defendant. Relying upon the *Explanation 1* of the Order XV Rule 5 of the C.P.C., learned counsel for the revisionist-applicant had stated that 'first hearing' would mean the date of filing of the written statement or the date for hearing mentioned in the summons or where more than one of such dates of hearing were there then the last date of hearing mentioned in the summon would be considered as the first date of hearing.

9. Learned counsel for the applicant-revisionist Sri Iqbal Ahmad has further stated that the *explanation 2* of the Order XV Rule 5 of the C.P.C. has explained the expression "entire gross amount admitted by him to be due". Further learned counsel for the applicant-revisionist has shown to the Court the *explanation 3* which explains the expression "monthly amount due" and he states that as per the explanation given in explanation 3 of the Order XV Rule 5 of the C.P.C. "monthly amount due" meant the amount due every month, whether as rent or compensation for use and occupation **at the admitted rate of rent.**

10. Learned counsel for the applicant-revisionist, therefore, has submitted that the Order XV Rule 5 of the C.P.C. was a very clear piece of legislation and any wrong interpretation to it could not be permitted, as by doing so, the meaning of the

provision of Order XV Rule 5 of the C.P.C. would be changed. He states that the provision, as was contained in Order XV Rule 5 of the C.P.C., was unambiguous and there were no two interpretation possible of it. He also states that if any distorted interpretation is made then it would result in an absurdity.

11. Learned counsel for the applicant-revisionist states that as per the *explanation 3* of the Order XV Rule 5 of the C.P.C., the monthly amount due had to be calculated at the **admitted** rate of rent. He states that if there was an admitted rate of rent then only could there be any amount said to be due before the first hearing. He further states that if there was any admitted rate of rent by an actual tenant only then the question of payment of month to month rent would arise.

12. Learned counsel for the Revisionist states that the Provincial Small Cause Courts Act, 1887 has also contemplated that if there was serious dispute raised by the defendants with regard to the title of the plaintiff and with regard to the relationship between the landlord and tenant then the Court could at any stage of the proceedings return the plaint to be presented to the Court having the jurisdiction to determine the title. In this regard, learned counsel for the Revisionist read out the contents of section 23(1) of the Provincial Small Cause Courts Act, 1887 which is reproduced here as under :-

23. Return of plaints in suits involving questions of title.- *(1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Causes depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.*

13. Learned counsel for the Revisionist has also relied upon the judgment of the Supreme Court in **Budhu Mal vs. Mahabir Prasad and other**s reported in **(1988) 4 SCC 194** and since he relied heavily on paragraph 10 of the judgment, the same is being reproduced here as under :-

"10. It is true that Section 23 does not make it obligatory on the Court of Small Causes to invariably return the plaint once a question would not be cognizable by a Court of Small Causes and it is for these reasons that we are of the opinion that these are such cases where the plaints ought to have been returned for presentation to appropriate court so that none of the parties was prejudiced."

14. Learned counsel for the Revisionist has also relied upon the decisions of the Supreme Court in **Rameshwar Dayal vs. Banda (dead) through his Lrs. And others** reported in **(1993) 1 SCC 531** and **Nirmal Jeet Singh Hoon vs. Irtiza Hussain and others** reported in **(2010) 14 SCC 564** which judgments clearly were to the effect that if the defendant denied the title of the applicant seriously then it was in the discretion of the Court to return the plaint for being presented to a Court having jurisdiction to determine the title.

15. Learned counsel for the revisionist- applicant thereafter dealt with the judgements as were cited by the

plaintiff-opposite party and submitted that when **Maya Devi and Another vs. Vipin Kumar Kushwaha and anothe**r reported in **2016 (3) ARC 474** was saying that there were two parts of Order XV Rule 5 of the C.P.C. then it had erred in law. Learned counsel for the revisionist-applicant states that when the decision in Maya Devi (supra) had stated that the first part dealt with the deposit of the amount admitted by the tenant to be due on the first hearing and the second part dealt with the law that when the relationship of tenant and landlord was denied then the monthly amount due was to be deposited whether it was admitted by the tenant or not then he submits that the Court erred in law as the payment had to be done of the admitted rent only and only when the relationship of tenant and landlord was established/admitted. He, therefore, submits that the Court in the judgement reported in **2008 (71) ALR 892 : Pradyuman Jee v. Special/Additional District Judge, Ballia,** decided on 2.4.2008 also erred in law when it had stated that if the defendant denies the existence of relationship between the landlord and tenant then he may not be required to deposit the amount as is referred in the first part of Order XV Rule 5 of the C.P.C. but he would still deposit the monthly amount due as per the second part of the Order XV Rule 5 of the C.P.C.

16. Learned counsel for the revisionist-applicant, to explain that the judgement had erroneously stated that when the relationship of landlord and tenant had been denied tenant had to pay the monthly rent, read out paragraph no. 11 of the judgement in **Pradyuman Jee (supra)** and compared it with the provision of Order XV Rule 5 of the C.P.C.

17. Since the learned counsel for the revisionist-applicant compared the law as had been laid down in **Pradyuman Jee (supra)** and the Order XV Rule 5 of the C.P.C., the paragraph no. 11 of the aforesaid judgement and the Order XV Rule 5 of the C.P.C. are being reproduced here as under;

11. It is, therefore, clear that Order XV Rule 5 CPC is in two parts. The first part deals with the deposit of the "amount admitted by him to be due" while the second part deals with the "monthly amount due" whether or not the tenant admits any amount to be due. ***Thus, in a case where the defendant denies the existence of landlord and tenant relationship, he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the "monthly amount due" within a week from the date of its accrual throughout the continuation of the suit because such deposit has to be made whether or not he admits any amount to be due.***

Order XV Rule 5 C.P.C.

Striking off defence for failure to deposit admitted rent, etc.-*(1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default*

in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2), strike off his defence.

Explanation 1.- *The expression "first hearing" means the date for filing written statement for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.*

Explanation 2.- *The expression "entire amount admitted by him to be due" means the entire gross amount, whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account and the amount, if any, paid to the lessor acknowledged by the lessor in writing signed by him and the amount, if any, deposited in any Court under section 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.*

Explanation 3.- *(1) The expression "monthly amount due" means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority, in respect of the building on lessor's account.*

(2) Before making an order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

18. Learned counsel for the revisionist-applicant has therefore submitted that nowhere in the Order XV Rule 5 of the C.P.C. it had been stated that if the relationship between tenant-landlord had been denied then also the defendant would have to deposit the monthly amount due at the admitted rate of rent.

19. Learned counsel for the revisionist-applicant submitted that the judgement of the Supreme Court reported in ***2022 8 ADJ 572 (SC) : Asha Rani Gupta vs. Vineet Kumar***, which had been heavily relied upon by the J.S.C.C. had stated that whether the defendant has not denied his status of being the lessee it was imperative for him to have scrupulously complied with the provisions of Order XV Rule 5 of C.P.C. i.e. he had to pay the arrears of rent due and he was also required to make regular deposits of the monthly amount due. However, he states that definitely the Supreme Court had stated that in every case of denial of relationship of landlord and tenant, the defendant would not enjoy the luxury of not paying the monthly rent. He submits that the

judgement in **Asha Rani Gupta (supra),** the Supreme Court had stated that when there was a denial of the title of the plaintiff by the defendant and also of the relationship of the landlord and tenant then such denial simplicitor did not mean that it would absolve the tenant/lessee to deposit the due amount of rent. He submits that the Supreme Court had stated that this question was a question of fact and was to be determined in every case with reference to its fact but it could not be stated to be a general proposition of law that the mere denying of title of the plaintiff or the relationship of landlord and tenant between the plaintiff and the defendant, the latter would be absolved of the duty of depositing the amount as was to be deposited in Order XV Rule 5 of the C.P.C.

20. Learned counsel for the applicant has stated that the judgment in Asha Rani Gupta (supra) has virtually reiterated what section 23 of the Provincial Small Cause Courts Act, 1887 has stated.

21. Learned counsel for the applicant in the Revision, to bolster his case, relied upon paragraphs no. 12, 12.1, 13 and 14 of judgement in **Asha Rani Gupta (supra)** and therefore they are being reproduced here as under:

*"12. Reverting to the provisions under consideration, it is noticed that while the first part of sub-rule (1) of Rule 5 of Order XV CPC requires deposit of the admitted due amount of rent together with interest, the second part thereof mandates that whether or not the tenant admits the amount to be due, he has to, throughout the continuation of the suit, regularly deposit monthly amount due within a week from the date of its accrual. Read as a whole, it is but clear that Order XV Rule 5 CPC embodies the fundamental principle that there is no holidaying for a tenant in payment of rent or damages for use and occupation, whether the lease is subsisting or it has been determined. T**he only basic requirement in the suit of the nature envisaged by Order XV Rule 5 CPC is the character of defendant as being the lessee/tenant in the suit premises.** Viewed from this angle, we are not inclined to accept the line of thought in some of the decisions of the High Court that in every case of denial of relationship of landlord and tenant, the defendant in suit for eviction and recovery of rent/damages could enjoy holidays as regards payment of rent.*

12.1. For what has been discussed hereinabove, the decision of the High Court in Ladly Prasad (supra) does not require much dilation when it remains indisputable that it is not always obligatory on the Court to strike off the defence. However, the said decision cannot be read to mean that despite default of the tenant in payment of rent, the defence has to be permitted irrespective of its baselessness. The decision in Kunwar Baldevji (supra), again, would have no application to the facts of the present case. Herein, the defendant-respondent has not only omitted to deposit the rent on the first date of the hearing but, has also omitted to deposit the accrued rent during the pendency of the suit.

13. In a suit of the present nature, where the defendant otherwise has not denied his status as being the lessee, it was rather imperative for him to have scrupulously complied with the requirements of law and to have deposited the arrears of rent due together with interest on or before the first date of

hearing and in any case, as per the second part of sub-rule (1) of Rule 5 of Order XV CPC, he was under the specific obligation to make regular deposit of the monthly amount due, whether he was admitting any such dues or not.

*14. I**n the context of the proposition of denial of title** of the plaintiff and denial of relationship of landlord and tenant between the plaintiff and defendant, we may also observe that such a denial simpliciter does not and cannot absolve the lessee/tenant to deposit the due amount of rent/damages for use and occupation, unless he could show having made such payment in a lawful and bona fide manner.* ***Of course, the question of bona fide is a question of fact, to be determined in every case with reference to its facts but, it cannot be laid down as a general proposition that by merely denying the title of plaintiff or relationship of landlordtenant/lessor-lessee, a defendant of the suit of the present nature could enjoy the property during the pendency of the suit without depositing the amount of rent/damages."***

22. Learned counsel for the revisionist-applicant, therefore, submitted that the Supreme Court in **Asha Rani Gupta (supra)** definitely did not lay down the law that in simply all cases where the defendant denied the relationship of landlord and tenant, the defendant as per the Order XV Rule 5 of the C.P.C. would still have to pay the monthly amount due even if it was absolved from paying the arrears due at the time of first hearing.

23. Learned counsel for the revisionist-applicant, thereafter, heavily relied upon a decision of this Court reported in **2003 (51) ALR 758 : Kunwar Baldevji and etc. vs. The XI Additional District Judge, Bulandshahr and others** and had submitted that the question whether the defendant had to pay the monthly rent even if he denied that any amount done was no longer res intergra as in the Division Bench, aforementioned, it had very clearly been stated that the provisions of Order XV Rule 5 of the C.P.C. were unambiguous and clear and only the "rent admitted" by the tenant had to be deposited as per the provisions of Order XV Rule 5 C.P.C. He submits that if the tenant denies any rent to be due then the Court as per the Division Bench judgement in **Kunwar Baldevji (supra)** had to adjudicate on the allegation and that finding could be given only after the first date of hearing. Since the learned counsel for the applicant read out the paragraphs no. 12 and 13 of the judgement, they are being reproduced here as under:-

"12. Having considered the aforesaid decisions we find that the language of Order 15, Rule 5, Code of Civil Procedure is unambiguous, clear and there is no scope of doing violence with it and stretch it to mean that expression "rent admitted by the tenant to be due" should mean rent found by the Court to be due…… Question of interpretation – of a statutory provision arises only when it is ambiguous or admits two interpretation or it is required to save the provision from being declared void. No such contingency exists in the present case.

13. If amount of rent is admitted then it is not required to be adjudicated by the Court. In case, tenant denies any rent to be due, court shall be required to decide the same. It is obvious that in such contingency Court will have to adjudicate and its finding will come subsequent to the 'first

date of hearing' contemplated under Order 15, Rule 5, Code of Civil Procedure. It is, therefore, evident that by the time the Court will render its finding, 'first date of hearing' which is cut off date for deposition of rent, shall be over. It also requires no comment that such an issue is first to be framed and thereafter adjudicated after parties have led evidence in accordance with law.

24. Learned counsel for the applicant also heavily relied upon a judgement of this Court reported in **2017 All.C.J. 1415 : Krishna Kumar Gupta vs. Manoj Kumar Sahu** and had submitted that if the relationship of landlord and tenant or lessor and lessee is not admitted by the defendant then the provisions of Order XV Rule 5 of the C.P.C. would not be applicable. Since the learned counsel for the revisionist read out the paragraph no. 13 of the judgement, it is being reproduced here as under:-

"13. One of the common features in the two categories, which is reflected by the use of words "admitted rate of rent" in both Explanation 2 and Explanation 3 of Order XV, Rule 5, C.P.C., is that there has to be an admitted jural relationship of lessor and lessee (landlord and tenant) between the plaintiff and defendant. A fortiori, if the relationship of landlord and tenant or lessor and lessee is not admitted by the defendant between the plaintiff and him, the provisions of Order XV, Rule 5, C.P.C. would not be applicable.

25. Learned counsel for the applicant-revisionist, therefore, submitted that the four judgements which have been relied upon by the revisionist and which have found mention in the order of the learned Single Judge dated 18.5.2023 laid down the correct law. He, however, submitted that as per the decision of Supreme Court in **Asha Rani Gupta (Supra)** read along with Section 23 of the Provincial Small Causes Court Act, 1887, the court below had to see as to whether the denial of the relationship of the landlord and tenant was denial simplicitor or whether it was an actual denial based on evidence. He, therefore, submits that if there was a denial of the relationship and was based on evidence then the Court will have to adjudicate upon the denial and its finding could be given subsequent to the first date of hearing as was contemplated under Order XV Rule 5 of the C.P.C.

26. Learned counsel for the plaintiff-opposite party in the Revision Sri Ashish Agrawal, however, in reply submitted that even if there was a denial of landlord-tenant relationship by the defendant, the defendant would not be absolved of the responsibility of depositing the monthly rent due and he heavily relied upon **2016 (3) ARC 474 : Maya Devi and another vs. Vipin Kumar Kushwaha and another, 2011 (2) ADJ 777 : Ram Chandra Srivastava vs. VIIth Additional District Judge, Barabanki an dothers, 2015 (1) AWJ 874 : Sri Ram Agarwal vs. Smt. Sheela Devi, 2022 (8) ADJ 572 : Asha Rani Gupta vs. Sri Vineet Kumar, 2012 (3) ADJ 298 : Dinesh Enameled Wire Industries Private Ltd. vs. M/s Swastik Udyog and others, 1983 ARC 651 : Mahboob alias Challa v. Mohammad Hussain, 2006 (1) ADJ 197 : Haider Abbas vs. Additional District Judge and others, 2002 (3) SCC 676 : Shrimant Shanrao Suryavanshi & anr vs. Pralhad Bhairoba Suryavanshi (D) by Lrs. & Ors, 1996 (2) ARC 285 : Bal Krishna vs. Ramanand Dixit, 1981 (3) SCC 486 : Bimal Chand Jain vs. Gopal Agarwal, 2018 Suppl. ADJ 464 : Vineet Kumar vs.**

Upper District Judge, Court No. 4 and others, 2011 (3) ARC 592 : Mukesh Singh and another vs. Shri Ramesh Chand Solanki and 2008 (71) ALR 892 : Pradyuman Jee vs. Special/Additional District Judge, Ballia.

27. Learned counsel for the plaintiff – opposite party in the Revision submitted, relying upon the above judgements that even when there was a denial by the defendant of the relationship of landlord and tenant, the defendant had to pay the monthly rent from month to month as per the provisions of Order XV Rule 5 of the C.P.C..

28. Analysing the judgements as have been cited by the plaintiff – opposite party in **2012 (3) ADJ 298 : Dinesh Enameled Wire Industries Prvt. Ltd vs. M/s. Swastik Udyog and others** we find that it supports the defendants case inasmuch as it has in clear word stated that the learned Division Bench in **Kunwar Baldevji (supra)** was a correct law. The judgement cited by the defendant in **2006 (1) ADJ 197 : Hairder Abbas vs. Additional District Judge and others** was with regard to the law as to whether the amounts deposited under Section 30 of the Rent Control Act and should be adjusted towards the payment under Order XV Rule 5 CPC. The judgement of **1996 (2) ARC 285 : Bal Krishna vs. Ramanand Dixit and Ors**. also does not relate to the present question at hand.

29. Having heard the learned counsel for the parties, this Court opines that a bare reading of Order XV Rule 5 of the C.P.C. shows that upon the filing of a Suit by a lessor for the eviction of a lessee and for the recovery from him of the rent or compensation the defendant shall at or before the first hearing of the Suit deposit the entire amount admitted by him to be due together with the interest thereon @ 9 % per annum and that the Order XV Rule 5 of the C.P.C. further goes on to say that even if the defendant does not admit any amount to be due, he shall throughout the continuation of the Suit regularly deposit the monthly amount due within a week from the date of its accrual and if there was a default then the Court may, subject to the decision to be taken under Order XV Rule 5 (2) of the C.P.C., strike off the defence of the defendant. The Court also finds that the expression "entire amount admitted by him to be due" has been explained under the explanation 2 which means the "entire gross amount".

30. The Court also finds that the *explanation 3* clearly explains "the monthly amount due" and as per the explanation it would be the "admitted" rate of rent. A perusal of the Order XV Rule 5 of the C.P.C. definitely does not show that if the defendant denied the relationship of landlord and tenant then there was a compulsion on the defendant to pay the rent from month to month as had been held in the four judgements cited by the plaintiff and have been noted by the learned Single Judge in his order dated 18.5.2023. In the judgement of the Division Bench in **Kunwar Baldevji (supra)**, the Court very clearly states that there was no requirement to interpret the Order XV Rule 5 of the C.P.C. when it is absolutely unambiguous and clear. There was no occasion to stretch the meaning of the expression "rent admitted by the tenant to be due" should mean "rent found by the Court to be due….." It states that the question of interpretation of a statutory provision arises only when the provision is ambiguous or admits of two interpretation or the

interpretation is required to save the provision from being declared void. The judgement in **Kunwar Baldevji (supra)** clearly states that with regard to Order XV Rule 5 of the C.P.C. no such contingency exists. Relying upon Kunwar Baldevji (supra), we also hold that only admitted rent would have to be paid when arrears were being paid. This Court further opines in view of the judgement of **Asha Rani Gupta(supra)** and in view of section 23 of the Provisional Small Cause Courts Act 1887 that if there was a case of denial of the relationship of landlord by the defendant then not in every case the defendant would be absolved of the responsibility of paying the month to month rent. A denial simplicitor did not absolve the defendant of the responsibility to pay the month to month rent. The denial had to be bonafide and that question could be determined in every case with reference to its facts and it cannot be laid down that a simple mere denial of title of the plaintiff or the relationship of landlord – tenant, the defendant of a Suit could be absolved from paying the monthly rent as per the provisions of Order XV Rule 5 of C.P.C. This is also the law as had been laid down by the Supreme Court in **Budhu Mal vs. Mahabir Prasad and others** reported in **(1988) 4 SCC 194** which had stated that the plaint had to be returned for a definite adjudication of a Civil Court in case there was a serious dispute with regard to the title. The Court, therefore, as per us, definitely would have to look into the degree of the denial.

31. Ultimately, this Court answers the reference in the following manner :

(I) In a suit for eviction, on the determination of lease if the lessee admits that there was rent due then at or before the first hearing of the suit he shall pay the entire admitted amount along with interest thereon at the rate of 9% per annum.

(ii) If he does not admit any amount to be due then he would throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual.

(iii) Default of the above two would give the Court a right to strike off the defence, subject to the provisions of sub-rule (2) of Order XV Rule 5 of the C.P.C. which gives the defendant an opportunity to represent within ten days from the first hearing.

(iv) As per the explanation-II of Order XV Rule 2 C.P.C., the entire amount admitted by the defendant-lessee has to be construed as the entire gross amount whether as rent or compensation for use and occupation, calculated at the "admitted rate of rent" for the admitted period.

(v) The monthly amount due which had to be paid within one week after the monthly amount payable became due was also to be paid at the "admitted rate of rent".

(vi) The law, as had been laid down in paragraph no.11 of **Pradyuman Jee vs. Special/Additional District Judge, Ballia** reported in **2008 (71) ALR 892** which had stated that if the defendant denies the existence of the landlord-tenant relationship then he may not be required to deposit the amount admitted to be due at or before the first hearing of the suit but he would still be required to deposit the monthly amount due, is not a correct law. Order XV Rule 5 of C.P.C. does not talk about the denial of the landlord-tenant

relationship. It only talks about "admitted rent".

(vii) As per the judgment of Kunwar Baldevji and etc. vs. The XI Additional District Judge, Bulandshahr & Ors. reported in **(2003) 51 ALR 758** if the amount of rent is not admitted then it is required to be adjudicated by the Court. In case, the tenant/defendant denies any rent to be due, the Court would be required to decide the same. Obviously then the Court will have to adjudicate and arrive at a finding at the first date of hearing contemplated under Order XV Rule 5 CPC as to what is the rent and what is payable. This issue has to be framed and thereafter adjudicated upon on the leading of evidence of the parties.

(viii) If the tenant-defendant denies the relationship of landlord-tenant then as per the judgment of the Supreme Court in **Asha Rani Gupta vs. Vineet Kumar** reported in **(2022) 8 ADJ 572 (SC)** and as per the provisions of section 23 of the Provincial Small Cause Courts Act, 1887, the Court will have to determine whether the question raised by the defendant with regard to title of the plaintiff was a serious one or whether the denial of the title was a question which was to be determined with the help of evidence which would be led by the parties. If the denial was a definite denial with substantial evidence then the Court of Small Causes, which did not have the jurisdiction/authority to determine the title of the plaintiff, would have the discretion to return the plaint at any stage of the proceedings to be presented before the Court having jurisdiction to determine the title.

32. The reference is thus, accordingly, answered.

33. Since an interim order was granted in favour of the defendant by the learned Single Judge while making the reference, we provide that the interim order would continue till the decision of the Revision. The case may now be listed before the learned Single Judge.

(2024) 1 ILRA 1155
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ Tax No.229 of 2023

M/S R.C. Infra Digital Solutions Thru. Auth ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Siddharth Nandwani

Counsel for the Respondents:
A.S.G.I., Digvijay Nath Dubey, Dipak Seth

Civil Law - The Central Goods and Services Tax Act, 2017 - Section 70 -Challenge to Notification No. 14/2017-Central Tax dated 01.07.2017 as ultra vires, jurisdiction of DGSI officers under Section 67, and summons under Section 70 of CGST Act, 2017 - Allegation of coerced deposit of Rs. 40 Lakhs - Notification upheld as Central Government has authority under Section 3 to appoint officers, and Board assigned functions via Circular No. 3/3/2017-GST - No parallel proceedings found as inquiries by Anti-Evasion Wing and DGSI distinct - Payment of Rs. 40 Lakhs deemed voluntary, no evidence of coercion.

Writ petition dismissed.

List of Cases cited:

1. J.K. Industries Ltd. Vs U.O.I., (2007) 13 SCC 673

2. St. of U.P. Vs Renusagar Co., AIR 1988 SC 1737

3. Commissioner of Customs Vs Sayed Ali, 2011 (265) ELT 179 (SC)

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

(1) Heard Mr. Sameer Gupta, Mr. Prashant Verma, Mr. Siddharth Nandwani, learned Counsel representing the petitioners and Mr. Ashwani Kumar Singh, learned Counsel representing the respondent No.1, Mr. Manish Mishra, learned Standing Counsel representing the Central Board of Indirect Taxes & Customs/respondent Nos.2, 3 and Mr. Digvijay Nath Dubey, learned Standing Counsel representing the Directorate of Goods & Service Tax Intelligence.

(2) The petitioner has invoked the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India challenging the Notification No. 14/2017- Central Tax dated 01.07.2017 primarily on the ground of it being ultra-vires to the power of the Central Government. A further challenge has been laid to the jurisdiction of the Additional Director General of Goods and Services Tax Intelligence in authorizing the other Intelligence Officer to carry out inspection/search proceedings at the premises of the petitioner under Section 67 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'CGST Act, 2017'). A consequential challenge has also been made by the petitioner to the issuance of summons dated 06.06.2023 and 14.06.2023 issued by the Intelligence Officer under Section 70 of the CGST Act, 2017 as it has been alleged to have been issued without authority of law. Other issue of an amount of Rs. 40 Lakhs having been deposited under coercion has been raised by the petitioner in the instant petition.

(3) The facts of the present case as is pleaded in the writ petition can be capitulated briefly by stating that the petitioner is a partnership firm registered under Goods and Services Tax having GSTIN 09AAYFR5496BIZH and is engaged in the business of work contract services. The Additional Director General, Directorate General of Goods and Services Tax Intelligence (hereinafter referred as '**DGSI**'), who had reasons to believe that documents related to search were secreted at the premises of the petitioner, authorized Intelligence Officers (arrayed as respondent Nos. 5 to 8) to conduct inspection/ search at the premises of the petitioner on 06.06.2023 under Section 67 of the CGST Act, 2017, wherein a punchnama of the said inspection/search was also got prepared by the authority.

(4) It is the case of the petitioner that although during the aforesaid inspection/search, the Intelligence Officer of DGSI were apprised about an ongoing enquiry being conducted by the Anti Evasion Wing of CGST and apparently a summon dated 16.05.2023 had also been issued by the said Anti Evasion Wing for the period November, 2018 to March, 2023, however, the petitioner was coerced to deposit an amount of Rs. 40,00,000/- under the threat of arrest by the said officers of DGSI, who also issued summon dated 06.06.2023 under Section 70 of the CGST Act, 2017 and called for the following information :-

"(i) Ledger of purchase and sale for the period November 2018 to till date;

(ii) Ledger of ITC and details of ITC available for the period November, 2018 to till date;

(iii) Bank statement for the period November 2018 to till date."

(5) Although, the petitioner had raised a preliminary objection to the issuance of the aforesaid summons without the DIN number as being in violation of Circular No. 122/41/2019-GST dated 05.11.2019, however, this Court finds that the said objection does not exist presently as it has been submitted by the petitioner that subsequently, the respondent rectified the said objection by issuance of a fresh summons dated 14.06.2023 and directing the same set of information/documents from the petitioner, to which again an objection was raised by the petitioner on the ground of jurisdiction, as according to him the same set of documents have already been furnished to the Anti Evasion Wing of GST and now asking of the same set of documents by the officers of DGSI was not legal on the ground of exercise of parallel jurisdiction.

(6) Learned Counsel for the petitioner has taken this Court to various provisions of the CGST Act, 2017 including Section 2 (24), which defines the term 'Commissioner', Section 3 which relates to 'officers appointed under the said Act', Section 2 (53) which relates to 'notification power of the Central Government to appoint such class of officers as provided under the Act', Section 2 (91) which defines 'proper officer', Section 2 (25) which defines 'commissioner in the Board', Section 168 which relates to 'power to issue instruction or directions'. According to the learned Counsel, a conjoint reading of Section 2 (91) with Section 168 (2) of the CGST Act, 2017 signifies that the proper officer would be the Commissioner in Board or an Officer of Central Tax, who is assigned that function by the Commissioner in Board and although Commissioner in Board is the proper officer for the purpose of CGST Act, 2017, however, the definition clause does not confer any power on the Commissioner in Board to assign any power/function to the Officer of the Central Tax. Further, according to the learned Counsel, it is Section 5 (3) of the CGST Act, 2017 which confers the power on the Commissioner to delegate his powers to officers who are subordinate to him and thus according to him, a reading of all these sections leads to the inevitable conclusion that the proper officer is Commissioner in Board and he has been conferred with the power to delegate the functions of proper officer to other subordinate officer of Central Tax.

(7) Thus, it has been contended by the learned Counsel for the petitioner that although the Central Government under the power conferred under Section 3 of the CGST Act, 2017 has issued the impugned Notification No. No. 14/2017- Central Tax and appointed the officers of DGSI as Central Tax Officers and also invested it with all the powers that are exercisable by the officers of corresponding ranks, however, according to him Section 3 of the CGST Act, 2017 only confers the power on the Central Government to appoint the class of officers by way of notification and does not permit them the authority to confer any power to such appointed officers. Simply put forward, according to the learned Counsel, the legislature has invested the authority to delegate the functions of proper function upon the Commissioner in Board, however, no such authority has been conferred upon the Central Government and as such the jurisdiction exercised by the Central Government in issuance of Notification No. 14/2017- Central Tax is ultra vires to

Section 5 of the CGST Act, 2017 and other provisions of the said Act.

(8) It has been submitted by the petitioner that the Central Government has usurped the power of Commissioner in Board by investing the powers with DGSI vide the said impugned notification No. 14/2017- Central Tax. According to him, the Central Government has no power to delegate the power exercisable by the Central Tax Officer to DGSI which has been specifically entrusted upon the Commissioner in Board by the statute and has in that regard also quoted Sections 167 and 168 (2) of the CGST Act, 2017 to argue that the Commissioner in Board may by notification direct any power exercisable by any authority, however, the same power is not available to the Central Government and merely by notifying DGSI as officer of Central Tax would not automatically invest them with the power to perform the function of proper officer. Thus, according to him, powers can be invested with DGSI by issuance of notification by the Commissioner in Board under Section 167 of the CGST Act, 2017 or by specifically delegating the power of proper officer by issuance of a circular akin to the circular No. 3/3/2017- GST dated 05.07.2017.

(9) The next leg of argument addressed by the learned Counsel for the petitioner is relating to the impugned search/inspection proceedings and the summons having been issued by the Intelligence Officer of DGSI amounted to conducting parallel proceedings on the same subject matter by two different wings of same authority. According to the petitioner, the DGSI Officers cannot exercise their jurisdiction to conduct any proceeding on the same subject matter which is already being conducted by the Anti Evasion Wing of GST Department. In an another limb of his argument, the learned Counsel vehemently submitted that the coercive action of the respondent has culminated into the recovery of an amount of Rs. 40 Lakhs from the petitioner without issuance of any show-cause notice or finalization of demand pursuant to the adjudication, which is also contrary to Instruction No. 01/2022-23 (GST-Investigation) dated 25.05.2022. The learned Counsel has also referred to the judgment of the Apex Court passed in **J.K. Industries Ltd. Vs. Union of India** : (2007) 13 SCC 673 to argue that a delegate cannot override the Act either by exceeding the authority or making provisions which are inconsistent with the Act. Judgments of the Apex Court in **State of U.P Vs. Renusagar Co.** AIR 1988 SC 1737 and **Commissioner of Customs Vs Sayed Ali :** 2011 (265) ELT 179S.C) have also been pressed for the proposition of subordinate legislation.

(10) Per contra, the learned Counsel for the respondents have controverted the arguments of the petitioner and the learned Standing Counsel for Central board of Indirect Taxes & Customs appearing for respondent Nos.2 and 3 has also chosen to file a written arguments. It has been the common ground of the respondents that the impugned Notification No. 14/2017 dated 1/7/2017 has subsequently been corrected through corrigendum dated 29/07/2019 by virtue of which the word "*the Central Board of excise and Customs"* has been omitted and in place thereof the word *"the Government"* has been inserted in the said impugned notification. The learned Counsel has also submitted that the present writ petition has been filed on misinterpretation and misconception of powers of the Central Government,

inasmuch as Section 3 of the CGST Act, 2017 vividly says that the Government is the only authority, which can appoint the officers for the purpose of the CGST Act, 2017 through notification and further Section 4 of the CGST Act, 2017 empowers the Central Board of Indirect Taxes to appoint such officers as it deem fit in addition to the officers appointed by the Government. Thus, it is the contention of the learned Counsel that the basic power of appointment lies with the Central Government and the Board has been merely given additional power. They have also contended that a conjoint reading of sub-section 1 of section 5 read with section 3 clarifies that the Government is authorized to appoint the officers for the administration of Act and the officers holding the post will discharge their duties as assigned under the CGST Act, 2017, therefore according to them, it cannot be said that only the Commissioner is authorized to delegate his power to all other officers. It has been contended that sub-section 3 of section 5 of CGST Act, 2017 only provides that the Commissioner can delegate his powers to any of his subordinate officers which does not mean that the power and authority of Central Government or the Board has been snatched by the legislation. It has also been contended that even section 167 read with sub section 2 of section 168 of CGST Act, 2017 also does not empower the Commissioner alone to authorize the officer for any particular act. Thus, it has been submitted that since the decision taken by the Central Government was only with respect to assigning the powers of Commissioner to certain other officers, who are already recognized as Central Tax Officers, it is well within the power conferred by the enabling Act and such an exercise of power cannot be termed as ultra vires. As regards the summons issued and the money deposited, it has been contended that the summons were issued in June, 2023 and the deposits were also made in the same month, however, the petitioner chose to come to this Court only in December, 2023 and since it is a case of search and the enquiry proceeding is still going on and the same is still not finalized, the present writ is premature. According to them, there is a mechanism to challenge the further proceedings, which have been provided in the CGST Act, 2017 itself and as such the prayer for summons and deposit are not maintainable before this Court in exercise of its writ jurisdiction. Thus, prayer for dismissal of the present petition is made in defence.

(11) This Court has given an anxious thought to the pleadings and contention of the parties. The fulcrum of the submission made by the parties are based on the validity of Notification No. 14/2017 dated 1/7/2017 and as such this Court finds apt to first deal with the said aspect.

(12) At the outset, it may be noted that the submissions made by the learned Counsel for the petitioner appears to be very attractive in the first blush, however, a deeper investigation into the submissions made by the learned Counsel for the petitioner would reveal that the same is without any substance. In order to appreciate his submissions, it would be beneficial to note that the impugned Notification No. 14/2017–Central Tax dated 01.07.2017 *inter-ali*a states :-

"In exercise of the power conferred under section 3 read with section 5 of the Central Goods and Services Tax Act, 2017 (13 of 2017), the Central Board of Excise and Customs hereby appoints the

officers in the Directorate General of Goods and Service Tax Intelligence, Directorate General of Goods and Service Tax, Directorate General of Audit as specified in column(2) of the Table below, as central Tax Officers and invest them with all the powers under the Central Goods and Service tax Act, 2017 and the Integrated Goods and Services Tax Act, 2017 and the rules made there under, throughout the territory of India, as are exercisable by the central tax Officers of the corresponding rank as specified in column (3) of the said Table…"

(13) Further, it has been contended that the aforesaid Notification was amended vide a corrigendum dated 29th July, 2019, wherein for the word "Central Board of Excise and Customs", the word "Government" has been substituted. Therefore, it is the Government, who has notified the impugned Notification No. 14/2017 dated 01.07.2017 and according to this Court, section 3 of the CGST Act, 2017 is sufficiently couched with the powers vested on the Government to appoint the various class of officers for the purposes of this Act. Thus, as regards the appointment of officers in the Directorate General of Goods and Service Tax Intelligence, Directorate General of Goods and Service Tax, Directorate General of Audit as specified in column (2) of the said Table as Central Tax Officers cannot be faulted with in the Notification. However, as contended by the petitioner, the power to these Central Tax Officers can be conferred only under Section 5 of the CGST Act and the procedure to be followed ought to be as mentioned under section 167 and 168 (2) of the CGST Act, 2017.

(14) No doubt, this Court is clear in its mind that in a taxation statute, any officer performing a function under the said statute must necessarily meet three concomitants, namely, **(i) existence of a class/post, (ii) appointment of officers to that said post/class and (iii) assignment of power to the said post/class**. Under the CGST Act, 2017, it is seen and as has been rightly contended by the learned Counsel for the petitioner that section 3 of CGST, 2017 creates the class/post of officers and it clearly says that the Government by notification shall appoint the said class of officers for the purposes of CGST Act. Further, Section 4 of CGST, 2017 provides for appointment of officers/additional officers by the Board in addition to the notification by the Government under Section 3 of the CGST Act, 2017. Most significantly, section 5 of the CGST Act, 2017 says that the Board may impose conditions/ limitations on exercise of powers and discharge of duties conferred or imposed on an officer of Central Tax under the Act. It further says that an officer of Central Tax may exercise the powers and discharge the duties conferred or imposed under the GST Act on any other officer of Central Tax, who is subordinate to him. Section 5(3) of the CGST Act, 2017 says that the Commissioner may delegate his powers to any other officer who is subordinate to him subject to conditions and limitation as may be specified by him. Thus, it can be safely said that section 5 of the CGST Act provides that any officer who has been so appointed must be assigned / entrusted / invested with specified powers under CGST Act to enable him to perform those functions.

(15) Apparently, unless these processes are undertaken, an officer cannot perform the functions under the law. The functions are specified in various provisions where either it is assigned to a

class of officers or to a 'Proper Officer'. A Proper Officer as per Section 2(91) of the CGST Act, 2017 is a 'Commissioner' or the officer of the Central Tax, who has been assigned that function by the Commissioner in the Board. Thus, assignment of function to a specific class of officers is an inevitable requirement.

(16) Vide Notification No. 02/2017-Central Tax dated June 19, 2017 issued under Section 3 read with Section 5 of the CGST Act, 2017, the Central Government appointed classes of officers for Central Tax and vested them with all the powers in respect of the territory specified. However, these provisions do not provide for assignment/entrustment/investment of powers by the Government. The Central Government issued another Notification No. 14/2017-Central Tax dated July 1, 2017 under Section 3 read with 5 of the CGST Act, 2017 notifying equivalent class/posts for officers of DGGI. Thus, officers of DGGI became Central Tax officers of specified class / post. However, as pointed out by the learned Counsel for the petitioner, these DGGI officers were merely appointed by the Government in view of section 3 of the Act and they could not have been assigned / entrusted / invested with specified powers under CGST Act to enable them to perform those functions under section 5 of the Act, as it is essentially the Board, which has been empowered under the said section of the GST Act to confer such power on the Officer of Central Tax.

(17) Section 5 of the CGST Act, 2017 states inter-alia :-

(1) Subject to such conditions and limitations as the Board may impose, an officer of central tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.

(2) An officer of central tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of central tax who is subordinate to him.

(3) The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.

(4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of central tax.

(18) It is apparent from the above that as per section 5 (1) of CGST Act, 2017, it is the Board, which confers and impose such conditions and limitation on an officer of central tax for exercising the powers and duties conferred under the CGST Act, 2017 and section 5(3) of CGST Act, 2017 empowers the commissioner to delegate his powers to any other officer, who is subordinate to him. Further, section 2 (16) of the CGST Act, 2017 says that "Board" means the Central Board of Indirect Taxes and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963). Further, section 3 of the Central Boards of Revenue Act, 1963 relating to Constitution of Central Boards for Indirect Taxes and Customs says that it is the Central Government, which shall constitute the Central Board of Indirect Taxes and Customs and the said Board shall be subject to the control of the Central Government and shall exercise such powers and perform such duties, as may be

entrusted to that Board by the Central Government or by or under any law. Thus, it appears that the Board is subservient to the Government under the Act and it could be well argued that when the power has been invested with the Board to do certain things, how can the Government not exercise such a power.

(19) However, the question of investing powers on the central tax officers by the Board or the government does not end there as this court finds that the Circular No.3/3/2017-GST dated July 5, 2017 (Annexure-11) issued by the Commissioner in Board relates to assignment of various functions under CGST Act, 2017 to different class of officers, who had been construed to be DGSI officers in terms of Notification No. 14/2017.

(20) A conjoint reading of Notification No. 14/2017 dated 01.07.2017 and Circular No. 3/3/2017-GST dated 05.07.2017 sufficiently contemplates the assigning of powers to DGSI officers by the Board. Let's take an example, as per the circular of 05.07.2017, a Superintendent of Central Tax has been assigned the power to function as is mentioned in Sub-section (1) of section 70 and a reading of Notification 14/2017 leads us to conclude as mentioned in serial No. 8 that a senior Intelligence officer, Goods and Service Tax Intelligence or Superintendent, Goods and Service Tax or Superintendent, Audit has been notified to be appointed under section 3 of the GST Act as a central Tax officer and is invested with all the powers under the central Goods and Service Tax Act, 201, throughout the territory of India, as are exercisable by the central Tax officers of the rank of "superintendent". In any case, this court does not find any force in holding that such technical nuances to be fatal for the Notification or to the functions performed by various DGGI officers. The jurisprudence on the implications of invocation of a wrong provision suggests that as long as an authority has power, which is traceable to a source, the mere fact that source of power is not indicated or wrongly indicated in an instrument does not render the instrument invalid.

(21) For all the aforesaid reasons, this Court is not inclined to hold that the impugned Notification No. 14/2014 dated 01.07.2017 is ultra vires to the powers provided to the Government under the CGST Act, 2017.

(22) Since, the present issue is relating to the power related to Inspection, search, seizure, arrest etc. by the DGSI officer, it can be seen from the CGST Act, 2017 itself that the said powers are mentioned under chapter XIV, wherein section 67 of CGST Act, 2017 relates to power of inspection, search and seizure. Section 69 of the CGST Act, 2017 relates to power of arrest, Section 71 of CGST Act, 2017 relates to access to business premises, section 72 of the CGST Act, 2017 relates to officers to assist proper officers and section 70 of the CGST Act, 2017 relates to power to summon persons to give evidence and produce document. Since, the said power invested under section 70 of the CGST Act, 2017 has been an issue in the present writ petition, it would be beneficial to quote section 70 of the CGST Act, 2017 which inter-alia states:

"70 (1) The proper officer under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in

any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

(2) Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code (45 of 1860)."

(23) From a bare reading of Section 70 of the CGST Act, 2017, it clearly emerges that the proper officer has the power to summon any person whose attendance he considers necessary either to give evidence or to produce the documents in any inquiry in the same manner in the case of a Civil Court under the Civil Procedure Code. Now, as per the definition of 'proper officer' as contained in Section 2 (91) of the CGST Act, 2017, a 'proper officer' in relation to any function to be performed under the CGST Act, 2017 means the Commissioner or the Officer of the Central Tax, who is assigned that function by the Commissioner in the Board. It is pertinent to note that as stated in the petition itself, the respondent No.4 to 8 is an officer of Directorate General of Goods and Services Tax Intelligence (DGGI) holding the designation of Senior Intelligence Officer, who was appointed as the Central Tax Officer with all the powers under the CGST Act and IGST Act and the Rules made thereunder, as are exercisable by the Central Tax Officers of the corresponding ranks as specified in the Notification No.14 of 2017-CT dated 1.7.2017 issued by the Government. It is further pertinent to note that the respondents being the officer of the Central Tax under the CGST Act, 2017 by virtue of the said Notification dated 1.7.2017, they were also assigned the powers of proper officer by the Board vide Circular dated 5.7.2017 issued in exercise of the powers conferred by Clause (91) of Section 2 of the CGST Act, 2017 read with Section 20 of the IGST Act. Therefore, the respondents are proper officer in relation to the function to be performed under the CGST Act, 2017 as contemplated under Section 2 (91) of the CGST Act, 2017, and as such, was entitled to issue summons under Section 70 of the CGST Act, 2017 in connection with the inquiry initiated against the petitioner.

(24) There is another aspect of the matter, inasmuch as it has been submitted by the learned Counsel for the petitioner that the said assignment of function has to be by way of Notification and not by way of Circular in view of Section 167 of the CGST Act, 2017 and in any case, the power was to be invested by the commissioner in Board. This court finds that Section 167 of the CGST Act, 2017 pertains to the delegation of powers by the Commissioner exercisable by any authority or officer under the Act to be exercisable also by another authority or officer as may be specified in the Notification. So far as Section 2(91) of CGST Act, 2017 is concerned, it pertains to the proper officer in relation to any function to be performed under the CGST Act, 2017 to be the Commissioner or the officer of Central Tax, who is assigned that function by the Commissioner in the Board. Here the Board means the "Central Board of Indirect Taxes and Customs" as defined in Section 2(16) of the CGST Act, 2017. Vide the Circular dated 5.7.2017 the said Board namely the Central Board of Excise and Customs in exercise of the powers conferred by Section 2(91) of the CGST Act, 2017 read with Section 20 of the IGST Act and subject to Section 5(2) of the CGST Act, 2017 has assigned the officers

the functions as that of proper officers in relation to the various Sections of the CGST Act, 2017 and the Rules made thereunder, and as such the Superintendent of Central Tax has been assigned the function of Section 70(1) of the CGST Act, 2017. Thus, there being no delegation of powers by the Commissioner, the provisions contained in Section 167 of the CGST Act, 2017 could not be said to have been attracted, nor was there any necessity to issue any such Notification. The Court, therefore, does not find any substance in the submission of the Ld. Counsel that the respondent No. 4 to 8 was not the 'proper officer' as per the definition contained in Section 2(91) of the CGST Act, 2017 and therefore, had no powers to issue summons under Section 70 of the CGST Act, 2017.

(25) This Court also does not find any force in the submission made by learned Counsel for the petitioner that two parallel proceedings in connection with the same issue were not sustainable. It may be noted that the communication dated 10.05.2023 was issued by the Anti-Evasion Department of the GST for limited inquiry in connection with irregular availment of ITC during the period 2018-19 to 2022-23 under the CGST, 2017 and as such has required the petitioner to produce (i) Ledger of purchase and sales for period November, 18 to March, 2023, (ii) Ledger of ITC availed for period Nov 18 to Mar 23, (iii) Bank Statement for period Nov 18 to Mar 23., whereas the officers of the DGSI have issued summons for making inquiry in the entire activities of the petitioner under the GST Act, 2017. Pertinently the stage is of enquiry and not of show-cause and apparently, the inquiry being conducted by the Ant evasion department and the inquiry being conducted by the officers of DGSI does not appears to be over-lapping. It is needless to say that the proceedings of issuing summons under Section 70 of the CGST Act, 2017 are the proceedings of judicial nature and the petitioners are bound to respect the same, and cooperate with the inquiry. As such, no prejudice is going to be caused to the petitioner if the statement is tendered or the documents are produced as required by the respondents and adequate safeguards are already in place for ensuring that these enquiries are conducted in a fair and reasonable manner.

(26) As regards the payment of Rs. 40 Lakhs made by the petitioners on 8.06.2023 vide Form GST DRC-03 under Rule 142(2) and 142(3) of the GST Rules (Annexure No.7), it may be noted that for the particulars at Sr. No.3 i.e. "cause of payment", it is shown as "voluntary" and at Sr. No. 4 i.e. "section under which voluntary payment is made", it is shown as "Section 74 (5)". At the bottom of the table in the said Form, at Sr. No.8 with regard to "reasons", it has been mentioned that "DRC against IGST Tax financial year 2023 ". Apparently, the said receipt does not mention any words like “"under protest" or “without prejudice” etc. and as such it cannot be prima-facie said that the said payment was made by the petitioners under duress and was not made voluntarily. Further, there was no complaint made by the petitioner before the grievance cell or before any authority of the respondent that the said payment was made under duress and was not made voluntarily.

(27) In the instant case, the petitioners having made payment under Section 74 (5) of the CGST Act, 2017, they appear to have informed the Proper Officer of such payment in the Form GST DRC-03 (Annexure No. 7) as contemplated in Rule

142(2) of the said Rules. It is needless to say that the said payment shall be dealt with or adjusted by the concerned respondent No.3 in accordance with law more particularly as per the provisions contained in Section 74 of the CGST Act, 2017.

(28) For all the aforesaid reasons, this Court does not find any merits in the present petition and as such the same is **dismissed.** However, in the facts of the present case, there shall be no order as to costs.

(2024) 1 ILRA 1165
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ Tax No. 1338 of 2022

M/S Dial For Cool, Noida ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prathamesh Upadhyay

Counsel for the Respondents:
C.S.C.

Civil Law - The Central Goods and Services Tax Act, 2017 - Section 107 - Challenge to dismissal of appeal by order dated 28.09.2022 as time-barred under Section 107 of CGST Act - Appellate authority failed to verify mode of service or record satisfaction of communication of order dated 04.03.2022 cancelling GST registration - Limitation period commences from date of communication, not order date - Impugned order lacks findings on service or knowledge, rendering it legally flawed - Order set aside, matter remitted to appellate authority for fresh adjudication with hearing, to be completed within two months.

List of Cases cited:

1. S/S Patel Hardware Vs Commissioner, St. G.S.T. & ors., Writ Tax No.1388 of 2018

2. Singh Traders Vs Additional Commissioner Grade-2 & ors., Writ Tax No.661 of 2020

3. M/s. Pearl and Co. Vs The Commissioner of Commercial Taxes & anr., W.P.(MD) No.19127 of 2022 and W.M.P.(MD) No.13962 of 2022

4. Tvl. Suguna Cutpiece Vs Appellate Deputy Commissioner (ST) (GST) & ors., W.P.Nos. 25048, 25877, 12738 of 2021, decided on 31.01.2022

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Heard Shri Prathamesh Upadhyay, learned counsel for the petitioner and Shri Bipin Kumar Pandey, learned Additional Chief Standing Counsel for the respondents-State.

2. The GST registration of the petitioner was cancelled by the authority/Assistant Commissioner, Noida Sector-10/respondent No.3 in the first instance by the order dated 04.03.2022. The petitioner carried the said order in appeal before the learned appellate authority/Additional Commissioner, Grade-2 (Appeal)-Ist, State Tax, Noida.

3. The petitioner has assailed the order dated 28.09.2022 passed by the learned appellate authority/Additional Commissioner, Grade-2 (Appeal)-Ist, State Tax, Noida, wherein the learned appellate authority has rejected the appeal filed by the petitioner under Section 107 of the CGST Act on the footing that the appeal was barred by limitation. The impugned order references the provisions of Section 107 of the Act and notices that the period of limitation of three months has been

provided for filing the appeal. In this case the appeal was filed after a period of four months and was accordingly barred by limitation.

4. Section 107 of the Central Goods and Services Tax Act, 2017 pari materia with Section 107 of the Uttar Pradesh Goods and Services Tax Act are relevant part which provide for limitation and the same are extracted hereunder:

"Section 107. Appeals to Appellate Authority-

(1) Any person aggrieved by any decision or order passed under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act by an adjudicating authority may appeal to such Appellate Authority as may be prescribed within three months from the date on which the said decision or order is communicated to such person.

(2) The Commissioner may, on his own motion, or upon request from the Commissioner of State tax or the Commissioner of Union territory tax, call for and examine the record of any proceedings in which an adjudicating authority has passed any decision or order under this Act or the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, for the purpose of satisfying himself as to the legality or propriety of the said decision or order and may, by order, direct any officer subordinate to him to apply to the Appellate Authority within six months from the date of communication of the said decision or order for the determination of such points arising out of the said decision or order as may be specified by the Commissioner in his order.

(3) Where, in pursuance of an order under sub-section (2), the authorised officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and such authorised officer were an appellant and the provisions of this Act relating to appeals shall apply to such application.

(4) The Appellate Authority may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of three months or six months, as the case may be, allow it to be presented within a further period of one month."

5. Section 169 of the Act provides for manner of service of notice, decision/order or summons which is relevant to the controvery is reproduced hereunder:

"Section 169. Service of notice in certain circumstances-

(1) Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by any one of the following methods, namely:?

(a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person; or

(b) by registered post or speed post or courier with acknowledgement due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or

(c) by sending a communication to his e-mail address provided at the time of registration or as amended from time to time; or

(d) by making it available on the common portal; or

(e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or

(f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision, order, summons, notice or any communication shall be deemed to have been served on the date on which it is tendered or published or a copy thereof is affixed in the manner provided in sub-section (1).

(3) When such decision, order, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved."

6. The provisions of Section 107 of the CGST Act contemplates that the period of limitation will commence from the date the order is "communicated to such person". The interpretation of the aforesaid phrase "communicated to the person" which is the start point of limitation, arose for consideration before this Court in **S/S Patel Hardware v. Commissioner, State G.S.T. and others (Writ Tax No.1388 of 2018).** S.D.Singh J. while examining the provision held as under:

"8. Keeping in mind the fact that the delay in filing the appeal may not be condoned beyond the period of one month from the expiry of period of limitation, the phrase "communicated to such person" appearing in Section 107(1) of the Act commend a construction that would imply that the order be necessarily brought to the knowledge of the person who is likely to be aggrieved. Unless such construction is offered, the right of appeal would itself be lost though a delay of more than a month would in all such cases be such as may itself not warrant such strict construction."

7. Similarly, the observations of **Pankaj Bhatia J. in Singh Traders v Additional Commissioner Grade-2 and others (Writ Tax No.661 of 2020)** regarding satisfaction of service in accordance with the provisions of Section 169 also become applicable to the facts of this case.

8. The mandatory prerequisites for reckoning the start point of period of limitation are these. The authority has to make a finding in regard to the mode of copy of the order and also whether service

upon the concerned person is complete. Secondly the authority has to record its satisfaction that the order has been "communicated to the assessee/person".

9. The impugned order does not reference the mode of service of the order nor does it record its satisfaction of service in the order. The finding that the order was "communicated to the assessee/person" is also absent. Learned tribunal was misdirected in law, inasmuch as, it neglected to record its satisfaction of the mandatory prerequisites for triggering the clock of limitation.

10. There is another aspect which needs to be adverted to. The authority below while deciding the issue of cancellation of registration of a dealer is liable to be guided by holdings of the Madras High Court in **M/s. Pearl and Co. v. The Commissioner of Commercial Taxes and another, (W.P.(MD) No.19127 of 2022 and W.M.P. (MD) No.13962 of 2022)** wherein the consequences of cancellation of registration of a dealer and the approach of the revenue while considering such matters was set out as follows:

"6.Considering the submission and perusal of the materials, this Court is of the view that restoring the registration would not cause any harm to the department on the other hand it would be beneficial for the state to earn revenue. Further, in the case of Tvl.Suguna Cutpiece Vs Appellate Deputy Commissioner (ST) (GST) and others (W.P.Nos. 25048, 25877, 12738 of 2021 etc.. batch), dated 31.01.2022. There some of the petitioner filed an appeal beyond the period of limitation either for filing application for revocation of cancellation, while some of them had directly filed a writ petition against the order cancelling the registration. While some of them filed appeal beyond the statutory period of limitation, there was further delay in filing the writ petition. However, considering the over all facts and circumstances of the case, it was held that no useful purpose will be served by keeping those petitioners out of the Goods and Services Tax regime, as such assessee would still continue to do business and supply goods/services. By not bringing them back to the Goods and Services Tax fold/regime, would not further the interest of the revenue. Relief was granted under similar circumstances with the following directions:

"216. Since, no useful will be served by not allowing persons like the petitioners to revive their registration and integrate them back into the main stream, I am of the view that the impugned orders are liable to be quashed and with few safeguards.

217. There are adequate safeguards under the GST enactments which can also be pressed against these petitioners even if their registration are revived so that, there is no abuse by these petitioners and there is enough deterrence against default in either paying tax or in complying with the procedures of filing returns.

218. Further, the Government requires tax to meet its expenditure. By not bringing these petitioners within the GST fold, unintended privilege may be conferred on these petitioners unfairly to not to pay GST should they end supplying goods and/or services without registration. For example, a person renting out an immoveable property will continue to

supply such service irrespective of registration or not.

219. Therefore, if such a person is not allowed to revive the registration, the GST will not be paid, unless of course, the recipient is liable to pay tax on reverse charge basis. Otherwise, also there will be no payment of value added tax. The ultimate goal under the GST regime will stand defeated. Therefore, these petitioners deserve a right to come back into the GST fold and carry on their trade and business in a legitimate manner.

220. The provisions of the GST Enactments and the Rules made there under read with various clarifications issued by the Central Government pursuant to the decision of the GST Council and the Notification issued thereunder the respective enactments also make it clear, intention is to only facilitate and not to debar and de-recognised assesses from coming back into the GST fold.

11. The impugned order dated 28.09.2022 passed by the respondent No.2/learned appellate authority is liable to be set aside and is set aside.

12. The matter is remitted to the learned appellate authority for fresh adjudication in accordance with law.

13. The learned appellate authority is directed to decide the controversy in light of the observations made in this judgement and upon giving an opportunity of hearing to the petitioner.

14. The entire exercise shall be completed within a period of two months from the date of receipt of a certified copy of this order.

15. The writ petition (tax) is allowed.

(2024) 1 ILRA 1169
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 02.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1400 of 2022

M/S Hindustan Herbal Cosmetics, Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shubham Agarwal

Counsel for the Respondents:
Sri Ravi Shanker Pandey,C.S.C.

Civil Law - The Central Goods and Services Tax Act, 2017 - Section 129 - Challenge to penalty order dated 24.05.2018 and appellate order dated 29.08.2019 - Penalty imposed for incorrect vehicle number in e-way bill (DL1 AA 3552 instead of DL1 AA 5332) - Typographical error with no evidence of intent to evade tax - No other infraction found, as tax invoice, bilty, and e-way bill were consistent - Mens rea for tax evasion required for penalty under Section 129 of CGST Act - Impugned orders quashed as without jurisdiction and illegal - Writ petition allowed, consequential reliefs to be provided within four weeks.

List of Cases cited:

1. M/s. Varun Beverages Ltd. Vs St. of U.P. & ors., 2023 U.P.T.C. (113) 331

2. Assistant Commissioner (ST) & ors. Vs M/s. Satyam Shivam Papers Pvt. Ltd. & anr., 2022 U.P.T.C. (110) 269 (SC)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. This is an application under Article 226 of the Constitution of India wherein the petitioner assails the order passed by the Additional Commissioner Grade-2 (Appeal), Commercial Tax, Ghaziabad/respondent No.3 dated August 29, 2019 and the order of the imposition of the penalty dated May 24, 2018 passed by the Assistant Commercial, Commercial Tax, Squad Unit-VI, Ghaziabad/respondent No.2.

2. The case of the petitioner is that the petitioner is a duly registered dealer under the Goods and Service Tax Act, 2017 (hereinafter referred to as 'the Act') and is a seller of cosmetics. The petitioner was supplying cosmetics to another registered dealer, namely, M/s Shree Sai Infotech in Jharkhand and the transaction was duly covered by a tax invoice, a bilty and e-way bill, all dated May 23, 2018.

3. It is a contention of the petitioner that the consignment of goods was sent by the petitioner in Vehicle No.DL1 AA 5332. When the vehicle was in transit, the same was intercepted on 23.5.2018 10.40 P.M. by the Goods and Service Tax authorities. The seizure order was passed on the ground that the vehicle number in Part-B of the e-way bill was incorrect as the e-way bill showed the vehicle bearing No.DL1 AA 3552 instead of DL1 AA 5332. Apart from the above factual position, it is clear that there was no other infraction on the part of the petitioner. Furthermore, the authorities have imposed penalty only on the ground that the vehicle number was not mentioned correctly. There is no allegation of any attempt by the petitioner for evasion of tax as the e-way bill, bilty and the tax invoice were matching and the consignee was also a registered dealer.

4. Counsel on behalf of the petitioner has submitted that number 5332 was typed incorrectly as 3552. He has submitted that this is so obviously a typographical error and similar mistake has also been made in the impugned order that has been passed by the authority concerned. He further relies upon a coordinate Bench judgment of this Court in ***M/s. Varun Beverages Limited v. State of U.P. and 2 others*** reported in ***2023 U.P.T.C. (113) 331*** and also upon the judgment of the Supreme Court in ***Assistant Commissioner (ST) and others v. M/s. Satyam Shivam Papers Pvt. Ltd. And another*** reported in ***2022 U.P.T.C. (110) 269 (SC).***

5. Per contra, Mr. Ravi Shanker Pandey, learned Additional Chief Standing Counsel has submitted that the Department via a circular has allowed non imposition of penalty in cases where there are mistake of two digits in the vehicle number and no further. He has further submitted that the judgment in ***M/s. Varun Beverages Limited (supra)*** would not apply as the same was a case of stock transfer and there was no question of any tax liability in that case. He has also attempted to distinguish the Supreme Court judgment on the ground that it was a case wherein the e-way bill had expired just before the vehicle was detained and seized.

Analysis and Conclusion

6. In the present case, one finds that there is definitely an error with regard to typing of the vehicle number and there is a difference of three digits instead of the permitted two digits (as per the government

circular) as submitted by the learned Additional Chief Standing Counsel. However, law is not to remain in a vacuum and has to be applied equitably in appropriate cases. The judgment in ***M/s. Varun Beverages Limited (supra)*** may be referred to for this purpose. The relevant paragraphs of the said judgment are delineated below:-

"7. The sole controversy engaging the attention of the Court is as to whether the wrong mention of number of Vehicle No. HR-73/6755 through which the goods were in transit and detained by the taxing authorities would be considered as a human error and will be covered under the circular No. 41/15/2018-GST dated 13.04.2018 and 49/23/2018-GST dated 21.06.2018, as the number mentioned in the e-way bill was UP-13T/6755 and the mistake is of only of HR-73 in place of U.P.-13T.

8. It is not in dispute that goods were being transported by the dealer through stock transfer from its unit at Gautam Buddha Nagar to its sale depot at Agra. The bilty which is the document of the transporter mentions the vehicle number as HR-73/6755. From perusal of the e-way bill which has been brought on record, it is clear that the vehicle number has been mentioned as UP-13T/6755. It is apparently clear that mistake is as far as the registration of the vehicle in a particular State and in place of HR-73, UP-13T has been mentioned in the e-way bill, while number of the vehicle 6755 is same.

9. As there is no dispute to the fact that it is a case of stock transfer and there is no intention on the part of dealer to evade any tax, the minor discrepancy as to the registration of vehicle in State in the e-way bill would not attract proceedings for penalty under Section 129 and the order passed by the detaining authority as well as first appellate authority cannot be sustained. Moreover, the Department has not placed before the Court any other material so as to bring on record that there was any intention on the part of the dealer to evade tax except the wrong mention of part of registration number of the vehicle in the e-way bill. The vehicle through which the goods were transported and the bilty showed the one and the same number while only there is a minor discrepancy in Part-B of the e-way bill where the description of the vehicle is entered by the dealer."

7. Furthermore, one may rely on the Supreme Court judgment in ***M/s. Satyam Shivam Papers (supra)*** wherein the Supreme Court has examined the applicability of the issue of mens rea under Section 129 of the Act. The relevant paragraphs of the said judgment are provided below:-

"6. The analysis and reasoning of the High Court commends to us, when it is noticed that the High Court has meticulously examined and correctly found that no fault or intent to evade tax could have been inferred against the writ petitioner. However, as commented at the outset, the amount of costs as awarded by the High Court in this matter is rather on the lower side. Considering the overall conduct of the petitioner No.2 and the corresponding harassment faced by the writ petitioner we find it rather necessary to enhance the amount of costs.

7. Upon our having made these observations, learned counsel for the petitioners has attempted to submit that the questions of law in this case, as regards the

operation and effect of Section 129 of Telangana Goods and Services Tax Act, 2017 and violation by the writ petitioner, may be kept open. The submissions sought to be made do not give rise to even a question of fact what to say of a question of law. As noticed hereinabove, on the facts of this case, it has precisely been found that there was no intent on the part of the writ petitioner to evade tax and rather, the goods in question could not be taken to the destination within time for the reasons beyond the control of the writ petitioner. When the undeniable facts, including the traffic blockage due to agitation, are taken into consideration, the State alone remains responsible for not providing smooth passage of traffic."

8. Upon perusal of the judgments, the principle that emerges is that presence of mens rea for evasion of tax is a sine qua non for imposition of penalty. A typographical error in the e-way bill without any further material to substantiate the intention to evade tax should not and cannot lead to imposition of penalty. In the case of M/s. ***Varun Beverages Limited (supra)*** there was a typographical error in the e-way bill of 4 letters (HR – 73). In the present case, instead of '5332', '3552' was incorrectly entered into the e-way bill which clearly appears to be a typographical error. In certain cases where lapses by the dealers are major, it may be deemed that there is an intention to evade tax but not so in every case. Typically when the error is a minor error of the nature found in this particular case, I am of the view that imposition of penalty under Section 129 of the Act is without jurisdiction and illegal in law.

9. In light of the above findings, the impugned orders dated 29.8.2019 and 24.5.2018 are quashed and set-aside. The consequential reliefs to be provided to the petitioner within the next four weeks.

10. The writ petition is allowed accordingly.

(2024) 1 ILRA 1172
ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 08.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1507 of 2023

M/S Eastern Machine Bricks & Tiles Industries Pvt. Ltd., Jharkhand ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Aloke Kumar

Counsel for the Respondents:
Sri Arvind Kumar Mishra (S.C.)

Civil Law - The Central Goods and Services Tax Act, 2017 - Section 74 - Challenge to order dated 14.09.2021 under Section 74 of CGST Act and appellate order dated 05.10.2023 - Show cause notice uploaded on web portal after petitioner's voluntary cancellation of GST registration in 2019, without proper service at petitioner's address - Non-disclosure of Special Investigation Branch (SIB) report relied upon by authorities - Appellate authority dismissed appeal without granting second hearing - Both orders violated principles of natural justice (audi alteram partem) - Orders quashed, matter remitted to Assistant Commissioner for fresh hearing on 30.01.2024 with SIB report provided to petitioner, reasoned order to be passed within two weeks.

List of Cases cited:

1. S.R. Cold Storage Vs U.O.I. & ors., 2022 SCC online (All) 550; [2022] 448 ITR 37 (All)

2. Mrs. Maneka Gandhi Vs U.O.I. & anr., (1978) 1 SCC 248

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. This is a writ petition under Article 226 of the Constitution of India, wherein the petitioner is aggrieved by order dated September 14, 2021 passed by Assistant Commissioner, State Tax, Sector-2, Fatehpur under Section 74 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the Act") for the tax period 2018-19 and the appellate order dated October 5, 2023 passed by the Additional Commissioner, Grade-2, (Appeal)-III, State Tax, Prayagraj.

2. The first ground taken by the learned counsel for the petitioner is that the petitioner had cancelled its registration voluntarily on September 18, 2019, whereas the notice under Section 74 of the Act was given to it only by way of uploading the same on the web portal on a subsequent date. He submits that the notice, that has been issued, was issued in the year 2021 or in late December 2020 as the date fixed for hearing was January 12, 2021. He further submits that as the petitioner had already cancelled its registration voluntarily, it was not required to check the web portal. Further ground has also been taken by the learned counsel for the petitioner with regard to the respondent No.3 proceeding on the basis of a Special Investigation Branch report (SIB report) behind the back of the petitioner without providing a copy of the same to the petitioner. He further states that the appellate authority also did not grant a second opportunity of hearing to the petitioner. He submits that the date fixed for hearing was August 22, 2023, on which date the petitioner could not appear. Subsequently, the appellate authority passed an order on October 5, 2023 dismissing the appeal of the petitioner on the ground that none appeared on behalf of the petitioner and reaffirming the order passed by Assistant Commissioner, State Tax/respondent No.3.

3. It is trite law that principles of audi alteram partem are required to be followed by the authority and giving a go by to the same results in violation of the principles of natural justice. One may examine the development of the law in relation to natural justice. The Division Bench of this Court in **S.R. Cold Storage v. Union of India and Others** reported in 2**022 SCC online (All) 550; {[2022] 448 ITR 37 (All)}** held as follows:

"25. The first and foremost principle of natural justice is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. It is an approved rule of fair play.

26. The principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an

order affecting those rights. These rules are intended to prevent such authority from doing injustice. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice.

27. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

28. Natural justice has been variously defined by different judges, for instance a duty to act fairly, the substantial requirements of justice, the natural sense of what is right and wrong, fundamental justice and fair-play in action. Over the years by a process of judicial interpretation two rules have been evolved as representing the principles of natural justice in judicial process, including therein quasi-judicial and administrative process. They constitute the basic elements of a fair hearing, having their roots in the innate sense of man for fair-play and justice which is not the preserve of any particular race or country but is shared in common by all men. The first rule is "nemo judex in causa sua" or "nemo debet esse judex in propria causa sua" that is no man shall be a judge in his own cause. The second rule is "audi alteram partem", that is, "hear the other side". A corollary has been deduced from the above two rules and particularly the audi alteram partem rule, i. e., "he who shall decide anything without the other side having been heard, although he may have said what is right, will not have been what is right" or in other words, as it is now expressed, "justice should not only be done but should manifestly be seen to be done". Natural justice is the essence of fair adjudication, deeply rooted in tradition and conscience, to be ranked as fundamental. The purpose of following the principles of natural justice is the prevention of miscarriage of justice."

4. The Supreme Court, in the celebrated constitutional judgment in **Mrs. Maneka Gandhi v. Union of India and another** reported in **(1978) 1 SCC 248**, while dealing with a challenge laid to an order by which a passport was impounded, expounded upon the significance of the principles of audi alteram partem to the doctrine of natural justice. Justice P.N. Bhagwati while authoring the judgment beautifully expounded the said principles as follows:

"14. .....But at the same time it must be remembered that this is a rule of vital importance in the field of administrative law and it must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and

judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise. That is why Tucker, L.J., emphasised in Russel v. Duke of Norfolk [(1949) 1 All ER 109] that "whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case". What opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal : it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing. The audi alteram partem rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise."

5. Subsequently, the Supreme Court, in **State of Kerala v. K.T. Shaduli Grocery Dealer Etc**. reported in **(1977) 2 SCC 777**, while dealing with the provision under the Kerala General Sales Tax Act, 1963, examined the principle of natural justice as follows:

"2. Now, the law is well settled that tax authorities entrusted with the power to make assessment of tax discharge quasi-judicial functions and they are bound to observe principles of natural justice in reaching their conclusions. It is true, as pointed out by this Court in Dhakeswari Cotton Mills Ltd. v. CIT [AIR 1955 SC 154 : (1955) 1 SCR 941 : (1955) 27 ITR 126] that a taxing officer "is not fettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law", but that does not absolve him from the obligation to comply with the fundamental rules of justice which have come to be known in the jurisprudence of administrative law as principles of natural justice. It is, however, necessary to remember that the rules of natural justice are not a constant: they are not absolute and rigid rules having universal application. It was pointed out by this Court in Suresh Koshy George v. University of Kerala [AIR 1969 SC 198 : (1969) 1 SCR 317 : (1969) 1 SCJ 543] that "the rules of natural justice are not embodied rules" and in the same case this Court approved the following observations from the judgment of Tucker, L.J. in Russel v. Duke of Norfolk [(1949) 1 All ER 109] :

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

3. One of the rules which constitutes a part of the principles of natural justice is the rule of audi alteram partem which requires that no man should be condemned unheard. It is indeed a requirement of the duty to act fairly which lies on all quasi-judicial authorities and this duty has been extended also to the

authorities holding administrative enquiries involving civil consequences or affecting rights of parties because as pointed out by this Court in A.K. Kraipak v. Union of India [(1969) 2 SCC 262 : (1970) 1 SCR 457] "the aim of the rules of natural justice is to secure justice or to put it negatively, to prevent miscarriage of justice" and justice, in a society which has accepted socialism as its article of faith in the Constitution is dispensed not only by judicial or quasi-judicial authorities but also by authorities discharging administrative functions. This rule which requires an opportunity to be heard to be given to a person likely to be affected by a decision is also, like the genus of which it is a species, not an inflexible rule having a fixed connotation. It has a variable content depending on the nature of the inquiry, the framework of the law under which it is held, the constitution of the authority holding the inquiry, the nature and character of the rights affected and the consequences flowing from the decision. It is, therefore, not possible to say that in every case the rule of audi alteram partem requires that a particular specified procedure is to be followed. It may be that in a given case the rule of audi alteram partem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross-examined by the party affected while in some other case it may not. The procedure required to be adopted for giving an opportunity to a person to be heard must necessarily depend on facts and circumstances of each case."

6. Justice P.N. Bhagwati further expounded on the necessity of disclosing to the assessee the information relied upon by the authorities. The relevant extract is provided below:

"12. This Court further fully approved of the four propositions laid down by the Lahore High Court in Seth Gurmukh Singh v. Commissioner of Income Tax [(1944) 12 ITR 393 (Lahore HC)]. This Court was of the opinion that the Taxing Authorities had violated certain fundamental rules of natural justice in that they did not disclose to the assessee the information supplied to it by the departmental representatives. This case was relied upon by this Court in a later decision in Raghubar Mandal Harihar Mandal's case (supra) where it reiterated the decision of this Court in Dhakeswari Cotton Mills Ltd.'s case (supra), and while further endorsing the decision of the Lahore High Court in Seth Gurmukh Singh's case pointed out the rules laid down by the Lahore High Court for proceeding under sub-section (3) of Section 23 of the Income-tax Act and observed as follows:

"The rules laid down in that decision were these: (1) While proceeding under sub-section (3) of section 23 of the Income-tax Act, the Income-tax Officer is not bound to rely on such evidence produced by the assessee as he considers to be false; (2) if he proposes to make an estimate in disregard of the evidence, oral or documentary, led by the assessee, he should in fairness disclose to the assessee the material on which he is going to found that estimate; (3) he is not however debarred from relying on private sources of information, which sources he may not disclose to the assessee at all; and (4) in case he proposes to use against the assessee the result of any private inquiries made by him, he must commu- nicate to the

assessee the substance of the information so proposed to be utilised to such an extent as to put the assessee in possession of full particulars of the case he is expected to meet and should further give him ample opportunity to meet it, if possible."

It will thus be noticed that this Court clearly laid down that while the Income-tax Officer was not debarred from relying on any material against the assessee, justice and fair-play demanded that the sources of information relied upon by the Income-tax Officer must be disclosed to the assessee so that he is in a position to rebut the same and an opportunity should be given to the assessee to meet the effect the aforesaid information."

7. Going forward, the Supreme Court in ***Dharampal Satyapal Limited v. Deputy Commissioner of Central Excise, Gauhati and others*** reported in ***(2015) 8 SCC 519*** outlined the fundamental importance of providing an opportunity for hearing before making any decision, and characterized it as a basic requirement in any legal proceedings. The Supreme Court further propounded that compliance with principles of natural justice is an implied mandatory requirement, and non-observance of these principles can invalidate the exercise of power. Relevant paragraphs have been extracted below:

28. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

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30. Wade [Administrative Law (1977) 395] also emphasises that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

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35. From the aforesaid discussion, it becomes clear that the opportunity to provide hearing before making any decision was considered to be a basic requirement in the court proceeding. Later on, this principle was applied to other quasi-judicial authorities and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. It was, thus, observed in A.K. Kraipak v. Union of India; [(1969) 2 SCC 262] that if the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see how these rules should not be made available to administrative inquiries. In

Maneka Gandhi v. Union of India;[(1978) 1 SCC 248] also the application of principle of natural justice was extended to the administrative action of the State and its authorities. It is, thus, clear that before taking an action, service of notice and giving of hearing to the noticee is required. In Maharashtra State Financial Corporation v. Suvarna Board Mills;[(1994) 5 SCC 566] , this aspect was explained in the following manner :

"3. It has been contended before us by the learned counsel for the appellant that principles of natural justice were satisfied before taking action under Section 29, assuming that it was necessary to do so. Let it be seen whether it was so. It is well settled that natural justice cannot be placed in a straitjacket; its rules are not embodied and they do vary from case to case and from one fact-situation to another. All that has to be seen is that no adverse civil consequences are allowed to ensue before one is put on notice that the consequence would follow if he would not take care of the lapse, because of which the action as made known is contemplated. No particular form of notice is the demand of law. All will depend on facts and circumstances of the case."

8. One may further refer to the recent judgment of the Supreme Court in **Madhyamam Broadcasting Limited v. Union of India and others** reported in **ILR 2023 (2) Kerala 545; (2023 SCC OnLine 366)** wherein the Supreme court highlighted that the principles of natural justice of which audi alteram partem is a part, guarantee a reasonable procedure which is a requirement entrenched in Articles 14, 19 and 21 of the Constitution of India. Chief Justice Dr. D.Y. Chandrachud while authoring the judgment has succinctly examined the principles of natural justice and after examining the Supreme Court's ratio in umpteen cases has penned the relevant paragraph which is extracted below:

"47. The judgment of this Court in Maneka Gandhi (supra) spearheaded two doctrinal shifts on procedural fairness because of the constitutionalising of natural justice. Firstly, procedural fairness was no longer viewed merely as a means to secure a just outcome but a requirement that holds an inherent value in itself. In view of this shift, the Courts are now precluded from solely assessing procedural infringements based on whether the procedure would have prejudiced the outcome of the case [See S.L. Kapoor v. Jagmohan; (1980) 4 SCC 379 "The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary"; also see Swadeshi Cotton Mills v. Union of India; A.I.R. 1981 S.C. 818]. Instead, the courts would have to decide if the procedure that was followed infringed upon the right to a fair and reasonable procedure, independent of the outcome. In compliance with this line of thought, the courts have read the principles of natural justice into an enactment to save it from being declared unconstitutional on procedural grounds [See Olga Tellis v. Bombay Municipal Corporation: (1985) 3 SCC 545; C.B. Gautam v. Union of India:(1993) 1 SCC 78; Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I: (2008) 14 SCC 151 and Kesar Enterprises v. State of Uttar Pradesh: (2011) 13 SCC 733]. Secondly, natural justice principles breathe reasonableness into the procedure. Responding to the argument that the principles of natural justice are not static

but are capable of being moulded to the circumstances, it was held that the core of natural justice guarantees a reasonable procedure which is a constitutional requirement entrenched in Articles 14, 19 and 21. The facet of audi alterum partem encompasses the components of notice, contents of the notice, reports of inquiry, and materials that are available for perusal. While situational modifications are permissible, the rules of natural justice cannot be modified to suit the needs of the situation to such an extent that the core of the principle is abrogated because it is the core that infuses procedural reasonableness. The burden is on the applicant to prove that the procedure that was followed (or not followed) by the adjudicating authority, in effect, infringes upon the core of the right to a fair and reasonable hearing."

9. Chief Justice Dr. D.Y. Chandrachud has further elaborated on the principles of natural justice in **State Bank of India and others v. Rajesh Agarwal and others** reported in **(2023) 6 SCC 1**. The relevant paragraph is delineated below:

"36. We need to bear in mind that the principles of natural justice are not mere legal formalities. They constitute substantive obligations that need to be followed by decision-making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial, and administrative authorities. Two fundamental principles of natural justice are entrenched in Indian jurisprudence: (i) nemo judex in causa sua, which means that no person should be a judge in their own cause; and (ii) audi alteram partem, which means that a person affected by administrative, judicial or quasi-judicial action must be heard before a decision is taken. The courts generally favor interpretation of a statutory provision consistent with the principles of natural justice because it is presumed that the statutory authorities do not intend to contravene fundamental rights. Application of the said principles depends on the facts and circumstances of the case, express language and basic scheme of the statute under which the administrative power is exercised, the nature and purpose for which the power is conferred, and the final effect of the exercise of that power."

10. The common thread that runs across these judgments is that although the principle of audi alteram partem can evolve itself given the facts and circumstances of each case, its significance and applicability is universal. Audi alteram partem, which is a part of the doctrine of natural justice, finds its roots primarily in the constitutionally guaranteed ideal of equality. This principle ensures that no one is condemned, penalized, or deprived of their rights without a fair and reasonable opportunity of hearing. It acts as a safeguard against arbitrary decision-making, upholding the principle of due process while also providing a crucial foundation for just and equitable legal or administrative proceedings.

11. Furthermore, the significance of the principal of audi alteram partem is deeply entrenched in the foundational tenets of natural justice. The phrase, denoting "hear the other side," is emblematic of the sacrosanct right vested in individuals to be accorded a fair and impartial hearing before the adjudication of their rights or interests. This cardinal principle operates as a bulwark against

arbitrariness and the capricious exercise of authority, mandating that decisions be reached only subsequent to a comprehensive and equitable deliberation of all relevant contentions. It is, in essence, the sine qua non of due process, standing as an unwavering sentinel against the potential tyranny of unchecked power. The judicious application of audi alteram partem not only upholds the sanctity of individual freedom but also fortifies the integrity of legal proceedings, fostering a milieu where justice is not merely meted out, but is perceived to be done through a conscientious consideration of diverse and adversarial perspectives.

12. In the present case, when the petitioner had cancelled its registration in the year 2019, a proper notice was required to be issued to it under Section 74 of the Act at its address. However, the authorities simply uploaded the Section 74 show cause notice on the web portal inspite of knowing that the petitioner had already cancelled its registration prior to the date of issuance of the show cause notice. This action clearly prevented the petitioner from appearing in the hearing in the original proceeding under Section 74 of the Act that was accordingly passed ex parte. Moreover, it was incumbent upon the authorities to provide the copies of materials being relied upon by them (SIB report, in this case) to the petitioner/assessee so as to enable him to deal with the same. In my view, any action that proceeds without proper intimation and service of the show cause notice to the petitioner is vitiated and bad in law, and is, accordingly required to be quashed and set aside.

13. In light of the above, the impugned orders dated September 14, 2021 and October 5, 2023 are quashed and set aside with a direction upon respondent No.3 to grant an opportunity of hearing to the petitioner on January 30, 2024 at 11.00 AM, and after hearing the petitioner, pass a reasoned order within two weeks from the date of hearing. It is expected that no unnecessary adjournments shall be granted by the authority concerned. The authority is also directed to provide a copy of the SIB report to the petitioner within a week from date.

14. With the above directions, the writ petition is allowed.

(2024) 1 ILRA 1180
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 3785 of 2023

Alok Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vipul Raj Gautam, Sri Kunal Shah, Sri Suvansit Kumar Jaiswal

Counsel for the Respondents:
C.S.C.

A. Service Law – Engineering Services Rules, 1990 – UP Service of (Irrigation Department) (Group-A) Rules, 1990 – Rule 5(1) – Relaxation Rules, 2006 – Rule 4 – Promotion – Promotional benefit – Entitlement – Not including the probation period in requisite period of 7 years as experience – Permissibility – Held, period of probation is liable to be included within 7 years service period required under the Rule for a candidate to possess requisite period of service for promotion –

Petitioner is entitled to promotional benefits. (Para 34 and 36)

B. Interpretation of statute – Golden Rule – Meaning – Something cannot be added to give extended meaning to the Rules which otherwise Rules do not mean by taking to the plane language and simple words, they are couched in. (Para 25)

Writ petition allowed. (E-1)

List of cases cited:

1. Sanjeev Kumar & ors. Vs St. of U.P. & ors.; 2018 (4) ADJ 366

2. Lal Pratap Singh Vs St. of U.P. & ors.; 2009 (3) AWC 2321

3. U.O.I.& ors. Vs K.B. Rajoria; 2000 (85) FLR 714

4. Hanumantha Reddy Vs U.O.I. & ors.; 1985 SCC Online AP 198

5. NCT of Delhi & ors. Vs Shri Rakesh Beniwal & ors.; 2014 SCC Online Del 3944

6. Civil Appeal No. 6868 of 2021; St. of U.P. Vs Vikas Kumar Singh decided on 22.11.2021

7. U.O.I.& ors. Vs K.B. Rajoria; 2000 (85) FLR 714

8. G. Hanumantha Reddy Vs U.O.I.& ors.; 1985 SCC Online AP, 198

9. NCT of Delhi & ors. Vs Rakesh Beniwal & ors.; (2014) 213 DLT 748

10. Pitta Sitaram Patrudu Vs U.O.I.; (1996) 8 SCC 637

11. Sanjeev Kumar Vs St. of U.P. & ors.; 2018 (4) ADJ 366

12. Commissioner, Karnataka Housing Board Vs C. Muddaiah; (2007) 7SCC 689

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

1. Heard Sri Kunal Shah, learned counsel for the petitioner and learned Additional Chief Standing Counsel.

2. Petitioner, who is currently holding the post of Assistant Engineer (Civil) in the Department of Irrigation and Water Resources Uttar Pradesh, Lucknow is aggrieved by the order dated 12.09.2022, impugned herein this petition for denying his claim for promotion as Executive Engineer on the ground that he did not fulfill the eligibility criteria of having minimum period of service to his credit as Assistant Engineer as required under the Uttar Pradesh Government Servants (Group A), Rules, 1990 (hereinafter referred to as "Rules 1990").

3. According to the petitioners, the feeding cadre for the post of Executive Engineer (Civil) in the department is the cadre of Assistant Engineer (Civil) and as per the rules criterion for promotion is seniority subject to rejection of unfit. Petitioner's case is that he otherwise stands above the 5th respondent, Mr. Utkarsh Bharadwaj in the seniority list of Assistant Engineer (Civil) by virtue of the order passed in his case determining the seniority on 8th of January, 2018 placing him in between Shri Sudhir Kumar Pal at serial No. 415 and Utakarsh Bharadwaj at Serial No. 416 by listing his name at serial no. 415 (A). This order has never been assailed against.

4. In order to appreciate the controversy involved in the present case *vis-a-vis* the claim of the petitioner, which according to him should have been accorded preference over and above impleaded respondents in the writ petition, it is necessary to draw facts in a narrow compass.

5. Petitioner was applicant for the post of Assistant Engineer (Civil) pursuant to the advertisement issued by the Public Service Commission, Uttar Pradesh. Advertisement was issued wayback in the year 2004 but selection process became a long drawn process and result was ultimately declared on 10th of March, 2011. The petitioner successfully made it to the merit list, however, he could not be offered appointment because of not furnishing of No Objection Certificate (NOC) of his earlier employer, namely, the U.P. Public Works Department, where he was working. Petitioner's earlier NOC ran out of his life because of the delayed selection process in the Public Service Commission. Accordingly, he applied for fresh NOC and this fact he intimated to the Public Service Commission. Since, the petitioner had been reverted in the meantime while working in U.P. Public Works Department, some more technicality arose in issuance of the NOC by particular section and ultimately that was issued only on 27th January, 2012, which the petitioner submitted before the Public Service Commission on 30th January, 2012. The petitioner was not issued any appointment order and accordingly when he enquired under the Right to Information Act, 2005, he was replied that his candidature has been cancelled. Consequently petitioner filed writ petition before this Court being C.W.P. No. 51969 of 2012, which was allowed by the Division Bench under its judgment and order dated 12.08.2014. The Commission ultimately forwarded the name of the petitioner for appointment on the post of Assistant Engineer (Civil) on 09.10.2014 and the State Government appointed petitioner by issuing an appointment order on 18.09.2015. However, on account of critical illness of his father, who was diagnosed of cancer and who had to undergo surgery at TATA Memorial Hospital, Mumbai, petitioner could not submit his joining and requested the State Government to extend the period and government extended vide notification dated 05.01.2016. Petitioner ultimately joined on the post of Assistant Engineer (Civil) on 04.02.2016.

6. In the background of above facts there arose question of seniority of the petitioner, which according to him was to be determined as per the U.P. Services of Engineer, Irrigation Department (Group B) Service Rules 2007 (Rule 21 of Rules 2007) read with Rule 5 of UP Government Service Seniority Rules 1991. Petitioner's seniority was to be determined as per the select/ merit list prepared by the Public Service Commission. Accordingly, petitioner pleaded for his placement in the seniority at appropriate stage in the light of the relevant service rules as well as various authorities, which was relied upon by him. A tentative seniority list was prepared and circulated by the State Government on 27.12.2016 placing the petitioner at Serial No. 415 (A) just above the 5th respondent. The objections were invited to the tentative seniority list so published but no objection was filed and the State Government finalized it under its order dated 8th January, 2018 placing the petitioner at Serial No. 415 (A) just above the 5th respondent.

7. In the meanwhile, Departmental Promotion Committee was convened on 29.12.2017 for considering promotion of Assistant Engineer (Civil) to the post of Executive Engineer (Civil). While, the criterion for promotion was seniority subject to rejection of unfit by taking aid to Uttar Pradesh in Government Servants qualifying service promotion of Rules 2006

which came to be further amended on 24th of April, 2013. As per the amended relaxation Rules, in the eligibility criterion of seven years of experience 50 percent relaxation would be granted by the Government through its Administrative Department in consultation with the personnel Department excluding the period of probation as may be laid down for the said post. However, a proviso was also added to the Rule 4, which by Clause 8 (1) provided for discretion with the administrative department for providing further relaxation beyond 50 percent in the minimum length of service prescribed for lower post if it finds any justification for the same. Accordingly, all those who were being considered for promotion in the year 2017, including respondent Nos. 5 to 15 were granted relaxation as they did not complete requisite service period of 7 years for promotion from the post of Assistant Engineer (Civil) to Executive Engineer (Civil). Since, the petitioners claim was pending consideration for seniority, he could not be given any benefit by the Departmental Promotion Committee. Soon after his seniority was determined placing him above the 5th respondent, who was promoted on 29th December, 2017 placing him at Serial No. 4 out of total list of eighty eight number of promoted Assistant Engineers, petitioner raised his grievance before the Department. The basic plea taken was that he having been placed in the seniority list above the 5th respondent, he would be taken to have been there in the cadre ever since, the 5th respondent was there and so he would be taken to have a total length of service from that date only, and thus was eligible for relaxation like 5th respondent.

8. The other plea taken was that the petitioner was made to join on account of not for his fault but for the fault of Government and the Public Services Commission and that he had to undergo a litigation before Court of Law which ultimately resulted in granting his writ petition and the respondents made him to join only on 04.02.2016. He submits that his claim immediately after his placement in seniority list under State Government order dated 8th January, 2019, he completed his probation period in service by 3rd February, 2018, and therefore, giving advantage of the proviso to Rule 4 in the special facts and circumstances of case, he should have been given promotion. However, the State-Government has rejected the claim of the petitioner under the order impugned on the ground that since at the time of consideration of promotion of junior to the petitioner, petitioner was not meeting the eligibility criterion, he could not be offered promotion from the date his junior, the 5th respondent and other juniors who were given promotion on 29th December, 2017. The authorities took the view that even if 50 percent of the relaxation was accorded to the petitioner insofar as the total requisite period of working of 7 years as Assistant Engineer as required under the rules, it would have come to only 3 years and 6 months and since the petitioner had been on probation for 2 years, he could not be taken to have completed his probation period which was of 2 years, as a candidate aspiring for promotion is required to have requisite experience of 7 years on the first day of July of the recruitment year. So if the recruitment year is taken to be 2017-18 as on Ist July, 2017, 50 percent relaxation would be as on that date provided the probation period is excluded. Petitioner having completed probation period only in February, 2018, it was out of question to consider his candidature for promotion in

the year 2017-18. In a nutshell, the reason assigned is that even if relaxation is accorded as per the Rule 4, i.e. 3 years and 6 months on Ist July, 2017, petitioners probation period being still on, he would not have fulfilled the criterion.

9. Sri Kunal Shah, learned Advocate appearing for the petitioner has raised two fold arguments for assailing the order impugned in this writ petition: **Firstly;** once the petitioner was placed in the seniority list, he would be taken to be there in service as Assistant Engineer with all consequential benefits and the requisite period of 7 years would count from the date his junior was placed in the seniority. Service period is to be reckoned with his junior placed in the seniority list below him, namely, the 5th respondent and taking that so, as on Ist July, 2017, petitioner would have already 3 and half years to his credit in service. Shri Shah submits that relevant Rule 1990 having been subject matter of interpretation by a Division Bench at Lucknow Bench of this Court in the case of **Sanjeev Kumar and others Vs. State of U.P. and others 2018 (4) ADJ 366,** wherein it was held that the period should be taken into consideration notionally as required towards 7 years of service without any experience. Shri Kunal Shah has also relied upon a decision of a coordinate Bench of this Court in the case of **Lal Pratap Singh Vs. State of U.P. and others 2009 (3) AWC 2321** wherein the Court held that qualifying service would not mean actual physical service. The Court had relied upon the Supreme Court judgment in the case of **Union of India and others Vs. K.B. Rajoria 2000 (85) FLR 714.** Shri Shah has also relied upon Division Bench judgment of of Andhra Pradesh High Court Hanumantha Reddy v. U.O.I. and Others High Court in 1985 SCC Online AP 198 where the difference had been made between actual service and continuous service and where the rules provide for continuous service then the notional service could be taken into account for the purposes of requisite period of service. Shri Shah has also relied upon a Division Bench judgment of the Delhi High Court in Government of **NCT of Delhi and Others v. Shri Rakesh Beniwal and Others, 2014 SCC Online Del 3944** wherein, the Court permitted 7 years service to be counted for the purposes of qualifying period, if the candidates were restrained by any act of the State Government from giving them joining; **Secondly,** argument of Mr. Kunal Shah, learned counsel for the petitioner is that the petitioner ought to have been granted benefit of the proviso to Rule 4 in the special facts and circumstances of the case as the petitioner was made to join subsequently after litigating the matter and then he had to fight for placement in the seniority list. Shri Kunal Shah has relied upon judgment of the Supreme Court in the case of **State of U.P. v. Vikas Kumar, Civil Appeal No. 6868 of 2021, Singh decided on 22nd November, 2021** where Relaxation Rules 2006 were taken into consideration.

10. Additional Chief Standing Counsel has sought to defnd the order for the reasoned assigned therein and submitted that any relaxation would be counted only if an employee has already completed the probation period as an employee still under probation cannot be posted and petitioner being on probation in the relevant year 2016-17, his candidature was rightly not considered.

11. Having heard learned counsel for the respective parties and having perused

the records and looking to the bare undisputed facts relating to appointment, joining and seniority accorded to the petitioner by the respondents themselves, it is absolutely clear that petitioner's notional seniority and as such service has been counted from the date one Mr. Utkarsh Bhardwaj, next junior to the petitioner has been given appointment and jointing. The order passed by the competent authority in the matter, namely, Principal Secretary, Irrigation Department and Water Resources, Government of U.P. dated 08th January, 2018 has remained unchallenged, and therefore, remained undisputed. The then Principal Secretary, Mr. Suresh Chandra vide paragraph 5 of the order in a quite unequivocal terms placed the petitioner above Mr. Utkarsh Bhardwaj and below Mr. Sudhir Kumar Pal assigning serial no. 415-A. The relevant paragraph 5 is reproduced hereunder:

"अतः उपर्युक्त के दृष्टिगत एतद्द्वारा श्री आलोक कुमार सिंह, सहायक अभियन्ता की ज्येष्ठता कार्यालय-ज्ञाप सं०- 599/सत्ताईस-1-2014-91/10 टीसी, दिनांक 04 मार्च, 2014 द्वारा प्रख्यापित अन्तिम ज्येष्ठता सूची में क्रमांक-415 पर प्रतिस्थापित श्री सुधीर कुमार पाल एवं क्रमांक-416 पर प्रतिस्थापित श्री उत्कर्ष भारद्वाज के मध्य क्रमांक-415(ए) पर अन्तिम रूप से प्रख्यापित की जाती है।"

12. The State respondents proceeded to consider promotion of petitioner's batch, Assistant Engineer to the post of Executive Engineer in the recruitment year 2017-2018.

13. The Engineering Services Rules, 1990 of the Irrigation department provide for two years period as probation and the rule 5(1) after fifth amendment to the Rules of 1990 provide that post of Executive Engineer, Civil or Mechanical be filled up by promotion from amongst substantively appointed Assistant Engineers, who have completed 7 years of service on the first day of the year of recruitment. Rule 5(1) of the U.P. Service of (Irrigation Department) (Group-A) Rules, 1990 are reproduced hereunder:

" Executive Engineer, Civil or Mechanical- By promotion from amongst substantively appointed Assistant Engineers in the Civil or Mechanical Branch, as the case may be, who have completed seven years service on the first day of the year recruitment. "

14. From a bare reading of the aforesaid Rules , it is very much clear that a candidate who seeks promotion from the post of Assistant Engineer to Executive Engineer, Civil, is required to possess "7 years service" in substantive capacity, which obviously would be including two years period of probation.

15. Yet another provision relevant here to be examined is of U.P. Government Servants Relaxation in qualifying Service for promotion (1st amendment) Rules, 2013, which permit the Government/ authority to provide relaxation in service period of 7 years. This amendment is relating to in U.P. Government Servant Relaxation in qualifying service for promotion Rules, 2006.

16. By virtue of amendment brought in the year 2013 the existing Rule 4 has been substituted by new Rule 4 and new Rule 4 runs as under:

"Column-2-

(4). In case of post is filled by promotion and for such promotion a certain

minimum length of service is prescribed on the lower post or posts, as the case may be, and the required number of eligible persons are not available in the field of eligibility, such prescribed minimum length of service may be suitably relaxed upto fifty percent by the Government in the Administrative Department in consultation with the Personnel Department of the Government, excluding the period of probation as laid down for the said lower post or posts, as the case may be : Provided that

(I) if in special circumstances, the Administrative Department finds out the justification of granting more than fifty percent relaxation in the minimum length of service prescribed on the lower post or posts as the case may be, for promotion, then in such situation a proper proposal shall be submitted by the Administrative Department through the Personnel Department before the Committee constitute as followed:

(I) Chief Secretary….. Chairman

(ii) Principal Secretary/Secretary

Personnel Department…… Member

(iii) Principal Secretary/Secretary to the Government in the concerned Administrative Department.

(II) and, the recommendation made by the Committee after due consideration, shall be communicated to the concerned Administrative Department through the Personnel Department and, thereafter, the minimum length of service prescribed on the lower post or posts, as the case may be, for promotion may be relaxed in accordance with the aforesaid recommendation by the concerned Administrative Department:

Provided further that provisions regarding relaxation in qualifying service for promotion incorporated by an amendment in the relevant service rules on or after May 01,2012 shall, from the date of commencement of such amendment, be deemed to have been omitted but, notwithstanding such omission, the promotions made in accordance with such amended service rules on or after May 01,2012 and prior to the date of commencement of the Uttar Pradesh Government Servants Relaxation in Qualifying Service for Promotion (First Amendment) Rules, 2013 shall remain unaffected."

17. Upon reading of the aforesaid Rules, it is very much clear that relaxation is to be granted in the first instance of 50 percent and in the special circumstance, further beyond 50 percent by administrative department.

18. It appears that respondents proceeded to consider the promotion of the Assistant Engineers of the petitioner's batch to the post of Executive Engineer in the relevant Recruitment year 2017-18. Obviously, since these appointees were of the year 2011-12, they had not completed requisite period of 7 years service and so taking aid of Relaxation Rules, 2006 (amended in the year 2013) 50 percent relaxation in 7 years came to be 3 and half years of the Assistant Engineers was accorded to all those who belonged to the batch of the petitioners and thus they came to be promoted having requisite service period of 3 and half years to their credit excluding period of probation undergone by them. Petitioner's candidature be not

accorded any consideration for the reason that petitioner had joined the service only on 4.2.2016 and he was still on probation despite there being post available to accommodate the petitioner.

19. Aggrieved by the decision of the respondents in not considering his candidature for promotion, the petitioner represented matter on 11.4.2022 and then he filed writ petition before this Court being Writ A No. 11320 of 2022, which was disposed of on 23rd August, 2022 with direction to the respondent no. 2 to consider and decide the representation of the petitioner in accordance with law within three weeks from the date of submission of certified copy of the order. The petitioner approached the authority accordingly to consider his claim and decide the same within time period as prescribed by the High Court by writing a letter on 29th August, 2022 and respondent Principal Secretary while deciding the representation of the petitioner rejected his claim for promotion basically on twin grounds: (a) as per Rule, 1990, the candidate must have completed 7 years of service of the first day of the year of recruitment, which the petitioner did not fulfil; and (b). petitioner having joined in the year 2016 did not have requisite period of service even after 50 percent of the relaxation was accorded and besides above, the ground is that petitioner was still on probation.

20. What has been argued before this Court and discussed above on facts, the **first** point that emerges out for consideration of this Court is, as to whether the period of 7 years of service in a substantive capacity would mean actual service alone or would be including notional service period and so also probation period so as to make petitioner entitled or dis-entitled to promotion even after 50 percent of relaxation; and the **second** point that arises for consideration is, as to whether in the given and circumstance of this case, were special enough to make petitioner entitle to further relaxation as per first proviso to Rule 4 of the Relaxation Rules, 2006.

21. As quoted hereinabove, Rule while provide for service period as 7 years service, the words and expression "7 years of service" has not been conditioned by any word like actual or experience, so meaning thereby one has to have total number of 7 years of service notional or actual to his credit on the first day of year of recruitment. Whenever Rules provide for particularly years of service or say number of years of service in other words and do not clarify it by any word or expression actual or experience, in my considered view, such expression would include notional service period as well.

22. A Coordinate bench of this Court in Lal Pratap Singh (supra) quoted a very celebrated judgment on the point, namely, **Union of India and Others v. K.B. Rajoria, 2000 (85) FLR 714,** wherein the Court interpreted the word regular service would not mean actual service. Qualifying the service period by any expression of actual or physical service has been held to be highly misplaced interpretation. Vide paragraph 19, learned Judge has held thus:

"*19. Though in slightly different context, but in Union of India & others Vs. K.B. Rajoria 2000 (85) FLR 714 the question came up for consideration as to what "regular service" in the grade would mean and whether it would cover notional promotion or not and in that context, the*

Apex Court held that by giving notional promotion with retrospective effect to the concerned incumbent in that case it would mean that he was regularly appointed to the post on that date. It also held that the word "regular" does not mean actual and for the said purpose, it referred to the definition of "regular" in Concise Oxford Dictionary, Ninth Edition, which reads as under :

"(1) conforming to a rule or principle, systematic; (2) harmonious, symmetrical; habitual, constant, orderly; (4) conforming to a standard of etiquette or procedure, correct, according to convention; (5) properly constituted or qualified, not defective or amateur, pursuing an occupation as one's main pursuit."

Here also for the purpose of pension, it is only the qualifying service, which is contemplated under Regulation 468 of CSR and not the actual physical service. The interpretation given to office memorandum referred to in para-15 in K.B. Rajoria (supra) by the Apex Court, in my view, would apply with full vigour in the present case also though that was a case of Central Government. Here also reading the words "qualifying service" as "actual physical service" is wholly misplaced having no basis and it also overlooks the effect and concept of "notional promotion" and the benefit ensued therefrom to the concerned employee. Any other view amounts to taking a benefit given by one hand to the employee by another hand, which is neither just nor in accordance with well known principle of service jurisprudence that no person, who is otherwise entitled to a relief, should be denied the same though the denial is not substantiated by any condition of service or statutory provision applicable to such employee. "

23. A bench presided over by Hon'ble the then Chief Justice of Andhra Pradesh High Court had the occasion to interpret the words and expression, "continuous service of 8 years" and that Court in that case of **G. Hanumantha Reddy v. Union of India and Others, 1985 SCC Online AP, 198** held that when the Rules provide for actual or continuous service, it may though be taken as an actual service but in particular facts and circumstances, it can be taken to include notional service also. The Court disapproved the reasoning of learned Single Judge who held that eight years of continuous service would mean only completion of actual service. Learned Single Judge in the said case had held concept of notional period of service absolutely irrelevant for counting period of service. Vide paragraph 6 the learned Single Judge had held thus:

" *The words "completed not less than 8 years of proviso to Regulation 5(2) (SIC)" means completion of actual service. Continuity of service which is contemplated in this Rule sic actual service. A deemed promotion or a notional date of seniority in the State Forest Service from a date earlier than that from which he actually officiated in the post cannot be considered to have officiated in the post during the period from the notional date to the date of commencement of officiating the service in that post. The seniority given by virtue of such a notional date is not relevant for purpose of determining the eligibility for inclusion in the list of I.A.S. officers to be prepare under the second proviso to sub-regulation (2) of Regulation 5(SIC)"*

24. Overriding the above, the Division Bench vide paragraphs 7 and 8 held thus:

7. With due respect we are unable to agree with the reasoning adopted by the learned Judge. It is admitted on all hands that the petitioner was entitled to have his seniority in the post of Deputy Collector reckoned from 16-9-1949. If the orders were passed in time, as the Government ought to have normally done, the petitioner who had been confirmed in the rank of Deputy Collector with effect from 1-11-1956 by G.O.Ms. No. 1125 dated 10-9-1979 would have been in terms of clause (1) of Rule 4, eligible for being considered for inclusion in the panel for the year 1958, on his completing 8 years as on 15-9-1957. The belated recognition of and giving effect to the legitimate rights of the petitioner, that too as a result of the relentless fight he had to carry on, should not operate to his prejudice in the matter of consideration for promotion, as the petitioner was in no way responsible for the delay. Justice has been delayed to him; but let it not be denied to him completely. Rules and Regulations, in our view, are intended to advance, not to frustrate the cause of justice. Merely on the ground that there is no positive direction in the rule to the selection committee to reckon notional seniority, in the absence of any prohibition in the rules against notional seniority being taken into account for the purpose of eligibility for being considered for inclusion in the panel, if the committee refuses to include the period covered by the notional seniority, restricting it to actual service in the post of Deputy Collector or its equivalent post, it would amount to perpetuation of injustice. It is to be also noticed that the rule also does not speak about the 'actual service'. It speaks only about 'continuous service', which could normally mean actual service, but in peculiar circumstances it could include notional service also. We must remember that the conferment of notional seniority on the writ petitioner was not a gratuitous act, but something due in recognition of his legal right. Undisputedly the petitioner would have been considered for inclusion in the 1958 list had this recognition come in time. Because of the delay in according this recognition, to which petitioner made no contribution, the writ petitioner had suffered enough throughout the time he was in service; and it would be only a token of what he deserved if now he is treated to have been eligible for being considered for inclusion in the 1958 list on the basis of his notional seniority, which might result in his entitlement for some arrears of salary and pensionary benefit on notional promotions and refixation of scales of pay. Why should the Court lend its support to deny even that to the writ petitioner?

8. In this connection, it has to be borne in mind that no special provision for reckoning notional seniority for the purpose of eligibility for inclusion in the list for appointment to the I.A.S. cadre could have been made in the rules. The rule-makers could not have possibly anticipated a situation like this, where it took decades to confer on the person concerned his due seniority for no fault of his. Such situation might be few and far between. An interpretation to meet ordinary situation would not meet the extraordinary situation. Ends of justice require that the petitioner who had been all through his career subjected to injustice should not be denied at least the monetary benefits, if any, to which he would be entitled, if his claims are considered properly. Once his seniority is legally re-

fixed, he would naturally be entitled to receive all the benefits flowing from the seniority so fixed from that date. The denial of that right would be adding premium to lethargy and callousness on the part of the authorities who had been instrumental in denying justice to the writ petitioner all these years.

25. No doubt the golden rule of interpretation is that something cannot be added to give extended meaning to the Rules which otherwise Rules do not mean by taking to the plane language and simple words , they are couched in.

26. In the case of Government of **NCT of Delhi and Others v. Rakesh Beniwal and Others, (2014) 213 DLT 748**, the Delhi High Court considered this aspect of the matter by framing two important questions thus:

"*10. The dispute herein requires resolution of two important questions:*

(a) Whether applicants who are deprived of joining service are entitled to be considered for promotion on the date which their immediate juniors were promoted and;

(b) Whether as a consequence, the respondent/applicants are entitled for all consequential benefits and arrears of pay for the period that they were deprived of being in service at the requisite position in the organisational hierarchy. Point No (a)"

27. In order to answer the question, the Court found it to be apt to refer to the authority of Supreme Court in the case of Pitta Sitaram Patrudu v. Union of India (1996) 8 SCC 637 and finally answered the points vide paragraphs 24,25 and 26 thus:

24. Whilst the law dictates that salary is to be paid for work done, a parallel cannot be drawn from the principle of "no work, no pay"to apply to the circumstances of the present dispute. The Tribunal appreciated that the applicants should not suffer at the cost of bureaucratic delays of the GNCTD and its litigative proclivities.The respondents herein were appointed many years after their other batch mates had been appointed. The maxim commodum ex injuriasuanemohaberedebeti.e. no person ought to take advantage from his own wrong applies squarely to the petitioners here. The Supreme Court in Kusheshwar Prasad Singh v. State of Bihar & Ors. (2007) 11 SCC 447 held, "13. it is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, 'a wrong doer ought not to be permitted to make a profit out of his own wrong'."

25. The maxim has been interpreted by the Apex Court in Mrutunjay Pani & Anr. v. Narmada Bala Sasmal & Anr. [1962] 1 SCR 290 wherein it was held that where an obligation is cast on a party and he commits a breach of such obligation, he cannot be permitted to take advantage of such situation. Further in Union of W.P.(C) 7423/2013 Page 16 I<u>ndia & Ors. v. Major General Madan Lal Yadav (Retd.)</u> *[1996] 3 SCR 785 it was observed, "In Broom's Legal Maxims (10th Edn.) p. 191 wherein it was stated;*

...it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in Courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

26. The delay in appointment and the consequential denial of benefits is the direct corollary of the inaction of the petitioners; consequently, they cannot take advantage of their own delays in declaring results and issuing appointment letters to deny promotion to the respondents. The Supreme Court has observed in this regard in the matter of Baij Nath Sharma v. Hon'ble Rajasthan High Court at Jodhpur,1988 SCC (L&S) 1754, "But here the appellant has been deprived of his promotion without any fault of his. High Court said that it might be sad state of affairs that the name of the appellant was not considered for promotion till he retired. High Court may feel anguish but it gives no comfort to the appellant. At least for future such an unfortunate thing should not happen to any other officer similarly situated. This malaise which abysmally afflicts any service when there is recruitment from different sources when there is recruitment from different sources crops up in the one form or the other with great disadvantage of one or the other. But then service is not constituted merely for the benefit of the officers in the service but with a certain purpose in view and in the present case for dispensing justice to the public at large."

[emphasis added]"

28. The division bench upheld the order of the Tribunal that had allowed the OA holding appointees who were made to join later, to be entitled to be offered promotion at par with juniors.

29. Here, I am reminded also of a recent judgment of Lucknow Bench of this Court in the case of **Sanjeev Kumar v. State of U.P. and Others, 2018 (4) ADJ 366,** wherein the Court was dealing with same rules but in respect of post of Executive Engineer, 'Mechanical'. The Court cited the Rule vide paragraph 21 and framed core question for consideration vide paragraph 23 thus:

"*23. Therefore, the core question for consideration in the present writ petition is, whether the petitioners were entitled to be considered for relaxation for qualifying service for promotion under Relaxation Rules 2006 or not. Relevant Rule 4 was amended by U.P. Government Servants Relaxation in qualifying Service for Promotion (First Amendment) Rules, 2013, which is reproduced as under:*

"4. In case a post is filled by promotion and for such promotion a certain minimum length of service is prescribed on the lower post or posts, as the case may be, and the required number of eligible persons are not available in the field of eligibility, such prescribed minimum length of service may be suitably relaxed upto fifty percent by the Government in the Administrative Department in consultation with the Personnel Department of the Government, excluding the period of probation as laid down for the said lower post or posts, as the case may be:

Provided that:-

(I) if in special circumstances, the Administrative Department finds out the justification of granting more than fifty

percent relaxation in the minimum length of service prescribed on the lower post or posts as the case may be, for promotion, then in such situation a proper proposal shall be submitted by the Administrative Department through the Personnel Department before the Committee constituted as follows:

(i) Chief Secretary....Chairman

(ii) Principal Secretary/Secretary to the Government in the concerned Administrative Department ..... Member

(II) and, the recommendation made by the Committee after due consideration, shall be communicated to the concerned Administrative Department through the personnel Department and, thereafter, the minimum length of service prescribed on the lower post or posts, as the case may be, for promotion may be relaxed in accordance with the aforesaid recommendation by the concerned Administrative Department:

Provided further that provisions regarding relaxation in qualifying service for promotion incorporated by an amendment in the relevant service rules on or after May 01, 2012 shall from the date of the commencement of the Uttar Pradesh Government Servants Relaxation in Qualifying Service for Promotion (First Amendment) Rules, 2013 shall remain unaffected."

30. The Court held case of that petitioner to be a special circumstance in which vide proviso 1 to Rule 4 special consideration was directed to be accorded in giving further relaxation beyond 50 percent. Vide paragraph 26, 27, 28 and 29, the Court held thus:

"26. As per submissions of learned Standing Counsel for the State, the case of the petitioners has been considered under the said proviso, but the special circumstances have not been found for granting relaxation, rather for promotion of the petitioners, there would be deficiency of Assistant Engineers, therefore, they have not been granted relaxation which in our opinion, is misconceived because a right may accrue to an employee who is senior than the others who are being considered, then they should have been considered and they cannot be denied consideration for the laxity of the department for recruiting the sufficient number of the employees on the feeding cadre post. Accordingly, the case of the petitioners should have been referred to the Committee under the Chairmanship of the Chief Secretary for consideration. The ground taken by the respondent nos. 1, 2 and 3 for disentitling the petitioners for consideration under the proviso to the Rule 4 of the relaxation rules is misconcieved and in our opinion, as indicated above, the special circumstance exists in favour of the petitioners, so their cases should be referred to the Committee of the Chief Secretary for consideration for granting relaxation failing which the petitioners may further suffer in future also in further promotions.

27. There is one more reason for considering the cases of the petitioners as a special case because the Government fixed the seniority of the petitioners at their respective places in view of the select list prepared by the Public Service Commission in accordance with law, even when the petitioners had joined subsequently in accordance with law to avoid any injustice to the petitioners due to issuance of the appointment orders subsequently for no fault of them.

28. The Hon'ble Apex Court, in the case of A. Raghu Vs. State of A. P. and others; reported in 2015 (14) SCC 221, considering a similar controversy in which the persons of a single selection were deputed on different dates for training at different centres held that since there was no fault with the individual concerned in deputing to training belatedly accordingly seniority was to be reckoned on the basis of the select list prepared by the Commission, considering the submission that the candidates having been selected for appointment in furtherance of a common selection process conducted by the Recruitment Board were liable to be treated as a single batch of candidates.

29. However, we are not inclined to interfere in the impugned orders dated 27.06.2017 and 03.07.2017 as the respondent nos. 4 to 19 have been considered for relaxation as per their eligibility and promoted in accordance with rules. But we are of the considered opinion that the petitioners are also entitled to be considered for relaxation in accordance with the proviso to Rule 4 of the Relaxation Rules 2006 and they shall be considered for grant of relaxation for promotion and on being granted relaxation for promotion to the post of Executive Engineer with effect from the date of promotion of respondent nos. 4 to 19. "

31. Looking to the above proposition of law regarding interpretation to the words and expressions, the years of service be 6,7 and 8 years, in my considered view, once the respondents had accorded due seniority to the petitioner at par with his batch of appointees and above promoted candidates includes a junior person, namely, Utkarsh Bhardwaj, impleaded as respondent no. 5 in the writ petition inasmuch as accorded seniority to the petitioner by treating him in employment w.e.f joining of Utkarsh Bhardwaj, petitioner would be taken to have been given benefit of notional seniority in service and if now this period is taken to be notional service period, then in the relevant year of recruitment is 2017-18 petitioner had total number of 5 and half years of service to his credit and 2 years of probation if taken out, he would be left with three and half years of service to his credit as on 1st July, 2017, the first day of the recruitment year. Now the petitioner has 3 and half years service left to his credit, so 50 percent of the relaxation if given to the petitioner as per Rule 4 of the Relaxation 2006, petitioner would become entitled to promotion as he was having 3 years 6 months service to his credit as on 1st July, 2017.

32. Still further looking to the special facts of the case where petitioner's candidature was wrongly rejected in the year 2012, even though he had submitted his NOC on 27th January, 2012 while appointments were being offered to the candidates of his batch in between November, 2011 and January, 2012 and petitioner did further make a representation on 3rd January, 2012, his candidature was wholly illegally rejected on 28.02.2012 and he had no other option but to rush to the Court for justice to question cancellation order dated 28th February, 2012 and so it was rightly quashed.

33. Justice was done, but in 2014 when writ petition was allowed. It is in these circumstances when the consequential order for appointment was issued, he landed up in circumstances that were beyond his control because his father was suffering from ailment of cancer and was admitted in Tata Memorial Hospital.

He had to seek time for joining which was allowed and ultimately, he jointed on 4th February, 2016. The cancellation of his candidature by U.P. Public Service Commission dated 28th February, 2012 was illegal and was quashed on 12.8.2014 by allowing writ petition being Writ A No. 51969 of 2012 and so more than two and half year period got wasted in litigation for which petitioner cannot be penalized. Since he was offered appointment on 18th September, 2015, so more than three years of period beginning from 28th February, 2012 till 18th September, 2015 was beyond his control for being there no fault on his part and so he cannot be penalized for the same. He could not submit his joining in the special facts and circumstances when his father was suffering from Cancer, a totally incurable disease as he was admitted to a hospital in Mumbai.

34. Now looking to the special facts and circumstances as discussed above in my considered view if respondents are not to consider his probation period, they were required to give him further relaxation as per proviso to Rule 4 of the Relaxation Rules, 2006, but here I may hasten to add that period of probation is liable to be included within 7 years service period required under the Rule for a candidate to possess requisite period of service for promotion.

35. It is a case where petitioner was not only denied initial selection and appointment for none of his fault but even subsequently after according due seniority, he has been not offered promotion whereas his juniors have been given promotion. Thus that order rejecting the claim of petitioner for promotion w.e.f date his joing were posted is held unsustainable and so deserves to be quashed.

36. I have already discussed above that reasons assigned in the order rejecting claim of the petitioner impugned herein this petition are totally unjustified, and so petitioner is accordingly held entitled to promotional benefits also.

37. I am here reminded of observations made by the Supreme Court in paragraphs 33 and 34 of its judgment in **Commissioner, Karnataka Housing Boardv. C. Muddaiah (2007) 7SCC 689**, which run as under:

"33. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the Court must consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may, however, be cases where on the facts and in the circumstances, the Court may issue necessary directions in the larger interest of justice keeping in view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee. In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and unjustifiably turned down. He finally approaches a Court of Law. The Court is convinced that gross injustice has been done to him and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The Court, in the circumstances, directs the Authority to extend all benefits which he would have obtained had he not been illegally deprived of them. Is it open to the Authorities in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of such plea would amount to allowing a party to take undue

advantage of his own wrong. It would perpetrate injustice rather than doing justice to the person wronged.

34. We are conscious and mindful that even in absence of statutory provision, normal rule is 'no work no pay'. In appropriate cases, however, a Court of Law may, nay must, take into account all the facts in their entirety and pass an appropriate order in consonance with law. The Court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so. The Court may in the circumstances, direct the Authority to grant him all benefits considering 'as if he had worked'. It, therefore, cannot be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a Court of Law and if such directions are issued by a Court, the Authority can ignore them even if they had been finally confirmed by the Apex Court of the country (as has been done in the present case). The bald contention of the appellant-Board, therefore, has no substance and must be rejected."

38. Accordingly, in view of above, writ petition succeeds and is allowed. The order dated 12.09.2022 is hereby quashed. Writ of mandamus is issued to the concerned competent respondent in the matter to confer the benefit of promotion upon petitioner w.e.f date of his junior Mr. Utkarsh Bhardwaj has been given promotion with all consequential benefits. Appropriate orders shall be passed by the authority within a period of thirty days of presentation of certified copy of this order.

39. Parties are left to bear their own costs.

(2024) 1 ILRA 1195
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-A No. 6119 of 2001

Manoj Kumar ...Petitioner
Versus
Ziladhikari & Ors. ...Respondents

Counsel for the Petitioner:
Sri Niraj Upadhyay, Sri J.S. Baghel

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974 – Compassionate appointment – Nature – Termination order was passed on the ground that appointment is temporary in nature and service is no more required – Validity challenged – Held, merely because the nature of appointment of the petitioner described as 'temporary' in the letter of appointment, the Rules, 1974, being statutory Rules, nowhere provide that the compassionate appointment of an appointee is temporary in nature – High Court disapproved the view taken by the respondents in the impugned order terming the nature of appointment of a compassionate appointee as temporary in nature. (Para 6 and 8)

Writ petition allowed. (E-1)

List of cases cited:

1. Ravi Karan Singh Vs St. of U.P. & ors; 1999 (3) UPLBEC 2263

2. Budhhi Sagar Dubey Vs DOIS; (1993) 1 UPLBEC 197

3. Gulab Yadav Vs St. of U.P. & ors; (1991) 2 UPLBEC 995

4. Dhirendra Pratap Singh Vs DIOS & ors; (1991) 1 UPLBEC 427

5. Special Appeal No.348 of 2002; Sanjai Kumar Vs Deputy Director General (NCC) Directorate, U.P. Lucknow & ors. decided on 16.07.2002

6. Mohinder Singh Gill & anr Vs Chief Election Commissioner, New Delhi & ors; AIR 1978 SC 851

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

1. Heard Sri J.S. Baghel, learned counsel for the petitioner and Sri I.P. Srivastava, learned Additional Chief Standing Counsel for the State-respondents.

2. Petitioner's father namely Munna Lal was working as a permanent Clerk in the office of respondent no.2 and he died in harness on 09.02.1990, whereafter a supernumerary post was created and the petitioner- Manoj Kumar was offered appointment on compassionate grounds on 27.09.1997. The petitioner started working on the post and after a period of three years, the order impugned was passed on 22.01.2000 observing that in view of UP Temporary Government Servants (Termination of Services) Rules, 1975, the services of the petitioner were no more required and the same accordingly, would be treated as terminated from the date of receipt of notice. It is the said order which is under challenge in the present writ petition.

3. Learned counsel for the petitioner submits that aforesaid service rules are not applicable to the petitioner's services, inasmuch as, it is well settled that a person who was appointed on compassionate ground, his appointment is substantive in nature and, therefore, petitioner could not be terminated as a temporary employee.

4. Learned Additional Chief Standing Counsel submits that in the letter of appointment itself, it was mentioned that petitioner's appointment is purely temporary which can be terminated without any prior intimation. He further submits that petitioner- Manoj Kumar has already expired and, therefore, the writ petition has rendered infructuous. Sri Srivastava, by referring to counter affidavit, further submits that petitioner- Manoj Kumar absented himself from duty without any prior information and despite service of show cause notice upon him, he did not respond and, hence, the order impugned was passed.

5. Meeting the aforesaid submissions, learned counsel for the petitioner submits that operation of the impugned order was stayed by this Court on 19.02.2001 and the petitioner continued to work in the department until death which occurred on 23.12.2020. He submits that the writ petition was dismissed for want of prosecution in the year 2018, and has been restored in October, 2023 and because of no knowledge of the order of dismissal, either to the petitioner or to the respondents, the services of the petitioner Manoj Kumar were not disturbed till his death. He further submits that after petitioner's death, his widow, Smt. Manju Lata, one of the substituted heirs/legal representatives of the deceased petitioner, made her claim for compassionate appointment, however, Senior Treasury Officer, Mainpuri, by passing order dated 07.06.2021, annexed to the substitution application, has observed that on account of pendency of present petition, the financial

condition of the claimant (Smt. Manju Lata) cannot be examined.

6. Having heard learned counsel for the respective parties, this Court is of the considered opinion that merely because the nature of appointment of the petitioner Manoj Kumar was described as "temporary" in the letter of appointment, the U.P. Recruitment of Dependants of Government Servant Dying in Harness Rules, 1974 being statutory Rules, nowhere provide that the compassionate appointment of an appointee is temporary in nature.

7. Regarding nature of services of compassionate appointee, a Division Bench of this Court in the case of ***Ravi Karan Singh vs. State of UP & ors; 1999 (3) UPLBEC 2263,*** by referring to earlier decisions in the case of ***Budhhi Sagar Dubey v. DOIS; (1993) 1 UPLBEC 197; Gulab Yadav v. State of UP & ors; (1991) 2 UPLBEC 995*** and ***Dhirendra Pratap Singh v. DIOS & ors; (1991) 1 UPLBEC 427***, has held that the appointment under dying-in-harness rules is of permanent nature. Later on, another Division Bench approved the decision in the case of ***Ravi Karan Singh*** *(supra)* while deciding Special Appeal No.348 of 2002 by judgment dated 16.07.2002 in the case of ***Sanjai Kumar v. Deputy Director General (NCC) Directorate, U.P. Lucknow & ors.***

8. For the aforesaid reasons, the view taken by the respondents in the order impugned terming the nature of appointment of a compassionate appointee as temporary in nature, cannot be approved and is held to be contrary to law.

9. I n so far as stand taken in the counter affidavit regarding some proceedings against the petitioner, the Court is of the view that no such ground has been taken in the order impugned which has been passed only by relying upon Rules which are not applicable. The Apex Court in the case of ***Mohinder Singh Gill & anr v. Chief Election Commissioner, New Delhi & ors; AIR 1978 SC 851***, has clearly laid down that the validity of the order impugned can be judged only on the basis of reasons assigned therein and such reasons cannot be supplemented by affidavits. Even otherwise, if the department proceeded to hold certain proceedings against Manoj Kumar, it would be presumed that the department was treating him as a regularly appointed person and not a temporary appointee.

10. In view of the above, the order impugned dated 22.01.2000 terminating the services of the petitioner- Manoj Kumar cannot be sustained in law and is hereby quashed.

11. The writ petition succeeds and is ***allowed***.

12. The concerned authorities are directed to consider the claim of the petitioner's widow Smt. Manju Lata for compassionate appointment as per the statutory rules and after analysing financial condition of the family within a period of three months from the date a certified copy of this order is produced before them. They shall also consider the claim of the heirs of the deceased petitioner for release of financial benefits arising out of services of the deceased petitioner within the same period of time.

(2024) 1 ILRA 1198
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.11.2023

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ-A No. 7273 of 2023

Prem Kumar Dubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Laxmi Kant Pathak, Jyotindra Prakash Pathak

Counsel for the Respondents:
C.S.C.

Service Law - U.P.Government Servants (Medical Care) Rules, 2011 - Rules 11 & 16 - In present case, rejection of petitioner's reimbursement claim on ground that it is not within time frame as indicated in Rules, 2011 is contrary to judicial precedents, objection of opposite parties rejected - CMO's letter verified and recommended petitioner's medical reimbursement claim as per rules, said letter did not mention any defect in format - Therefore, it does not stand reason that such ground is being taken for first time by opposite parties in counter affidavit which has been filed - Since petitioner submitted original bills and receipts, regarding reimbursement of claims pertaining to expenses incurred on treatment of his deceased wife, duly verified by competent authority, his reimbursement claim cannot be rejected on mere technical ground of format - Thus, two grounds taken by opposite parties to deny petitioner's reimbursement claim are unsupported by rules or precedent - Direction to competent authorities to pay reimbursement amount to petitioner along with interest @ 8% per annum from date of CMO's verification till actual payment. (Para 20 to 24)

Writ petition allowed. (E-13)

List of Cases cited:

1. Chandrika Prasad Yadav Vs St. of Bihar & ors. 2004 (6) SCC 331, (Para 31)

2. Kailash Vs Nanhku & ors. 2005 (4) SCC 480

3. Consumer Education and Research Centre Vs U.O.I. & ors. (1995) 3 SCC 42, (Paras 24, 25)

4. Kirloskar Brothers Ltd. Vs ESI Corporation (1996) 2SCC 682, (Para 9)

5. St. of Punjab Vs Ram Lubhaya Bagga (1994) 4SCC 117

6. Chairman Railway Board Vs Chandrima Das (2000) 2 SCC 465, (Para 32)

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

1. Heard learned counsel for the petitioner and State counsel for opposite parties.

2. Instant petition has been filed seeking a direction to opposite parties for payment of medical reimbursement to petitioner amounting to Rs.3,04,935/- as reimbursement in lieu of expenses incurred by petitioner for medical treatment of his wife, Late Smt. Durgawati Dwivedi.

3. It is submitted that petitioner's wife was employed on the post of Senior Assistant with the Principal, Government Polytechnic, Pratapgarh and was suffering from serious ailment due to which, she required hospitalisation and treatment but passed away on 24.09.2021. It is submitted that after demise of his wife, petitioner submitted medical claim amounting to Rs.3,41,029/- as medical reimbursement on 16.03.2022. The claim for reimbursement and bills annexed thereto were thereafter forwarded by opposite party no.4 on 28.03.2022 to the Chief Medical Officer, Pratapgarh for scrutiny and after scrutiny, the Chief Medical Officer verified the

amount of Rs.3,04,935/- vide letter dated 07.04.2022 but even thereafter, medical reimbursement of the said amount has not been made to petitioner, hence present petition has been filed.

4. In the counter affidavit filed by opposite parties, it has been stated that medical reimbursement to petitioner could not be processed since it was not submitted within a period of thirty days from commencement of treatment as required under Rule 11 of Uttar Pradesh Government Servants (Medical Care) Rules, 2011 (hereinafter referred to as the Rules of 2011) and that they were not on the prescribed format given in appendix (C) and also since it is provided that claim for reimbursement is required to be made within three months from the date treatment ends.

5. Learned State Counsel, therefore, submits that since petitioner's claim not being in consonance with the aforesaid Rules of 2011, medical claims of petitioner could not be processed although no rejection order has been passed.

6. Upon consideration of submissions advanced by learned counsel for the parties and perusal of material available on record, it is evident that petitioner's claim for medical reimbursement has been rejected on the twin grounds:-

(a) It was not within the stipulated time period;

(b) It was not in the prescribed format.

7. With regard to the first ground, it would be necessary to advert to the Rules of 2011. While Rule 11 indicates reimbursement pertaining to emergency treatment of patient, Rule 16 pertains to reimbursement of medical claims. Rule 11 stipulates that information with regard to commencement of treatment is required to be provided to the concerned authority as soon as possible, within a period of thirty days from commencement of treatment. Rule 16 operates in a situation where treatment has already concluded and provides that claim for reimbursement should be made as soon as possible, within a period of three months from the date treatment ends. The Rules 11 & 16 of Uttar Pradesh Government Servants (Medical Care) Rules, 2011 are as follows:

"11. किसी लाभार्थी को राज्य के भीतर या बाहर तात्कालिक / आपात स्तिथि में किसी निजी चिकित्सालय में उपचार प्राप्त करने की अनुमन्यता होगी। उपचार की लागत राज्य के भीतर उपचार कराने की दशा में संजय गाँधी स्नातकोत्तर आयुर्विज्ञान संस्थान और राज्य से बाहर की दशा में अखिल भारतीय आयुर्विज्ञान संस्थान, नई दिल्ली की दरों पर प्रतिपूरणीय होगी। प्रतिबन्ध यह है कि-

(क) उपचारी चिकित्सक द्वारा आपात दशा प्रमाणित की जाए।

(ख) रोगी द्वारा अपने कार्यालयाध्यक्ष को यथाशक्य शीघ्र किन्तु उपचार प्रारंभ होने के दिनांक से 30 दिनों के भीतर सूचित कर दिया जाय।

(ग) आपात स्तिथि में एअर एम्बुलेन्स पर होने वाले व्यय की धनराशि भी प्रतिपूरणीय होगी।"

"16. लाभार्थी द्वारा स्वीकर्ता प्राधिकारी को, यथाशक्य शीघ्र किंतु उपचार की समाप्ति के पश्चात तीन माह से अपश्चात परिशिष्ट "ग" में दिये गये विहिप प्रारूप में प्रतिपूर्ति दावा प्रस्तुत किया जायेगा। बीजक के, साथ सन्दर्भ-

पत्र, उपचार परामर्श पत्रक और उपचारी चिकित्सक द्वारा विधिवत् सत्यापित किये गये वाउचर और परिशिष्ट "ड" में (बहिरंग उपचार) और परिशिष्ट "च" (अंतरंग उपचार) में अनिवार्यता प्रमाण-पत्र मूल रूप में प्रस्तुत किया जायेगा। विशेष परिस्तिथियों में दावे को पुष्ट करने के लिए अन्य मूल दस्तावेज भी संलग्न किये जा सकते हैं। अपूर्ण वावों पर विचार नहीं किया जायेगा।

प्रतिबन्ध यह है कि किसी पेंशन भोगी का प्रतिपूर्ति दावा उस जिले के कार्यालयाध्यक्ष को प्रस्तुत किया जायेगा जहाँ से वह पेंशन आहरित कर रहा है। जहाँ ऐसा कोई कार्यालय न हो वहाँ सम्बन्धित जिले का मजिस्ट्रेट इस प्रयोजनार्थ कार्यालयाध्यक्ष और विभागाध्यक्ष भी होगा।"

8. The aforesaid rules, therefore, operate in different fields altogether with Rule 11 pertaining to reimbursement of claims regarding expenses incurred in emergency treatment and Rule 16 pertaining to situations for reimbursement of treatment which has already concluded.

9. It is admitted between the parties that claim made by petitioner even otherwise was beyond the stipulated time period of three months as prescribed under Rule 16 of the Rules of 2011. In such a situation, it would be necessary to examine as to whether the time period indicated in Rules 11 and 16 of the Rules of 2011 are couched in mandatory terms or are merely directory. A perusal of both the said rules makes it evident that medical claims are required to be made 'as far as possible' within a period for thirty days in terms of Rule 11 and 'as soon as possible within a period of three months' as per Rule 16 of the Rules of 2011.

10. The aforesaid wordings in the Rule 11 and Rule 16 of the Rules of 2011, therefore, cannot be said to be couched in mandatory terms since the words 'as far as possible' and 'as soon possible' by their very connotation and implication cannot be termed to be mandatory in nature.

11. The aspect of when a guideline can be said to be mandatory and directory in nature has already been interpreted by Hon'ble Supreme Court in the cases of-

(i) **Chandrika Prasad Yadav vs. State of Bihar & Others 2004 (6) SCC 331,** the relevant portion of which is quoted here-in-under:-

"31. *The question as to whether a statute is directory or mandatory would not depend upon the phraseology used therein. The principle as regards the nature of the statute must be determined having regard to the purpose and object the statute seeks to achieve."*

(ii) **Kailash vs Nanhku and Others 2005 (4) SCC 480**, the relevant portion of which is quoted here-in-under:-

"All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in

Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774, are pertinent:-

"The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence - processual, as much as substantive."

12. Upon applicability of aforesaid judgments in the present facts and circumstances, it is evident that the language of Rules 11 and Rule 16 of the Rules of 2011 are not couched in negative terms imposing any penal liability for non adherence to the same. In such circumstances, it is held that the time period indicated in Rule 11 and Rule 16 of the Rules of 2011 are mainly directory and not mandatory in nature.

13. The aforesaid aspect has also been considered by a Co-ordinate Bench of this Court in the case of Mahesh Chand Jarari vs. State of U.P. and Others, Writ-A No.10453 of 2019 and in the case of Devendra Dev Pandey vs. State of U.P. and Others, Writ-A No.1419 of 2013 wherein also the aforesaid time period has not been held to be mandatory in nature.

14. The aforesaid aspect would also be required to be seen in terms of the fact that the Rules of 2011 are beneficial in nature in consonance with the concept of a Welfare State and therefore are a means of reimbursing a government employee for expenses incurred during treatment of self or dependents. In the considered opinion of this Court, such a factor would also be directly relatable to Article 21 of the Constitution of India whereby right of dignity has been held to be a fundamental right.

15. In the case of **Consumer Education and Research Centre vs. Union of India and Others (1995) 3 SCC 42**, Hon'ble Supreme Court has held that right to health, medical aid to protect the health and vigour of a worker while in service or post retirement is a fundamental right under Article 21 of the Constitution of India in order to make life of the employee meaningful and purposeful with dignity of a person. Relevant portion of the judgment is as follows:

"24...Therefore, it must be held that the right to health and medical care is a fundamental right under Article 21 read with Articles 39(e), 41 and 43 of the Constitution and make the life of the workman meaningful and purposeful with dignity of person. Right to life includes protection of the c health and strength of the worker and is a minimum requirement to enable a person to live with human dignity. The State, be it Union or State Government or an industry, public or private, is enjoined to take all such actions which will promote health, strength and vigour of the workman during the period of employment and leisure and health even after retirement as basic essentials to live the life with health and happiness. The health and d strength of the worker is an integral facet of right to life...."

"25. Therefore, we hold that right to health, medical aid to protect the health and vigour to a worker while in service or post-retirement is a fundamental right under Article 21, read with Articles 39(e), 41, 43, 48-A and all related articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person."

16. In the case of **Kirloskar Brothers Ltd. vs ESI Corporation (1996) 2SCC 682,** again the medical facilities of a workman or employee has been held to be fundamental human right in order to enable him to enjoy the fruits of his labour. The relevant paragraph is as follows:

"9. The expression 'life' assured in Article 21 does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of living, hygienic conditions in the workplace and leisure facilities and opportunities to eliminate sickness and physical disability of the workmen. Health of the workman enables him to enjoy the fruits of his labour, to keep him physically fit and mentally alert. Medical facilities, therefore, is a fundamental and human right to protect his health. In that case health insurance, while in service or after retirement was held to be a fundamental right and even private industries are enjoined to provide health insurance to the workmen."

17. Similarly, in the case of **State of Punjab vs. Ram Lubhaya Bagga (1994) 4SCC 117**, it has been held as follows:

"...it is for the State to secure health to its citizen as its primary duty."

18. In the case of **Chairman Railway Board vs. Chandrima Das (2000) 2 SCC 465**, the definition of the word 'life' as defined in the universal declaration of human rights, 1948 has been explained vis-a-vis Article 21 of the Constitution of India in the following manner:

"32. The word "LIFE" has also been used prominently in the Universal Declaration of Human Rights, 1948. (See Article 3 quoted above.) The fundamental rights under the Constitution are almost in consonance with the rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in Kubic Darusz v. Union of India 36. That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a "person" who may not be a citizen of the country."

19. A perusal of the aforesaid judgments is, therefore, clearly indicative of the fact that right to medical facilities in case of an employee of the State or an instrumentality thereof or other authorities which come within Article 12 of the Constitution of India is a right which is inherently fundamental and therefore comes within definition of Article 21 of the Constitution of India.

20. In the present facts and circumstances, it is, therefore, quite evident that rejection of petitioner's claim for reimbursement on the ground that it was not within a time frame indicated in the Rules of 2011 is not in consonance with the judgments rendered. Therefore, such contentions by the opposite parties are rejected.

21. So far as the second ground for rejection is concerned, it is also evident from the letter dated 07.04.2022 issued by the Chief Medical Officer, Pratapgarh that claims of petitioner for medical reimbursement were verified and found established and corroborated whereafter recommendation was made by the concerned authority in accordance with rules. The letter dated 07.04.2022 issued by the Chief Medical Officer does not indicate that petitioner's claim for reimbursement was not in the proper format. Therefore, it does not stand a reason that such a ground is being taken for the first time by the opposite parties in counter affidavit which has been filed.

22. Once petitioner has submitted original receipts and bills regarding reimbursement of claims pertaining to expenses incurred on treatment of his deceased wife and the same have been verified by the competent authority, such claim cannot be permitted to be denied mainly on the technical ground that it is not in the prescribed format.

23. Considering the aforesaid discussions, it is evident that the twin grounds taken by the opposite parties to deny petitioner's claim for reimbursement were not in accordance with either rules or the judgments indicated here-in-above.

24. In consideration thereof, a writ in the nature of mandamus is issued commanding the opposite party no.2, i.e The Director, Technical Education, Uttar Pradesh, Vikas Nagar, Kanpur and other competent authorities to ensure payment of reimbursement of amount of Rs.3,04,935/- to petitioner within a period of six weeks from the date of certified copy of this order is produced before the said authority. In view of the fact that petitioner's claims are lying unattended since 07.04.2022 (the date when they were verified by the Chief Medical Officer, Pratapgarh), it is directed that interest at the rate of 8% per annum on the outstanding amount shall also be payable to petitioner with effect from 07.04.2022 till the date of actual payment.

25. Resultantly, the petition succeeded and is **allowed.**

26. Parties to bear their own costs.

(2024) 1 ILRA 1203
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

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

Writ-A No. 7332 of 2023

Smt. Sharda Devi ...Petitioner
Versus
General Manager, S.B.I., Lko & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Prabodh Dubey

Counsel for the Respondents:
Sri Satish Chaturvedi

A. Service Law – Ex gratia – Nature – As a matter of right or as a grace of Bank –

Delay in payment – Interest claimed – Permissibility – Held, ex gratia is an entitlement under a scheme framed by the Government and adopted by the respondent Bank – The dependents of an employee, who dies in harness, have a right to receive a lump sum payment determined in accordance with the scheme, which is just called '*ex gratia*'. The entitlement to receive *ex gratia* by the dependents of an employee of the Bank dying in harness is, therefore, a matter of right; not the outcome of an act of grace by the respondent Bank – Petitioner had a right to receive interest for the delay in the payment of *ex gratia* lump sum. (Para 20 and 24)

Writ petition allowed. (E-1)

List of cases cited:

1. U.O.I.& anr. Vs Manorma Devi; 2022 SCC OnLine Del 674

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

1. The petitioner's husband, the late Indra Mani Yadav was a Class-III employee in the service of the State Bank of India. He was posted at the State Bank of India, Branch Khalilabad, District Sant Kabir Nagar in the year 2007. He met with an accident and died in harness on 31.12.2007. The petitioner, the deceased employee's widow, moved the respondent Bank, seeking payment of death-retirement benefits on account of her husband's services. These benefits were paid to the petitioner by the Bank.

2. The petitioner next moved an application seeking compassionate appointment for her son. The Bank responded to the petitioner's application by their memo dated 01.12.2011 saying that w.e.f. 04.08.2005, the Establishment had discontinued granting compassionate appointment, but in its stead, pay a lump sum money, styled as ex gratia. It was said in the memo dated 01.12.2011 that the Bank were forwarding to the petitioner an application form for the payment of ex gratia, which the petitioner may, within a week of receipt thereof, submit to the Bank, completing all other formalities required.

3. The petitioner says that she submitted the application form to the Khalilabad Branch of the Bank on 13.12.2011, a copy of which is on record as Annexure No.3 to the writ petition. This application is in a printed proforma, filled up with grueling details and information.

4. It is the petitioner's case that after submitting her application form for payment of the *ex gratia*, she submitted several representations to expedite it, but all that she received was assurance extended by different officials of the Bank. The petitioner, being the widow of a deceased Bank employee, had faith in the higher officials of that organization and trusted them for their word. She moved a representation dated 22.09.2012, followed by another dated 23.11.2012, requesting payment of the *ex gratia,* to which she was entitled. These applications were duly received by the respondent Bank. After a substantial period of this chase and false assurances extended, the petitioner was compelled to institute Writ-A No.12428 of 2022 before this Court, seeking a direction to the Bank to release the *ex gratia* payable to her and further to consider her representation dated 27.12.2021. This petition was disposed of by this Court vide an order dated 01.09.2022, directing the Regional Manager, State Bank of India, Gorakhpur to decide the petitioner's representation and also look into her grievance about the non-

payment of ex gratia in terms of the claim. It was also ordered that the *ex gratia,* found due to the petitioner, be paid to her within a period of six weeks from the date a certified copy of the order was produced before the Bank. In compliance with the orders passed by this Court, the respondent Bank paid the petitioner's ex gratia on 01.09.2022, the sum of money paid being Rs.7 lacs. The petitioner expected that the payment made, being one after a long lapse of time, would carry interest, but that was not paid.

5. It is the petitioner's case that the respondent Bank officials, despite knowledge of the fact that her husband had died in harness in the year 2007, did not choose to pay her the ex gratia, to which she was then entitled under the relevant scheme. It is also asserted on behalf of the petitioner that after moving an application for the payment of ex gratia on 19.12.2011, the said sum of money was paid by the Bank on 19.11.2022, to wit, after a lapse of 11 years. It is the petitioner's case that though she is entitled to the payment of ex gratia on account of her husband's demise in harness that payment was withheld for more than a decade, due to lethargy and inaction of the respondents in breach of their duty.

6. The petitioner, after receipt of the ex gratia, moved an application on 06.12.2022, followed by another dated 17,12,2022, requesting payment of the accrued interest. The petitioner asserts that no decision was taken by the Bank with regard to her claim for payment of interest on account of all this delay. She has, therefore, instituted the present writ petition, praying that a mandamus be issued to the respondent Bank to pay due interest on the delayed disbursement of the ex gratia.

7. A counter affidavit has been filed on behalf of the Bank, where receipt of the petitioner's application dated 13.12.2011 for payment of *ex gratia* has been denied by the Branch concerned. The stand of the Bank with regard to receipt of the petitioner's application aforesaid can best be understood by the following averments in Paragraph No.7 of the counter affidavit:

"7. …..... The deponent sought the confirmation about the availability of the application of the petitioner stated to be dated 13.12.2011 however, the branch has informed that no such application was received in the branch. Deponent submits that the branch manager has informed that the branch possess the copy of the writ petition no 12428 of 2022 and the annexures filed therewith by the petitioner. The deponent also sought the information from the regional office and the present regional office has also informed that no such application is traceable in the regional office/not available in the concerned file available in the region."

8. The receipt of other applications was also denied by the Bank, as also assurance given by higher officials, as they are called, by the Bank. It is pleaded on behalf of the Bank that the order of this Court dated 01.09.2022, passed in Writ-A No.12428 of 2022, directs the Bank to release the petitioner's ex gratia, but does not order payment of interest. It is also pleaded by the Bank that the petitioner applied for ex gratia on 10.10.2022 and it was paid to her promptly thereafter on 19.11.2022. It is also the respondent Bank's case that ex gratia is paid after the beneficiary applies for it in prescribed

format, complete in all respects. Here, the application dated 10.10.2022 was received in the Bank after the petitioner had filed Writ-A No.12428 of 2022. The receipt of other applications has been denied. In Paragraph No.15 of their counter affidavit, the Bank say that after considering the petitioner's application dated 19.12.2022 for the payment of interest on the ex gratia, they declined it as there is no provision in the scheme for payment of interest.

9. Heard Mr. Arvind Prabodh Dubey, learned Counsel for the petitioner and Mr. Satish Chaturvedi, learned Counsel for the respondents.

10. The question involved is: If the petitioner is entitled to award of interest on the payment of ex gratia released with delay? The other question involved is: Whether at all there was a delay in the payment of ex gratia? On facts here, it would be more logical to answer the second question first. This involves an issue of fact if the petitioner was responsible for delay in the payment of ex gratia due to her. This stand of the respondent Bank postulates that a dependent of an employee, who dies in harness, is not entitled to receive ex gratia unless he/ she applies for it. To this end, they have pressed in aid their very comprehensive application form, which a dependent, seeking payment of ex gratia, must fill up and submit in order to be entitled to it. A question would, therefore, arise, apart from the fact if the petitioner did actually make her application promptly or belatedly, if the making of an application is the duty of a dependent of the deceased, like a money claim, which cannot otherwise be paid? Or, it is the duty of the Bank, whose employee has died in harness leaving dependents eligible under the ex gratia scheme, to facilitate them in applying promptly.

11. At the hearing of this petition, Mr. Satish Chaturvedi placed before this Court a copy of the State Bank of India Corporate Centre Mumbai Circular No. CDO/P&HR-PM/65/2014-15 dated 27th December, 2014. It would be apposite to set out this circular in all its detail. It reads:

> "All branches and offices of
> State Bank of India
> Madam/ Dear Sir
>
> (I) SBI SCHEME FOR COMPASSIONATE APPOINTMENT IN EXCEPTIONAL CIRCUMSTANCES
> (II) SBI SCHEME FOR PAYMENT OF EX-GRATIA LUMPSUM AMOUNT IN LIEU OF COMPASSIONATE APPOINTMENT
>
> Please refer to our circular letter No. CDO/P&HRD-PM/28/2005-06 dated 04th August 2005 and e-circular Nos. CDO/P&HRD-PM/20/2011-12, CDO/P&HRD-PM/06/2012-13 and CDO/P&HR-PM/75/2013-14 dated 13th May, 2011, 17th April, 2012 and 25th February, 2014 respectively.
>
> 2. Following receipt of recent communication from Ministry of Finance, GOI vide letter F.No. 18/2/2013-IR dated 5th December 2014 that all Public Sector Banks can have both the options i.e. compassionate appointment or payment of lumpsum ex-gratia amount, the Executive Committee of the Central Board of the Bank in its meeting held on 23rd December, 2014 has approved continuation of following two schemes duly modified as under:

A. Scheme for Compassionate Appointment in exceptional circumstances (As per Annexure-l and 'B-1', B-2′).

B. Scheme for payment of ex-gratia lumpsum amount in lieu of Compassionate Appointment with following modifications:

	Existing Ex-gratia Scheme		**Revised Ex-gratia Scheme (effective from 05.08.2014)**	
Cadre	Maximum Amount of Ex-gratia	Minimum 50% Amount of Ex-gratia payable on account of not fulfilling penury norms of monthly income of family less than 60% of last drawn salary of deceased employee net of taxes	Maximum Amount of Ex-gratia	Minimum 50% Amount of Ex-gratia payable on account of not fulfilling penury norms of monthly income of family less than 75% of last drawn salary of deceased employee net of taxes
Supervising	Rs.10.00 lac	Rs.5.50 lac	Rs.14.00 lac	Rs.7.00 lac
Clerical	Rs.9.00 lac	Rs.4.00 lac	Rs.12.00 lac	Rs.6.00 lac
Subordinate	Rs.8.00 lac	Rs.4.00 lac	Rs.10.00 lac	Rs.5.00 lac

C. The dependants of deceased employees falling under Scheme (A) i.e. where death is treated as in "Exceptional Circumstances" will have the option to chose either compassionate appointment or ex-gratia lump sum amount as per the eligibility under the scheme.

However, in all other cases of death as also in case of premature retirement due to incapacitation before reaching the age of 55 years, only ex-gratia lumpsum amount will be paid as per the eligibility and no compassionate anointment will be considered.

3. All other instructions relating to the scheme for Payment of Ex-gratia lumpsum amount shall remain unchanged.

4. Both the modified schemes will be effective from 05.08.2014 and all cases of death/premature retirement on medical ground occurred before 05.08.2014 will be dealt with as per the respective old schemes.

5. Please bring the contents of the circular to the knowledge of all concerned.

Yours faithfully

(Ashwini Mehra)
Deputy Managing Director & Corporate Development Officer"

12. A reading of the corporate office circular dated 27th December, 2014 would show that earlier the State Bank of India had a scheme for ex gratia payment in the event of death in harness, but no provision for offering compassionate appointment. However, acting in terms of a communication from the Ministry of Finance, Government of India carried in the letter bearing No. F.No. 18/2/2013-R dated 5th December, 2014, the Central Board of the State Bank of India in their meeting held on 23rd December, 2014, approved

the continuation of the *ex gratia* scheme, already in vogue, and accepted the scheme for compassionate appointment modified in the terms indicated in the corporate office circular dated 27th December, 2014. A reading of the circular dated 27th December, 2014 would show that whereas compassionate appointment is available in the two exceptional circumstances recorded in the scheme for compassionate appointment, the existing ex gratia scheme revised w.e.f. 05.08.2014, would be available in all other cases of death or premature retirement due to incapacitation before reaching the age of 55 years. Therefore, in cases of death, the payment of ex gratia lump sum is a right of the dependents, who are eligible under the scheme and not a discretion available with the respondent Bank, subject to fulfillment of conditions as in case of compassionate appointment.

13. This Court is mindful of the fact that the petitioner's husband died prior to revision of the *ex gratia* scheme w.e.f. 05.08.2014, but there was an existing ex gratia scheme, that was always in vogue. It was, therefore, the duty of the respondent Bank to have ensured that the petitioner, upon the demise of her husband, was facilitated in submitting her application for the award of ex gratia lump sum. The respondents cannot be heard to say that because the petitioner did not proactively assert her claim when they sent her the *ex gratia* payment form, her entitlement to receive it would commence when she actually made the application. In fact, the petitioner's entitlement to receive the ex gratia lump sum is not at all dependent upon the petitioner, or for that matter, any other dependent of the deceased employee, filling up the prescribed form; the right accrues upon the death in harness of an employee, whose dependent is entitled under the scheme (revised or pre-revised) in force in the Bank establishment. The prescribed form, on which the dependent has to make an application, is a means and mode to realize that right, but never a condition, on which the existence or the commencement of the right depends.

14. To understand it the way Mr. Chaturvedi wants us to do, would cause the profoundly welfare purpose of the scheme to be lost to a mercantile approach. This Court, therefore, holds that the petitioner's entitlement to receive the *ex gratia* lump sum accrued on the day that her husband died in harness; not on the day when she made the application.

15. This takes us to the other limb of the question, which is essentially one of fact. And, that is if the petitioner indeed made the requisite application on 13.12.2011, as she asserts, or she made it on 10.10.2022, as the respondent Bank would have us believe. A copy of the application that the petitioner says, she made on 13.12.2011, is annexed as Annexure No.3 to the writ petition, a fact already mentioned. It has also been noticed by this Court in an earlier part of the judgment that it runs into 13 pages. A perusal of the application shows also the fact that it carries such intricate details about various matters that it has made us call those details to be ‘gruelling’; excruciating. But, it is a fact that a photostat copy of the application, that is annexed, carries the minutest of detail in the application form, all filled up punctiliously by the petitioner with nothing left incomplete. It defies sound and robust logic why a person, who is entitled to some benefit upon submission of an application form to the respondent would fill up every

detail of it and then desist from submitting it.

16. There is indeed no earthly reason not to submit the application form, that is complete in all respects, and if submitted, would lead to award of handsome monetary benefits to the petitioner. The clinching fact that shows that the application form dated 13.12.2011 was indeed submitted, is the last part of the proforma, which mentions in Column E, recommendation for consideration/ rejection. Here, the rejection has been scored out and the application with a recommendation for consideration has been signed by the Branch Manager/ HOD. Across the length and breadth of the counter affidavit while denying that the respondent Bank never received the application form dated 13.12.2011, they have not said a word about the signatures of the Branch Manager on the application form, recommending it, that figure at Page No.36 of the paper-book, part of the document annexed as Annexure No.3 to the writ petition. The inference is obvious and that is that the application form, a xerox copy whereof, complete in all respects, the petitioner somehow managed to procure and keep with herself, was submitted to the Bank on 13.12.2011 and recommended by the Branch Manager. It is for this reason and the other circumstances that we refuse to believe the respondent Bank's stand that the petitioner did not submit her application form for award of the ex gratia lump sum on 13.12.2011, but did that as late as on 10.10.2022.

17. This brings us to the first of the two questions mooted; and, that is, if the petitioner is entitled to award of interest on the payment of *ex gratia* released with delay.

18. It is urged on behalf of the learned Counsel for the petitioner that the payment of *ex gratia* lump sum being withheld by the respondent Bank for a long period of time, or for whatever period of time, the petitioner is entitled to interest on the belated payment. He submits that interest is awarded to the party for the deprivation of the use of money, to which the party claiming would otherwise be entitled, if paid within time by the party obliged.

19. On the other hand, learned Counsel for the respondent Bank submits that the ex gratia lump sum is governed by a scheme, which is in the nature of a concession. All that is payable under the scheme is the sum of money to be calculated by the terms thereof. It is Mr. Chaturvedi's submission further that to receive ex gratia lump sum is not a right of the petitioner, like pension or gratuity, but a mere concession, the delay in disbursement whereof, cannot be capitalized upon by the beneficiary to raise a claim for interest.

20. The only issue to be examined here is, if the petitioner's entitlement to receive the *ex gratia* lump sum is one that she is entitled as a matter of right or it is some kind of an ad hoc help, that is extended by the State purely as an act of grace. The ex gratia lump sum paid here is not the kind of *ex gratia* payment, that one finds the State extending by way of grace or a humane gesture to the victims of a vis major or a railway accident. The unfortunate scores, who loose their lives, say, in a train accident, or suffer injury, cannot demand it by the hands of their dependents or themselves, in case of injury. Nevertheless, the State is often around extending a helping hand with some monetary recompense to the injured and the dependents of those killed in a railway accidnt or natural calamity. These are acts of pure grace by the State, where the

payment made to victims is *ex gratia* in the true sense of the term. There is no right to it nor a law to provide for it. The *ex gratia* lump sum involved here is completely different from how the term is generally understood. This is an entitlement under a scheme framed by the Government and adopted by the respondent Bank, or one already framed and enforced by the respondent Bank in their establishment, where the dependents of an employee, who dies in harness, have a right to receive a lump sum payment determined in accordance with the scheme, which is just called *'ex gratia'*. The entitlement to receive ex gratia by the dependents of an employee of the Bank dying in harness is, therefore, a matter of right; not the outcome of an act of grace by the respondent Bank.

21. Reference in this connection may be made to a Bench decision of the Delhi High Court in **Union of India and another v. Manorma Devi, 2022 SCC OnLine Del 674.** The question involved in **Manorma Devi** *(supra) i*s set out in Paragraph No.2 of the report, which reads:

"2. The short issue involved in the writ petition is : whether the respondent is entitled to the interest on "ex gratia" monetary compensation which was, admittedly, payable to her, because of her husband dying in harness?"

22. As the facts in **Manorma Devi** would show, the writ petition before the Delhi High Court arose out of a judgment of the Central Administrative Tribunal, which was twice moved by the original applicant, Manorma Devi, the widow of a gangman with the Northern Railway, who died in harness on 26.02.1998. Manorma Devi became aware of the scheme entitling dependents of a government servant dying in harness to receive *ex gratia* payment, much later in the day and she approached the Railways with her claim as late as on 02.08.2013.

23. Upon her claim not being attended by the Railways, Manorma Devi approached the Central Administrative Tribunal in the year 2013, that was disposed of with a direction to the respondent Railways to answer the legal notice dated 02.08.2013 served upon the Divisional Railway Manager within a specified period of time. It was also directed that the respondent Railway would deal with all points raised in the legal notice. Be that as it may, the result, after moving the Tribunal in their contempt jurisdiction, was that Manorma Devi was paid an *ex gratia* of Rs.5 lacs by the Railways, but denied her claim for interest that she had sought on account of the delay in satisfying her claim. Manorma Devi again approached the Central Administrative Tribunal in the year 2017, on occasion raising a case regarding non-payment of interest. The Tribunal allowed the Original Application. This brought the Union of India and the Railways to the High Court, where they invoked the writ jurisdiction against the order of the Central Administrative Tribunal granting interest on the delayed payment of ex gratia to Manorma Devi. It was in the context of these facts that it was observed by their Lordships of the Division Bench, after noticing the submissions advanced on behalf of the Railways:

"15. Mr. Singh, who appears on behalf of the petitioners, says that the impugned order is flawed for the following reasons:

(i) First, there is no provision for payment of interest on the ex gratia compensation paid to the respondent.

(ii) Second, the respondent has contributed to the delay i.e., she did not make a demand for payment of the compensation till 02.08.2013.

16. We have heard Mr. Singh and perused the record.

17. According to us, both the submissions of Mr. Singh are unsustainable.

18. The fact that there is no provision for payment of interest cannot be the reason for denying interest. We would have appreciated this submission, if there was a specific provision in the circular relied upon by the petitioners, to the effect, that no interest would be paid on the amount, which was to be paid as compensation qua employees, who died in harness. Interest is paid to a person when she/he is, deprived of use of money. It offsets the impact of inflation which diminishes the value of money. In such situations, unless there is a bar, interest should be paid in the ordinary course. The following observations of the Supreme Court in Irrigation Deptt., Govt. of Orissa v. G.C. Roy, (1992) 1 SCC 508, articulated this rationale, while examining the power of the arbitrator to award pendent lite interest:

"43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so on what principle. We must reiterate that we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words, we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following principles emerge:

(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 basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34, Civil Procedure Code and there is no reason or principle to hold otherwise in the case of arbitrator……

(iii)……The arbitrator must also act and make his award in accordance with the general law of the land and the agreement…..

(iv) Over the years, the English and Indian courts have acted on the assumption that where the agreement does not prohibit and a party to the reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. Thawardas [Seth Thawardas Pherumal v. Union of India, (1955) 2 SCR 48 : AIR 1955 SC 468] has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in that case there was no claim for interest but only a claim for unliquidated damages. It has been said repeatedly that observations in the said judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Until Jena case, [(1988) 1 SCC 418 : (1988) 1 SCR 253] almost all the courts in the country had upheld the power of the arbitrator to award interest pendente lite. Continuity

and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing complete justice between the parties, such power has always been inferred.

44. Having regard to the above consideration, we think that the following is the correct principle which should be followed in this behalf:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes — or refer the dispute as to interest as such — to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view."

19. Also see the observations made in Pickett *(Administratrix of the Estate of Ralph Henry Pickett Decd.) v. British Rail Engineering Ltd.*, [1978] 3 WLR 955.

"……My Lords, I believe the reasoning of the Court of Appeal to be unsound on this point. It is based upon a fallacy; and is inconsistent with the statute.

First, the fallacy. It is assumed that because the award of damages made at trial is greater, in monetary terms, than it would have been, had damages been assessed at date of service of writ, the award is greater in terms of real value. There is here a complete non sequitur. The cash awarded is more, because the value of cash, i.e. its purchasing power, has diminished. In theory the higher award at trial has the same purchasing power as the lower award which would have been made at the date of the service of the writ : in truth, of course, judicial awards of damages follow, but rarely keep pace with, inflation so that in all probability the sum awarded at trial is less, in terms of real value, than would have been awarded at the earlier date. In theory, therefore, and to some extent in practice, inflation is taken care of by increasing the number of money units in the award so that the real value of the loss is met. The loss, for which interest is given, is quite distinct, and not covered by this increase. It is the loss which is suffered by being kept out of money to which one is entitled.

Secondly, the statute. Section 22, Administration of Justice Act 1969, amending section 3, Law Reform (Miscellaneous Provision) Act 1934, provides that the court shall (my emphasis) exercise its power to award interest on damages, or on such part of the damages as the court considers appropriate, "unless the court is satisfied that there are special reasons why no interest should be given in respect of those damages." Such is the general rule laid down by the statute, which does, however, confer upon the court a discretion as to the period for which interest is given and also permits differing rates. Nothing can be clearer than the duty placed upon the court to give interest in the

absence of special reasons for giving none. Inflation is an economic and financial condition of general application in our society. Its impact upon this plaintiff has been neither more nor less than upon everybody else : there is nothing special about it."

20. Insofar as the second submission is concerned i.e., that the respondent made a demand only on 02.08.2013, is also untenable for the reason that it was incumbent upon the petitioners to first provide her necessary information that she was entitled to receive ex gratia compensation, and, after the necessary formalities were fulfilled, to pay the same as per her entitlement in terms of the circular dated 05.11.1999.

24. It is not in dispute that the respondent's husband died on 26.02.1998, and, therefore, right to ex-gratia compensation accrued in her favour, in terms of the parent circular dated 11.09.1998.

25. That being the position, the respondent is, in our view, entitled to the interest for the delay caused by the petitioners in payment of ex-gratia compensation."

24. Here also, this Court would notice that there is no bar under the Scheme in force in the respondent Bank's establishment on the award of interest for the belated payment of *ex gratia* lump sum. We have already held for a fact that there was indeed no delay in moving for the award of *ex gratia.* We have believed the petitioner's case that she moved her application for payment of *ex gratia* in the prescribed form on 13.12.2011, which was recommended by the Branch Manager at the relevant time. This Court is in wholehearted agreement with the view on the position of the law expressed by their Lordships of the Division Bench of the Delhi High Court in **Manorma Devi** that the petitioner had a right to receive interest for the delay in the payment of *ex gratia* lump sum. We have also indicated our own reasons why delay in the payment of *ex gratia* under a scheme, like the one under consideration here, would attract the award of interest.

25. In the result, this petition **succeeds** and **is allowed with costs**. A *mandamus* is issued to the General Manager, State Bank of India, Hazrat Ganj, Lucknow, the Regional Manager, State Bank of India, Buddh Vihar, Taramandal, Gorakhpur, the Chief Manager (Administration), State Bank of India, Buddh Vihar, Taramandal, Gorakhpur and the Branch Manager, State Bank of India, Khalilabad, District Sant Kabir Nagar to ensure, amongst themselves, payment of simple interest, on the *ex gratia* already paid, at the rate 7% per annum from 13.12.2011 until realization. The interest shall be paid within a period of two months by the respondent Bank to the petitioner from the date of receipt of a copy of this judgment.

26. Let a copy of this order be communicated to the General Manager, State Bank of India, Hazrat Ganj, Lucknow, Regional Manager, State Bank of India, Buddh Vihar, Taramandal, Gorakhpur, the Chief Manager (Administration), State Bank of India, Buddh Vihar, Taramandal, Gorakhpur and the Branch Manager, State Bank of India, Khalilabad, District Sant Kabir Nagar by the Registrar (Compliance).

(2024) 1 ILRA 1214
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 10371 of 2022

Prakash Chandra Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law – Constitution of India – Article 311 – UP Subordinate Rank Officers Police Officers (Discipline and Appeal) Rules, 1991 – Rule 8(2)A – Dismissal from service – Ground of conviction order was taken, which was stayed and subsequently set aside in the Criminal Appeal – Validity challenged – No assessment regarding conduct of petitioner was made – Effect – Held, authority is required to record reasons for dismissing the employee on the ground of conviction in a criminal case as to why his continuance would adversely affect the government establishment – There is no evaluation or assessment otherwise *qua* the conduct of the petitioner for the purposes of taking a decision to continue a convicted employee in the establishment or not – Held further, once the petitioner has been acquitted in the criminal case and the only ground taken in the order impugned terminating the services is the conviction in such criminal case, the order impugned is also not sustainable on merits. (Para 23, 25 and 27)

Writ petition allowed. (E-1)

List of cases cited:

1. U.O.I.Vs Tulsi Ram Patel; AIR 1985 SC 1416

2. Sadanand Mishra Vs St. of U.P.; 1993 LCD 70

3. Ratan Singh Vs St. of U.P. & ors.; 2013 (11) ADJ 352

4. Biresh Kumar Vs St. of UP & or.s; 2014 (9) ADJ 768 (DB)

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

1. Heard Sri Arvind Srivastava, learned Advocate appearing for the petitioner and Sri P.K. Srivastava, learned Additional Chief Standing Counsel for the State-respondents.

2. This is the fourth round of litigation by the petitioner questioning the decision of the disciplinary authority in dispensing with/terminating the services of the petitioner only on the ground that he has been convicted and sentenced in a criminal case under the judgment and order dated 25.03.2004 in Session Trial No.396 of 1999 which he appealed against before the High Court in Criminal Appeal No.1706 of 2004. The conviction of the petitioner has been under Sections 307/504/506 Indian Penal Code and Section 35 of the Arms Act. In the pending criminal appeal petitioner had already been enlarged on bail as the execution of the sentence has been stayed by the order of the Court and later on conviction and sentence has been set aside as the Criminal Appeal stood allowed.

3. It is to equally worth to mention here that on account of petitioner being sent to jail as a result of conviction in the session trial case, petitioner could be released on bail only in Criminal appeal and so he could not report for duty and

resultantly he faced dismissal from service on account of absence from duty.

4. The challenge to the said order of dismissal has been successful as the writ petition filed by the petitioner was allowed on 05.05.2015 holding that the dismissal from service was too harsh looking to the charges of absence from duty and the fact that petitioner had been absent for absolutely those reasons and circumstances which were beyond his control. The Court passed an order remitting the matter to look into the grievance of the petitioner afresh and take appropriate decision in accordance with law.

5. While authority proceeded to examine the matter on remand this time, dismissed him from service exercising power under Rule 8(2)A of the UP Subordinate Rank Officers Police Officers (Discipline and Appeal) Rules, 1991 for the reason that petitioner had been held guilty in the criminal case arising out of Case Crime No.257/1995 (S.T. No.224/1998) under Sections 307/504/506 IPC and has been sentenced for seven years rigorous imprisonment and further fine of Rs.3000/-. This order passed on 13.06.2015 came to be challenged again in writ petition being Writ-A No.38896 of 2015 and the Court relying upon the judgment in the case of ***Union of India vs. Tulsi Ram Patel; AIR 1985 SC 1416***, judgment of this Court in the case of ***Sadanand Mishra vs. State of UP; 1993 LCD 70, Ratan Singh vs. State of UP and ors; 2013 (11) ADJ 352 and Biresh Kumar vs. State of UP and ors 2014 (9) ADJ 768 (DB)*** held that dismissal of an employee ipso facto on account of conviction was not a permissible action because the disciplinary authority was required to not only give an opportunity of hearing but to examine that the act and conduct of the employee in the criminal case looking to the facts and allegations that were borne out in the discussions made by the trial judge to find whether amount to moral turpitude so as to hold him unfit for a government employment more especially in police force. Thus, the Court allowed the writ petition setting aside the order dated 13.06.2015 and directed the authorities to examine the conduct of the petitioner in the matter so as to justify whether he deserved punishment like dismissal/removal/reduction in rank within the meaning of provision (a) of Article 311(2) of the Constitution of India.

6. This order was further challenged unsuccessfully before the Special Appellate Bench which dismissed the intra-Court appeal on 20.11.2018 being Special Appeal No.635 of 2016 vide order dated 20.11.2018.

7. Petitioner this time represented the matter again before the 42nd Battalion, PAC, Naini, Prayagraj and the Commandant passed the order on 16.12.2019 holding representation of the petitioner to be meritless and devoid of any force as the explanations offered by the petitioner were found to be not satisfactory and then maintained the order dated 13.06.2015.

8. Three-fold arguments have been advanced by the counsel for the petitioner: (a) once the order dated 13.06.2015 had been set aside by this Court under the judgment and order dated 19.05.2016 passed in Writ-A No.38896 of 2015 and Special Appeal filed by the State was also dismissed, such an order having lost its existence could not have been held to be still maintained or otherwise revived by the authority; (b) there is no finding returned

by the authority that the act and conduct discussed in the judgment of the trial judge amounted to establish a case of moral turpitude against the petitioner so as to justify his dismissal from service; and (c) the authorities have not even adverted to the issue as to whether merely because sentence has been stayed petitioner did not deserve such a harsh punishment like dismissal from service in absence of any departmental proceeding so as to hold him guilty otherwise of the charges.

9. The argument is that there is no reflection on the conduct of petitioner while working in the establishment like police force and except for this solitary incident the rest of the service rendered by petitioner and his character roll were not taken into account at all.

10. Per contra, learned advocate appearing for the State has sought to justify the order impugned for the reasons assigned therein.

11. Having heard learned counsel for the parties and having perused the record, I find that three points are to be considered, ***firstly***, as to whether authority was justified in reiterating the order which had already been set aside by this Court; and ***secondly,*** whether the findings returned holding petitioner liable for dismissal from service are sustainable in law in light of the authorities cited by the learned counsel for the petitioner and ***lastly*** whether, after criminal appeal stood allowed setting aside conviction and sentence, petitioner's service deserved to be restored.

12. I find that departmental appeal had been dismissed both on delay and on merit.

13. Lookingto the principal order passed by the Commandant 42ndBattalion PAC Naini, Prayagraj dated 16.12.2019, I find that the show cause notice that is referred to in para 5 of the said order required petitioner to furnish his explanation as to why the earlier order passed on 13.06.2015 terminating the services of the petitioner may not be maintained. Para 6 refers to letter of the petitioner seeking further thirty days? time to furnish his explanation and after he was awarded extra time, he submitted his representation along with all documents and annexure on 02.11.2019. Petitioner also referred to judgment of Supreme Court in the case of ***Tulsi Ram Pate***l *(supra)* decided on 20.11.2018. Vide para 7, the disciplinary authority refers to various paragraphs of the representation of the petitioner that bear his explanation to the show cause notice. The explanation offered by the petitioner was that the earlier order passed by the authority not permitting the petitioner to join his service was quashed by the High Court on 05.05.2015 and yet again the services of the petitioner came to be dispensed with on the ground that petitioner had been convicted in the criminal case. The plea was also taken that in the pending criminal appeal before High Court, the order passed by the trial judge dated 25.07.2018 was stayed and the petitioner was directed to be reinstated in service.

14. In the circumstances, therefore, it was pleaded that petitioner required to be heard in the matter and yet the prescribed procedure was not followed and the services were dispensed with. This explanation offered by the petitioner has been rejected by the disciplinary authority for the reason that petitioner had remained

absent from 21.04.2004 and, therefore, he was rightly terminated from service on 10.05.2011 and since Court had directed to consider the matter again looking to the representation of the petitioner vide its order dated 05.05.2015 again after looking into the explanation of the petitioner then for the reason that petitioner was convicted in a criminal case and was sentenced for seven years rigorous imprisonment along with fine of Rs.3,000/- vide judgment and order dated 25.03.2004, exercising power under Article 8(2)(A) of the UP Subordinate Rank Police Officers (Punishment and Appeal) Rules, 1991, petitioner's services were terminated w.e.f. 21.03.2004 vide order dated 13.06.2015. It is held that order dated 13.06.2015 was passed in accordance with law and it is also observed that in the order staying sentence the High Court had not stayed the conviction but merely kept the sentence in abeyance, therefore, he could not be taken back in service. This was reiterated vide paragraphs 8 & 9. In the rest of the paragraphs, representation of the petitioner was referred and it was observed that they need no reply.

15. Referring to judgment passed in Special Appeal No.635 of 2016 dated 20.11.20218, the Authority took the view that matter has been examined in light of judgment of the Supreme Court and having found it to be absolutely different and since the petitioner has been convicted and sentenced with rigorous imprisonment coupled with the fine of Rs.3,000/- it would be taken that he stood convicted as on date 26.03.2004. The authority then refers in para 29, relevant Article 311 (1) and (2) and then proviso to the same and Clause (a) to the second proviso and come to conclude that no inquiry was required to hold him guilty of the charge where delinquent employee stood convicted in a criminal case for the same charge. Referring to the same article the authority observed that such a convicted employee was liable to be removed from service invoking power under Rule 8 (2)(a) of 1991 Rules. Then reiterating that only the sentence has been kept in abeyance in criminal appeal, petitioner was held not entitled to continue in employment and thus, the order impugned has been passed maintaining the order dated 13.06.2015.

16. Looking to the above facts, I find that order previously passed on 13.06.2015 has been maintained under the order impugned. Now coming to the order of the Writ Court dated 19.05.2016 passed in Writ-A No.38896 of 2015, I find that matter was directed to be decided in light of the settled principle of law laid down in Tulsi Ram Patel's case (supra). Operative part of judgment dated 19.05.2016 is reproduced hereinunder:

"17. For the aforesaid reasons, the writ petition is allowed and the impugned order dated 13.6.2015 is set aside. The disciplinary authority shall have due regard to the law laid down by Hon'ble Supreme Court in Tulsi Ram Patel's case and then determine as to whether the conduct of the petitioner is such as to warrant his dismissal, removal or reduction in rank within the meaning of proviso (a) to Clause (2) of Article 311 of the Constitution of India. "

17. The State had preferred intra-court appeal against this judgment being Special Appeal No.635 of 2016 wherein the same plea was taken by way of argument as has been the stand of State throughout. The division bench judgment noticed the argument of the respondent appellant that

petitioner was convicted in the criminal case and recorded that no reinstatement was directed by the learned Single Judge and the authority was required to pass order afresh. The relevant last five paragraphs of the order of the Division Bench dated 20.11.2018 are reproduced hereunder:-

"We have heard learned counsel for the parties and have perused the material on the record.

We find that the learned Single Judge has not issued any direction for the reinstatement of the respondent-petitioner. He has simply directed the concerned disciplinary authority to consider his cause in light of the law laid down by the Supreme Court in Tulsi Ram Patel's case. No other direction has been issued.

As regards, learned counsel for the appellant submits that learned Single Judge has issued a direction for his reinstatement, we do not find any such direction in the paragraph which we have reproduced above.

In view of the above, we find that there is no illegality in the order of the learned Single Judge and the authority concerned shall consider the case of the respondent-petitioner as directed by the learned Single Judge expeditiously, preferably within a period of six months from the date of communication of the order.

With the aforesaid observations, the special appeal stands disposed of. "

18. Thus, it is clear that the appeal to restore the order dated 13.06.2015 by setting aside the judgment of the order of the learned Single Judge was rejected holding that there was no illegality in the order of the learned Single Judge. The order was not set aside and special appeal stood disposed of. In fact the division bench maintained the order of the learned Single Judge and refused to interfere with the same and only directed for a six month?s time to take decision in light of the judgment of Single Judge from the date of presentation of certified copy of this order.

19. So now this much is clear that order dated 13.06.2015 had lost its existence in view of the order of learned Single Judge affirmed in appeal, therefore, the authority was certainly not justified in maintaining the order dated 13.06.2015 which was not in existence at all. Thus, on this count alone writ petition deserves to be allowed. However, it is necessary to look into the legal aspect of the matter as to whether the authority has discussed the fact of the petitioner's case and deliberated upon his conduct in light of the law laid down in ***Tulsi Ram Patel's*** case *(supra)* as this was specific direction of this Court both in the learned Single Judge judgment and the Division Bench judgment as quoted above.

20. While the order passed by the disciplinary authority was under challenge before the appellate authority, the criminal appeal filed by petitioner along with co-accused Ram Bali came to be allowed by the judgement and order dated 17.11.2021 holding that charges framed against the appellants under Section 307/34 of IPC were not at all proved and, thus, finding of conviction was held to be bad and illegal and so the judgment and order of conviction passed by the trial judge on 25.03.2004 in Session Trial No.396/1999 was set aside. It is stated that this judgment of criminal appeal in favour of the

petitioner was not further challenged at all and the petitioner moved an application before the departmental appellate authority to stay the impugned order passed by the disciplinary authority.

21. While the appeal was pending, petitioner preferred writ petition being Writ-A No.4191 of 2022. Ultimately the departmental appeal was dismissed as meritless and also on the ground of it being barred by time. The order of the disciplinary authority, thus, stood confirmed and so the said writ petition got dismissed as withdrawn on 07.05.2022 to file such writ petition.

22. Now testing the order passed by the authority from point of view of law laid down in ***Tulsi Ram Patel's*** case *(supra)*, the authority was bound in law to record finding regarding act and conduct of the petitioner relating to his involvement in the criminal case so as to hold that his continuance in the employment will not be justifiable.

23. In ***Tulsi Ram Patel's*** case *(supra),* the Court has very clearly held that authority is required to record reasons for dismissing the employee on the ground of conviction in a criminal case as to why his continuance would adversely affect the government establishment. The the direction contained in the judgment of the leaned Single Judge dated 19.05.2016 was also to the effect that the matter would be decided in light of law laid down by the Supreme Court in case of ***Tulsi Ram Patel's*** case *(supra)*. In ***Tulsi Ram Patel*** *(supra),* the Constitution Bench laid down the principle thus:

"It is obvious that in considering this mater the disciplinary authority will have to take into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features if any present in the case and so on and so forth. ..... In other words, the position is that the conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a summary inquiry as to the nature and extent of the penalty to be imposed on the delinquent employee and in the course of the inquiry if the authority is of the opinion that the offence is too trivial or of a technical nature it may refuse to impose any penalty in spite of the conviction."

24. Reiterating the law and comprising in short in the case of ***Sadanand Mishra*** *(supra),* Division Bench of this Court vide paragraph 20 observed thus:

"*20. The principles enunciated by Hon'ble the Supreme Court are:*

(1) On the conviction of an employee on a criminal charge, the order of punishment cannot be passed unless the conduct which had led to his conviction is also considered.

(2) The scrutiny or examination of conduct of an employee leading to his conviction is to be done ex-parte and an opportunity of hearing is not to be provided for this purpose to the employee."

25. From the impugned order, as I have discussed above, passed by the disciplinary authority, I find that, except for the reason of conviction in the criminal

case and awarding of sentence of rigorous imprisonment coupled with fine, no other reason has been assigned for terminating the services of the petitioner. Thus, in my view, there is no evaluation or assessment otherwise qua the conduct of the petitioner for the purposes of taking a decision to continue a convicted employee in the establishment or not. Moral turpitude itself can be a ground but there has to be discussion regarding that and finding also to justify the order terminating the services of the such convicted person on the ground of moral turpitude. The order impugned is absolutely silent on the above count.

26. Now since the petitioner has been acquitted in the criminal case holding clearly that charge was not made out and that the finding of conviction was unsustainable being bad and illegal, I treat it to be a case of no evidence and not a matter of benefit of doubt.

27. In the circumstances, therefore, petitioner, may be not so stated specifically, but stood honourably acquitted. Once the petitioner has been acquitted in the criminal case and the only ground taken in the order impugned terminating the services is the conviction in such criminal case, the order impugned is also not sustainable on merits. The appellate authority has not discussed anything except reiterating the view taken by the disciplinary authority that petitioner had been convicted in a criminal case so to hold that there was no merit in the appeal though the appeal has also been dismissed on the ground of delay. The order passed by the appellate authority is also not sustainable.

28. In view of the above, writ petition succeeds and is allowed. The order dated 16.12.2019 passed by the disciplinary authority and 28.03.2022 passed by the appellate authority are hereby quashed. Petitioner is directed to be reinstated in service forthwith with all consequential benefits.

(2024) 1 ILRA 1220
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2023

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Writ-A No. 11493 of 2023

Dr. Dhananjay Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Girdhar Prasad Tripathi, Sri H.N. Singh (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Sidharth Khare, Sri Jigar Khare, Sri Ashok Khare (Sr. Adv.)

Service Law - Petitioner, appointed as Lecturer on 19.02.1991, promoted as Associate Professor on 01.01.2006, became eligible for consideration upon vacancy of substantive post of Principal on 12.08.2016 - On refusal of seniors, petitioner appointed Officiating Principal by order dated 12.06.2018 and assumed charge on 14.06.2018 - Complaints by local MLA and College Accountant led to Commissioner ordering inquiry against petitioner on 24.09.2020 - Inquiry committee found petitioner, as Officiating Principal, bypassed authorized accountant, engaged Pvt. persons, issued irregular vouchers, committed financial irregularities in violation of Government Orders - Further he was directed to hand over charge of Officiating Principal to sixth respondent owing to irregularities - By impugned order, third respondent rejected petitioner's claim to officiate as Principal - Once

sixth respondent declined to officiate as Principal on medical grounds with recital to resume after recovery, he cannot now claim officiating against same vacancy - Allegations forming basis of petitioner's discharge were identical to those in charge-sheet dated 13.8.2021 - Inquiry Officer submitted report on 25.9.2021, no material shows that inquiry was concluded by any final order as per law - Impugned order, set aside. (Para 5, 6, 7, 8, 11, 16, 39, 46)

Writ petition allowed. (E-13)

List of Cases cited:

1. Sundershan Kumar Vs St. of U.P. & ors., Special Appeal No.959 of 2006 decided on 15.9.2006 **(Relied)**

2. Ashok Kumar Jain Vs St. of U.P., 2008 (1) ADJ 512, (Para 7) **(Relied)**

3. Smt. Archana Singh Vs St. of U.P. 2009 (6) ADJ 115, (Para 13) **(Relied)**

4. Smt. Duleshwari Devi Vs St. of U.P. & ors. 2012 (3) ADJ 742, (Paras 15 to 17) **(Relied)**

5. Babulal Badriprasad Varma Vs Surat Municipal Corporation & ors. (2008) 12 SCC 401

6. ARCE Polymers Pvt. Ltd. Vs Alphine Pharmaceuticals Pvt. Ltd. & ors. (2022) 2 SCC 221

7. U.O.I. & ors. Vs N. Murgu Ganeshan 2022 (2) SCC 25

8. Dhanesh Kumar Sharma Vs St. of U.P. & ors. (2004) 5 AWC 4099, Special Appeal No.506 of 2022

9. Vikas Jain Vs St. of U.P. & ors. Special Appeal No.677 of 2022, decided on 8.7.2022

10. Ashok Kumar Pandey Vs St. of U.P. & ors. decided on 19.12.2022

11. Dr. Jagathy Raj V.P. Vs Dr. Rajitha Kumar S. & ors. (2022) 6 SCC 299

12. Yoginath D. Bhagde Vs St. of Mah., 1999 (7) SCC 739

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri H.N. Singh, learned Senior Counsel assisted by Sri Girdhar Prasad Tripathi, learned counsel for the writ petitioner, Sri Saurabh, learned Standing Counsel who appears for respondents No. 1 to 5 and Sri Ashok Khare, learned Senior Counsel assisted by Sri Jigar Khare, learned counsel for the respondents.

2. Since affidavits have been exchanged between the parties and they do not propose to file any further affidavits thus with their consent the writ petition is being decided at the fresh stage.

3. The facts of the case as worded in the writ petition are that there is an institution by the name of Mathura P.G. College, Rasra, District Ballia which is affiliated to Jannayak Chandrashekhar University, Ballia (In short respondent University) and the first statute of Mahatama Ganhi Kashi Vidyapeeth (First amendment) Statue 2011 are applicable.

4. Since the fourth respondent institution is affiliated to the respondent University thus the payment of salaries of the teaching and non teaching staff of the institution is being made under the provisions of Section 60B of the U.P. State Universities Act, 1973.

5. The writ petitioner claims to be appointed as a Lecturer/Associate Professor on 19.2.1991 in the subject Geography and was promoted in the grade of Associate Professor on 1.1.2006. A substantive post of Principal fell vacant on 12.8.2016. As

per the seniority list one Dr. Smt. Urmila Singh was the senior most Lecturer/Associate Professor followed by the sixth respondent Dr. Dharmatmanand Gupta and then the writ petitioner, Dr. Dhananjay Singh.

6. Since Dr. Smt. Urmila Singh and sixth respondent Dr. Dharmatmanand Gupta, Associate Professor (Economics) refused to officiate as a Principal of the fourth respondent Institution on 11.6.2018 so the writ petitioner who was next in the league was allowed to Officiate as a Principal of the institution in question by virtue of an order passed by the Authorised Controller/District Magistrate, Ballia on 12.6.2008 who was manning the institution in question. The signature of the writ petitioner as an Officiating Principal was also attested and he assumed the charge as an Officiating Principal on 14.6.2018.

7. According to the writ petitioner complaints were lodged by a Local M.L.A. and Sri Anil Kumar Singh, Accountant Mathura, P.G. College Rasra, Ballia regarding the working of the writ petitioner as an Officiating Principal institution in question pursuant whereto an order is stated to have been passed by Commissioner Azamgarh Division, Azamgarh on 24.9.2020 for holding of inquiry against the writ petitioner.

8. A Committee is stated to have been constituted headed by Chief Development Officer, Ballia along with the Senior Treasury Officer and District Inspector of Schools, Ballia, which conducted the inquiry while submitting the inquiry report that the works relating to accounts in the institution in question was not being conducted properly as despite the fact that there happened to be an authorised accountant the writ petitioner in the capacity of an officiating Principal was getting the accounts work done through private persons. Apart from the same the vouchers were also issued in the name of employees who were presenting the said vouchers creating a situation whereby the regularly appointed and authorised accountant was being deprived of work and financial irregularities were being committed which was against the Government Orders.

9. A communication noticing the aforesaid irregularities was issued under the signature of the Chief Development Officer, Ballia to the Commissioner Azamgarh Division, Azamgarh on 13/17.11.2020

10. After the receipt of the communication dated 13/17.11.2020 of the Chief Development Officer, Ballia addressed to Commissioner Azamgarh Division, Azamgarh another communication was issued on 30.7.2021 under the signatures of Joint Director Higher Education on behalf of the Director of Higher Education addressed to the Administrator, Mathura P.G. College, Rasra, District Ballia wherein it was recited that inquiry was conducted in the light of the communication of the Additional Chief Secretary, U.P. Government vide letter dated 15.2.2021 and after noticing the said irregularity so pointed out against the writ petitioner the matter was referred for taking follow up action.

11. Consequently, on 6.8.2021 Administrator, Mathura P.G. College, Rasra, District Ballia fourth respondent proceeded to issue an office order whereby owing to the iregularities as referred to above the writ petitioner was directed to

handover the charge of the Officiating Principal to the sixth respondent, Dr. Dharmatmanand Gupta.

12. Challenging the order dated 6.8.2021 passed by the fourth respondent, Administrator, Mathura P.G. College, Rasra, District Ballia the writ petitioner preferred Writ-A No.10764 of 2021, Dr. Dhananjay Singh vs. State of U.P. which came to be allowed on 13.9.2021. Order whereof is being quoted herein under:-

Heard Sri H.N.Singh, learned Senior Counsel, assisted by Sri Girdhar Prasad Tripathi, learned counsel for the petitioner and Sri Ratan Deep Mishra, learned Standing Counsel for the respondents.

The petitioner, by means of the present writ petition, has assailed the order dated 06.08.2021 passed by the respondent no.6-Administrator, P.G. College Rasra, District Ballia/ Regional Higher Education Officer, Varanasi, by which the petitioner has been removed from the post of Officiating Principal of the College.

The Mathura P.G. College (hereinafter referred to as "the College") is an Educational Institution affiliated with Jannayak Chandrashekhar University, Ballia (hereinafter referred to as "the University"). The first statute of Mahatma Gandhi Kashi Vidyapeeth (First Amendment) Statute, 2011 is adopted by the University.

The vacancy of Principal in the College came in existence in the year 2018. As the senior most Associate Professor of the College, namely, Dr. Smt. Urmila Singh and the second senior most Associate Professor Dr. Dharmatma Nand refused to accept the charge of Officiating Principal. The petitioner being at Sl. No.3 in the seniority list, was offered the charge of Officiating Principal. Subsequently, the petitioner was appointed as Officiating Principal on 12.06.2018. The signature of the petitioner has been attested by the respondent no.7-Regional Higher Education Officer, Varanasi Region, Varanasi and the petitioner since then has been continuously working as Officiating Principal of the College. However, by the order dated 06.08.2021, the petitioner has been removed from the Post of Officiating Principal of the College on several charges.

Challenging the said order, learned counsel for the petitioner has contended that the order being punitive and stigmatic in nature, therefore, an opportunity of hearing ought to have been afforded to the petitioner before passing the impugned order. He further submits that neither any notice or opportunity of hearing was afforded to the petitioner by the respondents, hence, the order impugned cannot sustain. In this respect, necessary averments has been made in paragraph no.21 of the writ petition.

This Court on earlier occasion, i.e., on 27.08.2021 has passed the following order:-

"Orders of Director of Education as also the Administrator is assailed primarily on the ground that though petitioner is continuing as Officiating Principal for the last three years but without putting him to any notice the order has been passed for dislodging him from the office of Officiating Principal. It is stated that Accountant, who has since retired, has otherwise been found guilty of various irregularities by the Joint Director vide order dated 6.8.2021, and therefore the

charge that work was not taken from him is otherwise not sustainable.

Learned Standing Counsel may obtain instructions.

Post as fresh, once again, on 10.9.2021.

Status quo with regard to working in the office of Officiating Principal, till then, shall be maintained."

Pursuant to the order of this Court dated 27.08.2021, learned Standing Counsel on the instructions, which is taken on record, states that the charge of the petitioner has been taken on the ground that the petitioner is not the senior most Associate Professor in the College.

Be that as it may, the order impugned discloses that certain charges have been levelled against the petitioner, on the basis of which, the charge of Officiating Principal has been withdrawn from him. A reading of the impugned order discloses that the order is punitive and stigmatic in nature, thus, the order impugned could not have been passed without giving any notice or reasonable opportunity of hearing to the petitioner.

Learned Standing Counsel submits that the instructions with regard to the averments made in paragraph no.21 of the writ petition are silent, even otherwise perusal of the impugned order does not indicate that any notice or opportunity of hearing has been afforded to the petitioner by the respondent no.6 before passing the impugned order.

In this view of the fact, the order impugned is not sustainable, hence, is hereby set aside.

As in the present case, respondent no.6-Regional Higher Education Officer, Varanasi Region, Varanasi is also the Administrator of the College, therefore, in the facts of the present case, this Court is of the opinion that in the interest of justice it would be appropriate to refer the matter to the respondent no.2-Director, Higher Education, U.P. Degree (Earth-I) Anubhag, Prayagraj to take a decision with reference to the continuance of the petitioner as Officiating Principal of the College within a period of two months from today, after giving due notice and opportunity of hearing to the petitioner as well as other interested parties.

The writ petition is allowed subject to the observations made above."

"Order on Civil Misc. Impleadment Application

The present impleadment application has been filed by one Anil Kumar Singh for being impleaded as respondent no.8 in the array of parties.

The applicant has filed the present impleadment application contending inter-alia that he applicant was working on the post of Accountant in the College and he has retired on 30.06.2021. The petitioner was appointed as Officiating Principal in the College on 12.06.20218 but after some time without any reason he restrained the applicant to work in the College and thereafter the applicant informed about the conduct of the petitioner to the higher authority as well as on the portal of the Hon'ble Chief Minister on 18.02.2020 about the embezzlement of found of the said College as well as verification of false document of the petitioner. Thereafter, the authority has

considered the complaint of the applicant and on an inquiry being instituted, the petitioner was removed from the post of Officiating Principal on 03.08.2021 and senior most teacher Dr. Dharmatma Nand Associate Professor (Economics) has been appointed as Principal in the College. The applicant was being mentally harassed by the petitioner without there being any complaint or reason, and therefore any passed in favour of the petitioner would seriously prejudice the applicant.

In the opinion of the Court, since the applicant has already retired from the service, hence, the impleadment application is misconceived. Accordingly, the present impleadment application being misconceived, is hereby rejected."

13. Pursuant to the order dated 13.9.2021 passed in Writ-A No.10764 of 2021, the third respondent, Joint Director of Higher Education U.P. at Prayagraj issued a communication dated 27.9.2021 to the writ petitioner herein, Sri Anil Kumar Singh, Accountant as well as to Regional Higher Education Officer, Varanasi Region, Varanasi fifth respondent requiring them to the present along with their versions on 5.10.2021 for hearing.

14. The writ petitioner claims to have tendered its version on 5.10.2021. Thereafter on 27.5.2022 the Joint Director of Higher Education on behalf of Director of Higher Education U.P. at Prayagraj proceeded to pass an order whereby it held that in view of the irregularities found against the writ petitioner as an Officiating Principal the sixth respondent being the senior most was entitled to officiate as Principal.

15. This led to filing of **Writ-A No.9761 of 2022** by the writ petitioner which came to be decided on 19.10.2022 order whereof is being quoted here under:-

"Heard Sri H.N. Singh learned Senior Counsel assisted by Sri Girdhar Prasad Tripathi learned counsel for the petitioner, the learned Standing Counsel for the State respondents and Sri Prabhakar Awasthi learned counsel for the private respondent.

Challenge has been raised to the order dated 27.5.2022 passed by the Joint Director Education. By that order, the claim of the petitioner to be reinstated as officiating Principal of Mathura P.G. College, Rasra, District Ballia, has been rejected.

Having heard learned counsel for parties and having perused the record, it transpires, claim of the petitioner stems from the earlier order passed by the Administrator of the institution making over officiating charge of Principal to the petitioner. Petitioner claims that the said order would operate till a regularly selected candidate joins the institution.

On the other hand, Sri Awasthi would claim that the petitioner is next in seniority to the private respondent No. 6. He could only claim continuance of officiating charge of Principal for three months from the date of issuance of the order 06.8.2021. Since the respondent No. 6 had expressed his inability to function as the Principal for some time, the said respondent did not waive off his right to be considered to discharge officiating charge of Principal of the above named institution after the initial period of three months.

That objection raised by learned counsel for the private respondent has been

met with a further submission advanced by learned Senior Counsel for the petitioner, who would contend that the language of the order dated 12.6.2018 is clear. In any case, the vacancy had arisen on 12.8.2016 and therefore, the situation contemplated by the statute 20-A(12) cannot be relied upon against the petitioner.

While such and other submissions are being pressed by learned counsel for parties, impugned order indicates complete non application of mind. Besides making a bald recital of the claim made by the parties and quoting the provisions of law, no consideration of facts has been made and no reasoning is contained in the order before reaching the conclusion that the petitioner is not entitled to restoration of officiating charge of Principal. The approach of the Joint Director is not appreciated. Quasi judicial authorities are vested with important function to decide the claims involving civil rights of citizens. Once the Court requires such authorities to pass an order in accordance with law, it entails the responsibility to afford reasons for the conclusions to be recorded by such authorities.

In absence of any reasoning given, the impugned order cannot be sustained. It is set aside. Matter is remitted to respondent No. 3 to pass a fresh order strictly in accordance with law after affording due opportunity of hearing to the parties and giving adequate reasons to meet their submissions. Such exercise may be completed within a period of two months from today.

Till the decision to be taken by the respondent No. 3, pursuant to this order, status quo as on date may prevail.

With the above directions, writ petition stands disposed of."

16. The writ petitioner thereafter preferred an application setting out the facts that he was entitled to officiate as the Principal in question. However, now the order impugned has been passed by the third respondent, Joint Director of Higher Education U.P. at Prayagraj on behalf of the Director of Education Prayagraj dated 12.1.2023 whereby the claims set up by the writ petitioner has been negated.

17. Questioning the order dated 12.1.2023 passed by the third respondent, Joint Director of Higher Education U.P. at Prayagraj on behalf of the Director of Education Prayagraj the present petition has been preferred.

18. This Court entertained the writ petition on 19.7.2023 wherein the following order was passed:-

"Vakalatnama filed by Sri Siddharth Khare on behalf of respondent no.6 is taken on record.

Sri H.N. Singh, learned Senior Counsel assisted by Sri Girdhar Prasad Tripathi, for the petitioner has sought to argue that the order dated 12.1.2023 passed on behalf of the second respondent, Director Higher Education U.P. Degree (Earth-I) Anubhag, Prayagraj by Joint Director Higher Education, U.P. Prayagraj proceeds on misconception of fact. Though two grounds have been taken in the order impugned firstly, that as per the seniority list dated 11.9.2020 and 30.9.2021 the sixth respondent is senior to the writ petitioner and secondly in view of the allegations of financial misappropriation, irregularities the writ petitioner cannot be allowed to

function of the post of Officiating Principal in the fourth respondent institution.

Sri H.N. Singh, learned Senior Counsel has argued that he does not dispute the seniority position of the writ petitioner vis-a-vis the sixth respondent, however according to him pursuant to the own sweet-will of the sixth respondent he showed its inability to officiate on the said post due to the medical ailments and the writ petitioner was allowed to officiate since 12.6.2018 however in the garb of allegations pertaining to financial irregularity he had been sought to be ousted. He has further argued that the first attempt was made on 6.8.2021 wherein certain allegations relating to financial irregularities were sought to be slapped upon the writ petitioner which was subject matter of challenge in Writ-A No.10764 of 2021, Dr. Dhananjay Singh vs. State of U.P. and 6 others which came to be allowed on 13.9.2021 wherein this Court opined that the order was punitive and was passed in violation of principle of natural justice, the matter was remitted to the second respondent to pass an order and thereafter consequent to the notice another order was passed on 27.5.2022 whereby a ground was taken that the writ petitioner was junior to the sixth respondent, thus the writ petitioner had no claim about the same which even in fact was also subject matter of challenge by the writ petitioner in Writ-A No.9761 of 2022 (Dr. Dhananjay Singh vs. State of U.P. & five others wherein the order was set aside and the matter was remitted back though status quo as on date was directed to be maintained.

Learned counsel for the writ petitioner submits that now the impugned order has been passed again negating the claim of the writ petitioner on the said two grounds and discussed above. He further submits that by virtue of a communication dated 17.11.2020 at page 67 of the paper book and it has been recommended to hold inquiry against the writ petitioner with regard to the certain allegations and on 4th December, 2020 the Commissioner in question while corresponding with the State Government and also recommended for holding of inquiry but post the said two documents on 6.8.2021 the second respondent has issued a communication to the fourth respondent wherein after taking the version of the writ petitioner, it has been mentioned that Sri Anil Kumar Singh, the Accountant was responsible for the financial irregularities. According to Mr. Singh the said entire exercise is just in order to dislodge the writ petitioner and to continue the sixth respondent to function as the Officiating Principal in the fourth respondent institution.

Sri Ashok Khare, learned Senior Advocate on the other hand submits that the interpretation which is being sought to be shown by the learned counsel for the petitioner that the refusal is for a time immemorial is not sustainable particularly for the fact that it was due to the medical reasons limited to one year and further the writ petitioner does not possess any legal enforceable right to be posted as Officiating Principal.

Parties are also in agreement that the sixth respondent is still holding the charge as an Officiating Principal of the institution in question or order which is being sought to be quashed is dated 12.1.2023.

Sri Awadhesh Kumar Mishra, learned Standing Counsel who appears for the respondent no. 1 to 5 shall seek

instructions and file their response within a period of two weeks. Sri Khare may also file their response within aforesaid period.

Put up this case on 10.8.2023 as fresh."

19. A counter affidavit has been filed on behalf of respondents no. 2, 3 & 5 of the Assistant Director in the office of the Director, Higher Education U.P. at Prayagraj dated 11.10.2023 followed by a counter affidavit on behalf of the sixth respondent to which rejoinder affidavits have been filed.

20. A statement has been made by Sri Saurabh, learned Standing Counsel that an Administrator has been appointed in the Mathura P.G. College, Rasra, District Ballia who is the District Magistrate, Ballia thus he also represents the fourth respondent and he does not propose to file any response further.

21. Sri H.N. Singh, learned Senior Counsel for the writ petitioner submits that the order dated 12.1.2023 passed by the third respondent, Joint Director of Education, U.P. Prayagraj, on behalf of the Director of Education U.P. Prayagraj is not sustainable even for a single moment particularly in view of the fact that once the sixth respondent, Dr. Dharmatmanand Gupta who though is senior to the writ petitioner had shown its inability to perform functions as an Officiating Principal on 11.6.2018 owing to health issues and thereafter the writ petitioner who was next in the league was allowed to function as an Officiating Principal by virtue of the order dated 12.6.2018 of the fourth respondent and he was handed over the charge on 14.6.2018 then now it is not open for the sixth respondent to again claim officiation as a Principal taking a U-turn and a somersault as the vacancy which had arisen on account of superannuation of the regular Principal is still continuing without there being any change thus according to him the sixth respondent has foregone his right and his claim is barred by the doctrine of delay latches and acquiescence.

22. Learned counsel for the writ petitioner seeks to relies upon the judgement in the case of **Sundershan Kumar vs. State of U.P. & others, Special Appeal No.959 of 2006** decided on 15.9.2006, **Ashok Kumar Jain vs. State of U.P. 2008 (1) ADJ 512, Smt. Archana Singh vs. State of U.P. 2009(6) ADJ 115** and **Smt. Duleshwari Devi vs. State of U.P. and others 2012(3) ADJ 742**. While drawing force from the aforesaid judgments it is being sought to be submitted on behalf of the writ petitioner that once an incumbent declines to officiate as a Principal on the very vacancy despite being senior most then he/she cannot be permitted to turn around and to claim appointment as an Officiating Principal on the said post.

23. Further reliance has been placed upon the judgement in the case of Babulal Badriprasad Varma vs. Surat Municipal Corporation and others (2008) 12 SCC 401 and ARCE Polymers Private Ltd. vs. Alphine Pharmaceuticals Private Ltd. and others (2022) 2 SCC 221 so as to contend that the doctrine of estoppel acquiescence and waiver will come into play with regard to the statutory right so claimed by the writ petitioner once he had declined to officiate as a Principal.

24. Learned Senior Counsel for the writ petitioner has further argued that it was not open for the sixth respondent to claim

right of officiation particularly after enormous and inordinate delay in claiming its legal right after a period of seven years while relying upon the decision in the case of **Union of India and others vs. N. Murgu Ganeshan 2022 (2) SCC 25.**

25. It also argued by learned Senior Counsel for the writ petitioner that one of the ground which was made basis for passing of the order dated 12.1.2023 by the third respondent is that there happens to be an inquiry conducted at the level of the State respondents pursuant whereto it was found that the writ petitioner had committed financial and procedural irregularities while functioning at the Officiating Principal of the institution in question. According to him a departmental charge sheet was issued to the writ petitioner dated 13.8.2021 by the Inquiry Officer to which the writ petitioner tendered its reply and thereafter the Inquiry Officer tendered its inquiry report dated 25.9.2021 but till date no final action has been taken in pursuance of the inquiry report dated 25.9.2021 submitted by the Inquiry Officer before the Disciplinary Authority/Regional Higher Education Officer, Varanasi/fourth respondent. He submits that even from the perusal of the charge sheet and the findings recorded by the Inquiry Officer it is clear that the inquiry proceedings was the sham as nothing has been set out in the inquiry report so as to suggest that the writ petitioner had committed any financial or procedural irregularities so as to inflict any punishment upon him. Submission is that in order to block the chances of the writ petitioner to officiate as a Principal of the institution in question an inquiry report has been prepared and it has been kept in a drawer so as to use it as a tool whenever the occasion arises.

26. Learned Senior Counsel for the writ petitioner lastly submits that the entire dispute arose when the writ petitioner in the capacity of an Officiating Principal did not take any work from Sri Anil Kumar, who was the Accountant of the institution in question who committed financial irregularities which came to be noticed in the communication dated 6.8.2021.

27. Thus it is prays that the impugned order be set aside.

28. Countering the said submission, Sri Ashok Khare, learned Senior Counsel appearing for sixth respondent submitted that the writ petitioner is not entitled to any relief as admittedly the sixth respondent is senior to the writ petitioner. The sixth respondent owing to his medical issues had shown its inability to officiate as the Principal of the institution in question for a period of one year and in its communication dated 11.6.2018 he had specifically pointed that after a period of one year he would work as an Officiating Principal and thus according to him the said act of declining to function as an Officiating Principal was not a permanent denial to work as an Officiating Principal but for a specific reason for a limited period and once the sixth respondent became well then now he is claiming for officiation as a Principal of institution in question. He further submits that on account of inability of the sixth respondent for a particular period the writ petitioner was allowed to officiate thus he cannot resist the claim of the writ petitioner as admittedly it is the right of a senior most incumbent to officiate as the Principal of the institution in question. He seeks to rely upon the decision in the case of **Dhanesh Kumar Sharma vs. State of U.P. & others (2004) 5 AWC 4099, Special**

Appeal No.506 of 2022, Vikas Jain vs. State of U.P. & five others decided on 8.7.2022, Special Appeal No.677 of 2022, Ashok Kumar Pandey vs. State of U.P. & four others decided on 19.12.2022 and judgement in the case of Dr. Jagathy Raj V.P. vs. Dr. Rajitha Kumar S. And others (2022) 6 SCC 299.

29. Sri Ashok Khare, learned Senior Counsel has invited the attention of the court towards the communication dated 17.11.2020 of the Chief Development Officer, Ballia addressed to the Commissioner Azamgarh Region, Azamgarh, communication dated 30.7.2021 of the Joint Director of Higher Education on behalf of the Director of Higher Education to the Administrator, Mathura P.G. College, Mathura and the order dated 6.8.2021 of the Administrator, Mathura P.G. College, Rasda, District Ballia so as to contend that there were several complaints against the writ petitioner while working as an Officiating Principal with respect to financial and technical irregularities. He submits that in the wake of said allegations rightly the order impugned has been passed whereby the writ petitioner has been divested from his right to continue as an Officiating Principal giving charge to the sixth respondent who is obviously senior to the writ petitioner. According to him the said exercise has been undertaken in the interest of the institution and it is s a conscious decision.

30. Sri Saurabh, learned Standing Counsel has adopted the arguments of Sri Khare and according to him the impugned order is perfectly valid in accordance with law and no fault whatsoever can be attributed in this regard and the writ petition is liable to be dismissed.

31. I have heard learned counsel for the parties and perused the record carefully.

32. Undisputedly, the fourth respondent institution, Mathura P.G. College, Rasra, District Ballia is a Post Graduate institution affiliated with Jan Nayak Chandrashekhar University, Ballia. So far as the provisions pertaining to officiation is concerned the same is provided under Statute 12Ka.20. As per the said Statute whenever the post of Principal falls vacant then the Committee of Management of the said institution for a period of three months or till the appointment of the Regular Principal whichever is earlier can appoint an Officiating Principal, according to the choice and in case post completion of three months and non-joining of a Regular Principal the Senior Most Teacher is to be granted officiation till the joining of the regularly selected Principal. It is also not in dispute that the sixth respondent is senior to the writ petitioner.

33. The dispute came into existence when the sixth respondent showed its inability to officiate as the Principal of the institution in question on 11.6.2018 owing to medical issues by virtue of a letter containing a recital that after the period one year and post his recovery he shall be present for officiating as the Principal in institution in question. The writ petitioner who was next in the league was accorded officiation on 12.6.2018 and he assumed charge as an Officiating Principal on 14.6.2018. Thereafter on 5.7.2021 the writ petitioner claims to have approached the respondents for permitting him to officiate.

34. The bone of contention of the rival parties is as to whether the communication dated 11.6.2018 declining

to officiate as a Principal would be for all time be treated to be a refusal to officiate as a Principal or not. An additional fact also needs to be noticed at this juncture that it is the same vacancy which had arisen on 12.8.2016 consequent to the retirement of a Regular Principal, though the writ petitioner who is junior to the sixth respondent was allowed to officiate.

35. The Division Bench of this Court in the case of **Sundershan Kumar (Supra)** had the occasioned to consider the said issue and it was held as under:-

"In the present case the facts are different. The substantive vacancy had arisen on 30.6.2003 and the same vacancy is continuing. It is not a case where leave vacancy has subsequently been converted into a substantive vacancy or a fresh substantive vacancy had arisen. Therefore, respondent no.6 having refused to officiate as the Principal on the said substantive vacancy, he is not entitled to stake claim for appointment as Officiating Principal on the same very vacancy subsequently on the retirement of Officiating Principal. Therefore, the above case law is of no help to respondent no.6 and in fact it goes against him in as much there is no fresh substantive vacancy of the post of Principal.

In our opinion, respondent no.6 in unequivocal terms had refused to officiate as Principal when the substantive vacancy of the post of Principal had occurred on 30.6.2003. The said same post continued to remain vacant as no substantive appointment on the said vacancy was made. Mere fact that an ad-hoc arrangement of Officiating Principal, which was made earlier on the said post, has come to an end, it does not mean that a fresh substantive vacancy had been created or arisen. The substantive vacancy remains the same and only Officiating arrangement has come to an end. Since respondent no.6 had declined to officiate as Principal on the said very vacancy, he cannot be permitted at this stage to turn around and to claim appointment as Officiating Principal on the same very post.

The respondent no.6 having refused to accept Officiating appointment is estopped under Law from claiming officiating appointment on the same substantive vacancy. It would have been a different thing if a substantive vacancy which had occurred earlier, had been filled up by a regular appointment and then a fresh vacancy had been created. In that event, respondent no.6 may have become entitle for reconsideration for Officiating Principal on the fresh substantive vacancy.

The above view taken by us stands fortified by an unreported Division Bench Judgment of this Court in the case of Smt. Sudesh Kakkar Vs. The Regional Inspector of Girls Schools & Ors. passed in Special Appeal No.141 of 1993 decided on 7.4.1994, which has been relied upon in the case of Satya Vir Singh (supra)."

36. Though, Sri Khare, has relied upon the decision in the case of **Dhanesh Kumar Sharma (Supra)** that refusal at a point of time to officiate as a Principal would not be for time immemorial but the said judgement would not be of any help to the sixth respondent particularly when the said judgement stood impliedly overruled. In para 7 of the judgement in the case of **Ashok Kumar Jain (Supra)** it was held as under:-

"7. The substantive vacancy occurred on 30.6.1998 on the retirement of Rames Chandra Gupta and no fresh vacancy occurred upon the retirement of Girish Chandra Jain on 30.6.1997. It was the same vacancy which continued. Consequently, the vacancy which occurred on 30.6.1998 continued and continued to exist 30.6.2007. The same post continued to remain vacant and no substantive ap pointment on the said vacancy was made. The mere fact that an adhoc arrange ment of officiating Principal was made earlier on the said post which came to a end would not mean that a fresh substantive vacancy had again been creates The substantive vacancy remained the same and only an officiating arrangement had come to an end. This view was also held in the aforesaid Division Bench judgment of Sundershan Kumar (supra), which is squarely applicable to the prese facts and the circumstances of the case. The judgment cited by the learned counsel for the petitioner stands impliedly overruled in view of the decision of the Division Bench."

37. Yet in the case of **Smt. Archana Singh (Supra)** while relying upon the decision in the case of **Sundershan Kumar (Supra)** and **Ashok Kumar Jain (Supra)** in para 13 it was held as under:-

"In the present case the facts are different. The substantive vacancy had arisen on 30.6.2003 and the same vacancy is continuing. It is not a case where leave vacancy has subsequently been converted into a substantive vacancy or a fresh substantive vacancy had arisen. Therefore, respondent No. 6 having refused to officiate as the Principal on the said substantive vacancy, he is not entitled to stake claim for appointment as Officiating Principal 9 on the same very vacancy subsequently on the retirement of Officiating Principal. Therefore, the above case law is of no help to respondent No. 6 and in fact it goes against him inasmuch there is no fresh substantive vacancy of the post of Principal.

In our opinion, respondent No. 6 in unequivocal terms had refused to officiate as Principal when the substantive vacancy of the post of Principal h had occurred on 30.6.2003. The said same post continued to remain vacant as no substantive appointment on the said vacancy was made. Mere fact that an ad-hoc arrangement of Officiating Principal, which was made earlier on the said post, has come to an end, it does not mean that a fresh substantive vacancy had been created or arisen. The substantive vacancy remains the same and only Officiating arrangement has come to an end. Since respondent No. 6 had declined to officiate as Principal on the said very vacancy, he cannot be permitted at this stage to turn around and to claim appointment as Officiating Principal on the same very post.

The respondent No. 6 having refused to accept Officiating appointment is estopped under Law from claiming officiating appointment on the same substantive vacancy. It would have been a different thing if a substantive vacancy which had occurred earlier, had been filled up by a regular appointment and then a fresh vacancy had been created. In that event, respondent No. 6 may have become entitle for reconsideration for Officiating Principal on the fresh substantive vacancy.

31 The above view taken by us stands fortified by an unreported Division Bench Judgment of this Court in the case of

Smt. Sudesh Kakkarv. Regional Inspector of Girls Schools and others, passed in Special Appeal No. 141 of 1993 decided on 7.4.1994, which has been relied upon in the case of Satya Vir Singh (supra)....."

38. Further in the case of **Smt. Duleshwari Devi (Supra)** this Court in para 15, 16 and 17 observed as under:-

"15. In any case, the aforesaid judgment looses its binding force in view of the Division Bench judgment in Sundarshan Kumar (supra) wherein Division Bench has said that once the senior most teacher has declined to take over charge as officiating Principal after occurrence of a substantive vacancy, such senior most teacher cannot retract subsequently to claim charge of the office of the Principal after the same having been delivered to the next senior, who is performing the duties thereafter satisfactorily so long as the same substantive vacancy continue. Senior most teacher, who has already declined, cannot claim charge on mere change of opinion and such situation would arise only when a fresh substantive vacancy occurred and not earlier thereto.

16. The decision in Dhanesh Kumar Sharma (supra) has been referred to in a subsequent Single Jude's judgment in Ashok Kumar Jain (supra) and relying on Division bench judgment in Sundershan Kumar (supra), the Hon'ble Single Judge in Ashok Kumar Jain (supra) has clearly observed that judgment in Dhanesh Kumar Sharma (supra) stands impliedly overruled by Division Bench decision.

17. This is what has been held by another Single Judge in Archana Singh (Smt.) (supra) while relying on Division Bench judgment in Sundarshan Kumar (supra) and it says :

"if a teacher refuses to officiate as the Principal of the College then, if the same substantive vacancy continues, he cannot subsequently turn around and claim appointment as Officiating Principal."

39. Applying the above noted decisions in the facts of the present case an irresistible conclusion stands drawn that once the sixth respondent had shown its inability to officiate as a Principal and declined the claim then it is not open for her to turn around and to claim officiation particularly against the same vacancy.

40. So far as the reliance placed by Sri Khare upon the decision in the case of **Dhanesh Kumar Sharma (Supra)** is concerned the same has already held in the case of **Ashok Kumar Jain (Supra)** and **Smt. Duleshwari Devi (Supra)** to be impliedly overruled.

41. Likewise the decision in the case of **Vikas Jain (Supra)** would also not to be of any aid and assistance to the sixth respondent particularly when in the said decision the Court in para 9 had only observed that prima facie the Court was of the view that the charge of the officiating Head Master till the appointment of a Regular Head Master takes place is to be held by senior most Assistant Teacher since the final decision regarding appointment of Officiating Head Master in the institution in question was to be taken by Assistant Director of Education (Basic) Saharanpur Division, Saharanpur.

42. The decision in the case of **Ashok Kumar Pandey (Supra)** would also not apply in the present facts of the case

inasmuch as the said judgement is of a case wherein the issue before the Court was that while declining to officiate as a Principal there was a stipulation contained therein which was unqualified that the Teacher therein had specifically come up with stand that he has not in a position to accept the responsibility as a head of the institution. The said judgement nowhere deals with the issue which is being raised in the present writ petition relatable to the fact that it is the same vacancy against which the candidate declined to officiate as a Principal.

43. The decision in the case of **Dr. Jagathy Raj V.P. (Supra)** is also not applicable as it is a case of officiation being made of Head of the Department based on seniority on rotational basis for three years.

44. The judgements relied upon in the case of **Babulal Badriprasad Varma (Supra)** and **ARCE Polymers Private Ltd (Supra)** also support the case of the writ petitioner particularly when the conduct of the sixth respondent is barred by estoppel, acquiescence and waiver.

45. Similarly the judgement in the case of **N. Murgu Ganeshan (Supra)** also applies in the case particularly when after a enormous and inordinate delay the writ petitioner is raising its claim for officiation in that regard.

46. Additionally this Court may also record that the allegations which were made basis for discharging the writ petitioner while working as an Officiating Principal was the same charges which were levelled upon the writ petitioner on the basis charge sheet dated 13.8.2021. It is come on record that an Inquiry Officer was appointed which tendered its inquiry report on 25.9.2021 however nothing has been brought on record by either of the parties showing whether the said inquiry report has been given a logical end while passing any final order closing the inquiry proceedings as per law.

47. The Hon'ble Apex Court in the case of **Yoginath D. Bhagde vs. State of Maharastra, 1999 (7) SCC 739** had the occasion to consider the issue as to what would be the import and impact of the submission of the inquiry report without there being any final order and the Hon'ble Apex Court observed as under:

> "Mere submission of findings to the disciplinary authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the disciplinary authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent."

48. Viewing the case from all the angles this Court is of the firm opinion that the order dated 12.1.2023 passed by the third respondent cannot be sustained and is liable to be set aside.

49. Accordingly, the writ petition is **allowed**. The order dated 12.1.2023 passed by the third respondent fully is set aside. A mandamus is issued to the respondents to accord joining to the writ petitioner as an Officiating Principal of the institution in question.

50. Passing of this order would not preclude the Disciplinary Authority/ Competent Authority to take a final decision in accordance with the statute and

the regulations pursuant to the inquiry report dated 25.9.2021 submitted by the Inquiry Officer before the Disciplinary Authority/Competent Authority.

(2024) 1 ILRA 1235
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2023

BEFORE

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

Writ-A No. 13111 of 2023

Ashwani Bedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pranesh Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava, Sri Jitendra Sarin, Sri Kartikeya Saran, Sri Kaushalendra Nath Singh, Sri Vinayak Ranjan

Service Law - U.P. Government Servant's Conduct Rules, 1956 - Rule 3 - Salary/allowance - Withholding - Disciplinary Authority, while writing impugned order, has heavily relied upon contents of letter dated 11.09.2015 issued by Executive Engineer which reports story of petitioner's involvement in illegal shifting of electricity line, also electric poles without permission of competent authority - Contents of letter could be true but it would require production of relevant witnesses, including former Executive Engineer, who addressed letter dated 11.09.2015 to Higher Authority, accusing petitioner of illegal shifting - In absence of production of relevant witnesses, including Executive Engineer, respondents have fallen for grave error in returning finding of guilt against petitioner, based on letters and idle papers - Thus impugned order unsustainable, respondents are at liberty to proceed afresh from stage of charge-sheet. (Para 30, 31)

Writ petition allowed. (E-13)

List of Cases cited:

1. St. of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772, (Paras 27, 28)

2. Roop Singh Negi Vs Punjab National Bank & ors. (2009) 2 SCC 570, (Para 14)

3. St. of U.P. & anr. Vs Kishori Lal & anr., 2018 (9) ADJ 397 (DB)(LB), (Paras 14, 17 to 19)

4. Smt. Karuna Jaiswal Vs St. of U.P, 2018 (9) ADJ 107 (DB) (LB), (Paras 15 to 17)

5. Ashish Kumar Tiwari Vs St. of U.P. & ors. 2021 (1) ADJ 420

6. Ranveer Singh Vs U.O.I. & ors. 2021 (5) ADJ 136

7. Prem Narain Singh Vs St. of U.P. & anr., 2023 (2) ADJ 580

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

1. This writ petition is directed against the order dated 20.08.2022, passed by the Managing Director, Paschimanchal Vidyut Vitaran Nigam Limited, Meerut, punishing the petitioner with award of a censure entry and withholding one increment with cumulative effect. Also, under challenge is the charge-sheet dated 15.02.2021 and the inquiry report dated 02.03.2022, the inquiry report being one submitted by the Temporary Inquiry Committee, VI.

2. The facts giving rise to this writ petition are that the petitioner was appointed an Assistant Engineer in the service of the U.P. Power Corporation on 24.07.2014. He was posted as the Sub Divisional Officer, Electricity Sub-Station Division-II, Gulawathi under the Electricity Distribution Division-I, Bulandshahr on 08.08.2014. He is presently posted as the

Assistant Engineer (Revenue), Electricity Distribution Division-III, Bulandshahr. A letter dated 11.09.2015 was issued by the Executive Engineer, Electricity Distribution Division-I, Bulandshahr and forwarded by the Superintending Engineer, Electricity Distribution Circle-II, Bulandshahr to the Chief Engineer (Distribution) Ghaziabad Zone, Ghaziabad. It was said that there was an illegal shifting of some electricity poles carrying the 33 KV line from the 132/33 KV Sub-Station, Gulawathi to 33/11 KV Sub-Station, Gulawathi No.1, wherein the petitioner appeared to be involved. On the basis of the said allegation, the petitioner was suspended from service pending inquiry vide order dated 18.09.2015. Upon condition that the inquiry would continue, the petitioner was reinstated in service by the Chief Engineer, Ghaziabad Circle Ghaziabad vide order dated 01.10.2015. The petitioner was attached to the office of Electricity Distribution Circle-II, Bulandshahr.

3. There are then averments about the grievance made by the petitioner to release his salary and allowances for the period of suspension, as the disciplinary proceedings were continuing for a very long period of time and no charge-sheet was served for more than four years. In the meantime, the respondents stopped the petitioner's increment pending settlement of his entitlement to receive salary for the period of suspension from service. This led to a writ petition before this Court, being Writ Petition No. 825 of 2020. These are details and matters, which are not very relevant for the purpose of the present writ petition. The petitioner was served with a charge-sheet on 15.02.2021, that is to say, more than five years after the suspension order was passed against him. The charge against the petitioner, carried in the charge-sheet dated 15.02.2021, which is the solitary charge and issued by the Inquiry Committee with the approval of the Managing Director, reads:

"आरोप संख्या :-01

आपकी उपखण्ड अधिकारी, विद्युत वितरण उपखण्ड- गुलावठी अन्तर्गत विद्युत वितरण खण्ड - प्रथम, बुलन्दशहर के पद पर दिनांक 16.01.2015 से 04.03.2017 की अवधि के दौरान तत्कालीन आधिशासी अभियन्ता, विद्युत वितरण खण्ड- प्रथम, बुलन्दशहर द्वारा अधीक्षण अभियन्ता, विद्युत वितरण मण्डल - द्वितीय, बुलन्दशहर को सम्बोधित अपने कार्यालय पत्र सं0-3293 दिनांक 11.09.2015 के माध्यम से अवगत कराया गया कि दिनांक 06.09.2015 की रात्रि में उन्हें दूरभाष पर सूचना मिली कि 132/33 के0वी0 उपकेन्द्र गुलावठी से निकलने वाली 33 के०वी० विद्युत लाईन जो कि 33/11 के०वी गुलावठी नं0 01 को जाती है, की लाइन के कुछ पोल शिफ्ट कर दिये गये हैं तथा उक्त कार्य दिनांक 05.09.2015 एवं 06.09.2015 में किया गया है। इस सम्बन्ध में आपसे पूछने पर आपके द्वारा कोई स्पष्ट उत्तर नहीं दिया गया। तत्पश्चात सम्बन्धित 132 के0वी0 उपकेन्द्र पारेषण के एस0एस0ओ0 से पूछने पर बताया गया कि उन्होने यह कार्य उपखण्ड अधिकारी श्री अश्वनी वेदी की देख-रेख में तथा रेस्टिंग पीरियड में दूरभाष के माध्यम से पारेषण से अनाधिकृत शटडाउन लेकर कराया गया है। इस प्रकार आपके द्वारा विभागीय नियमों के विपरीत प्लॉट मालिक से मिलीभगत करके यह कार्य बिना सक्षम स्तर से स्वीकृति प्राप्त किये कराया गया है।

इस प्रकार आपको अपने दायित्यों के प्रति शिथिलता एवं लापरवाही बरतने, शिथिल कार्यप्रणाली का परिचय देने, वस्तुस्थिति से

अपने उच्चाधिकारियों को अवगत न कराने, तथा उ0प्र0 सरकारी कर्मचारी आचरण नियमावली 1956 की धारा-3 का उल्लंघन करने हेतु आरोपित किया जाता है।"

4. In support of the charge, the following documents were relied upon to prove it:

"उपरोक्त आरोप के समर्थन में निम्नलिखित साक्ष्य प्रस्तावित है:-

1. अधिशासी अभियन्ता, विद्युत वितरण खण्ड- प्रथम, बुलन्दशहर के पत्र सं0-3293 /वि०वि० ख०प्र० / बु०/ दिनांक 11.09.2015 की छायाप्रति ।

2. अधीक्षण अभियन्ता, विद्युत वितरण मण्डल - द्वितीय, बुलन्दशहर के पत्र सं0-8232 / वि० वि० द्व ० / बु०/ दिनांक 19.09.2015 की छायाप्रति ।

3. कर्मचारी आचरण नियमावली 1956 प्रकाशित अभिलेख के नियम 3 का संगत अंश । कमांक 01 एवं 02 पर अंकित साक्ष्य संलग्न किये जा रहे है तथा कमांक 03 पर अंकित साक्ष्य प्रकाशित अभिलेख है, जिसे आप अपने स्तर से प्राप्त करें।"

5. It must be remarked here that the relevant part of Rule 3 of the U.P. Government Servant's Conduct Rules, 1956, cited as a document, is by no means a document. To refer to the provision of a service rule as a document, ex facie betrays lack of understanding of the law by Members of the Inquiry Committee as well as the Managing Director, who issued, and approved the charge-sheet, respectively, about something as elementary as what constitutes a document or documentary evidence and what is, in fact, nothing more than the law, under which the employee was charged. Though, failure by men not trained in law, to understand the distinction between what is law and what is documentary evidence in a case, particularly, when it is a matter of a reference alone in the charge-sheet, may not be very material but it betrays that lack of understanding of something very essential, which could ultimately bear upon the soundness of judgment of the Inquiry Tribunal as well as the Disciplinary Authority. This Court expects that in future a provision in a Service Rule shall never be referred to in a charge-sheet as a document by the respondent Corporation.

6. It is the petitioner's case that he was not provided with a copy of the letters dated 11.09.2015 and 19.09.2015, the two documents annexed to the charge-sheet though shown as annexures there. The petitioner, therefore, addressed a memo dated 18.03.2021 to the respondents as well as the Inquiry Committee asking to be provided with copies of these letters. The memo dated 18.03.2021, addressed to the Superintendent Engineer, Electricity Distribution Division-I and II, Bulandshahr, with a copy to the convener of the Inquiry Committee, and the Chief Engineer concerned was sent by registered post, receipts whereof are placed at page no. 53 of the paper book. The petitioner says that these documents were not supplied. With time running out, the petitioner submitted a reply to the charge-sheet, denying the charge and saying that it was based on no evidence besides conjecture. The circumstances appearing in favour of the petitioner are also indicated.

7. It is averred in paragraph no. 16 of the writ petition that though the petitioner was personally heard by the Inquiry

Committee on 02.03.2022, through video conferencing, but, no witness was examined on behalf of the establishment in support of the charge. In short, no oral evidence was led by the employers/establishment to prove the charge against the petitioner. The Inquiry Committee submitted a report dated 02.03.2022, holding the solitary charge proved. On the basis of the said inquiry report, the petitioner was issued with a show cause notice dated 06.04.2022 by the Managing Director, Paschimanchal Vidyut Vitran Nigam Limited, Meerut, the Disciplinary Authority. The petitioner submitted a reply in response to the show cause notice on 26.04.2022 to the Managing Director. The Managing Director then proceeded to pass the order impugned dated 20.08.2022, punishing the petitioner with a censure entry and withholding of one increment with cumulative effect.

8. Aggrieved by the said order, this writ petition has been instituted.

9. It is averred in paragraph nos. 16, 25 and 28 of the writ petition that the Inquiry Committee, while holding the inquiry, did not have any witness or oral evidence produced before it by the establishment in support of the charge. There was, thus, no occasion for the petitioner to cross-examine any witness. The short counter-affidavit that has been filed in answer to this writ petition, clearly avers in paragraph no. 7 to the following effect:

> "That no witnesses were examined by the department in respect of Charge-sheet dated 15.02.2021, as there was only documentary evidence against the Petitiner and the same were supplied to Petitioner along-with charge-sheet."

10. Heard Mr. Pranesh Kumar Mishra, learned Counsel for the petitioner and Mr. Vinayak Ranjan, Advocate, holding brief of Mr. Kartikeya Saran, learned Counsel for respondent no.3. The record has been perused.

11. A statement was made on behalf of respondent nos. 1, 2, 4 and 5 that they do not wish to file a return because essentially the issue arises between the petitioner and respondent no.3.

12. Upon a perusal of the aforesaid averments in the writ petition and the respondent's admission in paragraph No. 7 of the short counter affidavit, it is evident that the Inquiry Committee proceeded to record a finding of guilt, glossing through papers alone, without the establishment/employers producing any witness to prove the solitary charge, on the basis of which, the impugned order has been passed by the Managing Director.

13. A perusal of the inquiry report shows that in the first part of the report, there is a description of the origin and course of proceedings against the petitioner. In the second part, the solitary charge, numbered as Charge No. 1, has been set forth. In the third part, the petitioner's reply to the charge-sheet has been set out. In the fourth part, there is a brief discussion to hold the charge proved. The findings recorded read:

> "विवेचना :-
>
> आरोपी अधिकारी के प्रतिउत्तर, व्यक्तिगत सुनवाई एवं पत्रावली में उपलब्ध प्रारंभिक जाँच इत्यादी अभिलेखों की विवेचना एवं परिक्षोणोपरान्त यह पाया गया है कि दिनांक 06.09.2015 को तत्कालीन अधिशासी अभियन्ता

विद्युत वितरण खण्ड- प्रथम, बुलन्दशहर को उनके दूरभाष पर सूचना मिली कि 33 के०वी० लाईन गुलाबी-1 के कुछ पौल शिफ्ट कर दिये गये है इस सम्बन्ध में तत्कालीन अधिशासी अभियन्ता (वितरण) द्वारा श्री अश्वनी वेदी उपखण्ड अधिकारी से पूछने पर श्री अश्वनी वेदी द्वारा कोई स्पष्ट उत्तर नहीं दिया गया व अवर अभियन्ता श्री दीपक दुबे से जब पूछा गया तो उन्होन उपरोक्त अवधि में छुट्टी पर होने के सम्बन्ध में सूचित किया तथा थोड़ी देर बाद फोन पर बताया की उन्होंने लाईन मैन से पूछा तो पता लगा है कि लाईन शिफ्ट की गई है उन्होंने यह भी बताया की 132 के०वी० उपकेन्द्र पारेषण के एस०एस०ओ० से पूछने पर उन्होंने कार्य उपखण्ड अधिकारी श्री अश्वनी वेदी की देखरेख ने तथा रोस्टिंग पिरयड में दूरभाष के माध्यम से पारेषण से अनाधिकृत शटडाउन लेकर गलत नीयत से कराया गया है। उक्त के सम्बन्ध में विद्युत वितरण खण्ड-द्वितीय बुलन्दशहर द्वारा अपने पत्रांक 3293 दिनांक 11.09.2015 (पृष्ठ स० 13) के माध्यम से अधीक्षण अभियन्ता, वि०वि०ग०- द्वितीय बुलन्दशहर को पूर्ण घटना क्रम से अवगत कराते हुए श्री अश्वनी वेदी के विरूद्ध कठोर कार्यवाही की संस्तुति की गयी। अधीक्षण अभियन्ता विद्युत वितरण मण्डल - द्वितीय बुलन्दशहर द्वारा अपने पत्रांक 8232 दिनांक 16.09.2015 (पृष्ठ सं0 12) द्वारा मुख्य अभियन्ता गाजियाबाद क्षेत्र गाजियाबाद को पत्र के माध्यम से श्री अश्वनी वेदी के विरूद्ध कठोर कार्यवाही के साथ जाँच की भी संस्तुति की गयी।

उपरोक्त अधिशासी अभियन्ता विद्युत वितरण खण्ड प्रथम बुलन्दशहर एवं अधीक्षण अभियन्ता विद्युत वितरण मण्डल द्वितीय बुलन्दशहर की संस्तुति के आधार पर मुख्य अभियन्ता गाजियाबाद क्षेत्र गाजियाबाद द्वारा श्री अश्वनी वेदी को कार्यालय ज्ञाप सं0 7586 दिनांक 18.09.2015 (पृष्ठ सं0 58) को निलम्बित कर दिया गया था। 33 के०वी० विद्युत लाईन के पोल शिफ्ट होने की तत्कालीन अधिशासी अभियन्ता व अधीक्षण अभियन्ता द्वारा भी पुष्टि की गयी है। अतः आरोपी पर आरोप सिद्ध होता है।"

14. It is by now well settled as a salutary principle, governing departmental inquiries, where the findings are likely to lead to the imposition of a major penalty, that it is the duty of the establishment or the employer to examine witnesses before the Inquiry Committee or the Inquiry Officer, producing them along with documentary evidence. The Inquiry Committee or the Inquiry Officer, though officers or personnel of the establishment, must act as impartial arbiters and the charge must be established before them by the establishment through a Presenting Officer, leading evidence both oral and documentary. In case of a major penalty, it is imperative that the charge be proved by examining witnesses, and not merely relying on documents that are no more than idle papers unless proved by the oral testimony of witnesses. This has certainly not been done. How vital it was in this case would be evident from a perusal of the findings recorded by the Inquiry Committee.

15. The Inquiry Committee has sustained the charge about the illegal shifting of the 33 KV electricity line, which involved shifting of some electric poles by the petitioner also, said to be without permission of the Competent Authority, relying on a statement by the Executive Engineer recorded during the preliminary inquiry, based on information gathered by the Executive Engineer, Electricity Distribution Division-I, Bulandshahr over telephone from different persons. The statement of the Executive Engineer says

that he learnt over telephone that some poles of the 33 KV line, under Gulawathi-1 have been shifted. In his statement recorded at the preliminary inquiry, it is mentioned that, in this connection, the former Executive Engineer, Electricity Distribution said that upon enquiry from Ashwani Bedi, the Sub-Station Officer, no clear answer was given. But, upon enquiry from Deepak Dubey, Junior Engineer, he said that, during the period in question, Deepak Dubey was on leave, but later on informed the Executive Engineer over telephone that, upon enquiry from the lineman, he came to know that the electricity line had been shifted. The Junior Engineer also informed that upon enquiry from the Sub-Station Officer of the 132 KV Sub-Station, he said that he had got this work done under the supervision of Aswani Bedi, Sub Divisional Officer, after effecting rostering of electricity bringing about an unauthorised shutdown with an ill-intention. It is then noted by the Inquiry Committee that the Electricity Distribution Division-II, Bulandshahr by a letter No. 3293 dated 11.09.2015, informed the Superintending Engineer, Electricity Distribution Division-II of the entire episode recommending strict action against the petitioner. The Inquiry Committee has then noticed a letter by the Superintending Engineer, Electricity Distribution Division-II, Bulandshahr, bearing No. 8232 dated 16.09.2015, addressed to the Chief Engineer, Ghaziabad Zone, Ghaziabad, recommending strict action against the petitioner and an inquiry. This is all for a finding that the Inquiry Committee have recorded in substance.

16. It is true that in a departmental enquiry, the Evidence Act does not apply but, the Evidence Act, after all, is a very systematic enunciation of the adjective law of evidence, applicable to trials before a Court of law. A domestic Tribunal need not worry about what the law of evidence says. Nevertheless, salutary procedures, governing consideration of relevant evidence and some salutary Rules about proof of facts, have to be observed in order to ensure that a delinquent in a domestic inquiry, who would be visited with adverse civil consequences, is not punished by the ignorance of a lay Inquiry Tribunal.

17. If one were to read the findings of the Inquiry Committee, which have been extracted verbatim in Hindi, and then also rendered almost for the whole of it in English, it would show that the Inquiry Committee have based their findings on three communications – two telephonic calls and a letter. The first telephonic call is the one dated 06.09.2019 received by the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr on his telephone, giving him information that the 33 KV line, Gulawathi-I has had a shifting of its electric poles. The former Executive Engineer inquired about the fact from Ashwani Bedi, Sub-Divisional Officer (petitioner), but did not receive a clear answer. The former Executive Engineer then inquired about the fact of Deepak Dubey, a Junior Engineer. Dubey said in the first instance that during the relevant period of time, he was on leave. But, a little later, he called over telephone to tell the former Executive Engineer that he (Dube, J.E.) had inquired of the lineman about the fact and come to know that the electric line had been shifted. Dubey also informed the Executive Engineer that the Sub-Station Officer, 132 KV Sub-Station, upon being asked about the fact, had revealed that he had done this work (shifting the electric line) under the supervision of Ashwani Bedi and carried it out during the rostering

period, which was managed on telephone by an unauthorised shutdown got done with an ill-intention. The said fact was also communicated by the Electricity Distribution Division-II, Bulandshahr through their Letter No.3293 dated 11.09.2015 to the Superintending Engineer, Electricity Distribution Division-II, Bulandshahr, setting forth the entire calendar of events and recommending strong action to be taken against the petitioner. This is, more or less, the evidence on which the Inquiry Committee have founded their conclusions. Amongst the three items of evidence considered, of the two telephonic communications, one is without the mention of its date. It is the one between the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr and the Junior Engineer, Deepak Dubey. The other communication dated 06.09.2015, which triggered action against the petitioner, speaks about an information received by the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr over his telephone from a caller, whose identity has not been specified at all. The third and the only documentary evidence is the letter dated 11.09.2015 from the Electricity Distribution Division-II, Bulandshahr to the Superintending Engineer, Electricity Distribution Division-II, Bulandshahr, which is said to carry the entire sequence of events leading to the unauthorised shifting of electricity line, including electric poles, by the petitioner.

18. A perusal of the charge-sheet would show that the only document relied upon to sustain the charge is the letter dated 11.09.2015 from the Executive Engineer, Electricity Distribution Division-I, Bulandshahr, addressed to whom is not mentioned there. The other is a letter dated 19.09.2015 from the Superintending Engineer, Electricity Distribution Division-II, Bulandshahr, with the addressee not being mentioned in the charge-sheet. There appears to be some inaccuracy about the authors of the letter dated 11.09.2015, in as much as, the reference number of the letter dated 11.09.2015 in the charge-sheet and the inquiry report are identical, that is to say, 3293. The date and the reference number tally in the charge-sheet and the findings in the inquiry report. What does not tally is that, in the charge-sheet, the author of the letter bearing number 3293 dated 11.09.2015, is shown as the Executive Engineer, Electricity Distribution Division-I Bulandshahr, whereas, in the findings recorded in the inquiry report, the author of the said letter with the same reference number and date is shown to be the Electricity Distribution Division,-II Bulandshahr, without mentioning even an official human for the author. These small inaccuracies have been pointed out not to pick holes in the findings of the Inquiry Committee but to notice the demonstrably casual nature of the Inquiry Committee's approach in recording their findings. Substantially, this Court notices that the Inquiry Committee have relied upon a telephonic communication dated 06.09.2015 received by the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr from some unknown quarter and then the telephonic communication between the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr and Deepak Dubey, Junior Engineer, of which the date does not find mention.

19. Now, a perusal of the findings, based on the phone call dated 06.09.2015 received by the former Executive Engineer, Electricity Distribution Division-I,

Bulandshahr through an unknown caller and the other phone call that the said Executive Engineer received from Deepak Dubey, Junior Engineer with no date of the call mentioned, have been relied by the Inquiry Committee as gospel truth and proof of all that is said in the two phone calls. The mention of these phone calls and the contents of the conversation have been taken note of by the Inquiry Officer on a perusal of some preliminary inquiry report, where all these facts are recorded. The former Executive Engineer, Electricity Distribution Division-I, Bulandshahr was never called as a witness before the Inquiry Committee in support of the charge to testify to all that he had heard during the telephonic conversation on 06.09.2015, and the later one of some unknown date with Deepak Dubey. Deepak Dubey too was not called as a witness, nor was the lineman, on whose information, Deepak Dubey relied to inform the Executive Engineer about the fact of the line and the electric poles being shifted.

20. The Sub-Station Officer, 132 KV Sub-Station, from whom Dubey gathered the further facts that the shifting of the electric line and poles was done under the supervision of the petitioner after managing a rostering period through a shutdown of electric supply, done maliciously, was also not produced as a witness at the inquiry. These facts have been gathered from whatever the former Executive Engineer said during the preliminary inquiry about the telephonic conversation, the information that he received through some unknown caller, on 06.09.2015 and then again on some unspecified date from Deepak Dubey, the Junior Engineer. In the preliminary inquiry report too, the former Executive Engineer has given facts based on hearsay of remote origin.

21. The findings of the Inquiry Committee are, therefore, based on utter hearsay, recorded in a preliminary inquiry report, based on phone calls. There is a letter dated 11.09.2015 from the Electricity Distribution Division-II, addressed to the Superintending Engineer, Electricity Distribution Division-II, Bulandshahr, said to be apprising him of the entire sequence of events, but in the absence of identification of its author, can hardly be of any worth. The said letter too, by whomsoever written, seems to have depended upon the telephonic conversation that the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr had with Dubey, and reported during the preliminary inquiry.

22. This Court must say, therefore, that even if these are facts that the respondents had collected through inquiries made by the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr, all this had to be proved before the Inquiry Tribunal by examining witnesses, who are said to have told the Executive Engineer that the shifting of the electricity line and poles took place unauthorisedly, under the petitioner's supervision. A finding of this kind cannot be based on reports of telephonic conversation recorded during a preliminary inquiry, referring to hearsay from men, who have never made it before the Inquiry Committee to depose in favour of the charge, or whatever they are reported to have said. The findings of the Inquiry Committee are based on the statement of a man, the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr, recorded during the preliminary inquiry, who heard about the fact, subject matter of the charge from Deepak Dubey, Junior Engineer, who, in

turn, came to know of it from a Sub-Station Officer. Interestingly, the name of the Sub-Station Officer is not mentioned across the entire length and breadth of the Inquiry Committee's report. The statement of the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr recorded during the preliminary inquiry, upon which the Inquiry Committee have placed reliance to sustain the charge, is hearsay and irrelevant evidence, on which nothing can turn.

23. Before proceeding further in the matter, this Court must remark that the respondent Corporation are a big establishment, whom this Court believes would have a Law Department of their own. Even if the best legal brain would not go to the respondents and join their Law Department, a legally trained mind would, at least suggest laymen heading the inquiry, or the Managing Director, who is the Disciplinary Authority, also a layman, in contra-distinction to a legally trained mind, the essence of the hearsay rule and avoid acting on hearsay. It seems that the Inquiry Tribunal and the Managing Director have fallen into this error of acting on remote hearsay because they seem to think like many other educated men in fields, other than the law, that law is pure common-sense. This is an utter misconception, which must not be harboured by anyone and whenever confronted with duties that affect rights of citizens necessarily calling for legal training, those charged with that responsibility and not trained in the discipline must not hesitate to seek appropriate advice.

24. This Court has no hesitation to say that the kind of evidence, on which the Inquiry Committee have acted to hold the charge proved, is absolutely irrelevant and far from competent to bring it home. A grave miscarriage of justice has been committed by the Inquiry Committee in holding the petitioner guilty of the charge, acting on a statement of the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr, recorded during the preliminary inquiry, reporting facts based on remote hearsay, that have no relevance to prove the charge. That what ought to have been done in a situation is something, which, in any case, is the inevitable course to follow in any domestic inquiry, where charges are serious enough, if proved, to lead to the imposition of a major penalty. The requirement is that, in a case involving the imposition of a major penalty, as already said, the establishment must examine witnesses in support of the charge through a Presenting Officer before their own Inquiry Officer or Inquiry Committee, who should, in that role, act as impartial arbiters; not Officers of the establishment.

25. This issue engaged the attention of their Lordships of the Supreme Court in **State of U.P. and others vs. Saroj Kumar Sinha, (2010) 2 SCC 772**, where it has been held:

"27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he

would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents."

26. Regarding the issue in hand, the Supreme Court in **Roop Singh Negi vs. Punjab National Bank and others, (2009) 2 SCC 570,** observed:

"14.Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

27. A Division Bench of this Court in **State of U.P. and another vs. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB)** had occasion to consider the issue about the procedure by which an inquiry is to be held in matters involving the imposition of a major penalty and observed:

"14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541.

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17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold and ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In any case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. <u>In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also."</u>

(Emphasis by Court)

28. The issue again came up before a Division Bench of this Court in **Smt. Karuna Jaiswal vs. State of U.P, 2018 (9) ADJ 107 (DB) (LB),** where it was held:

"15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry

Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

29. I also had occasion to consider this issue in **Ashish Kumar Tiwari vs. State of U.P. and others, 2021 (1) ADJ 420** as well as **Ranveer Singh vs. Union of India and others, 2021 (5) ADJ 136,** besides **Prem Narain Singh vs. State of U.P. and another, 2023 (2) ADJ 580.** The principle, culled out in those decisions, is also to the same effect that in domestic inquiries, involving the likelihood of imposition of a major penalty, it is imperative for the establishment/employer to produce witnesses/ oral evidence in support of the charge, which must be proved in the first instance by the establishment. It is then that the burden shifts to the employee, if he so desires, to lead evidence in rebuttal. Nothing of the kind has been done in this case. There has been no Presenting Officer, no witness, no document produced properly in evidence and proved where the petitioner could cross-examine the witness and then produce, if required, evidence in defence. The Inquiry Committee seem to have held an oral hearing for the petitioner of the viva-voce kind, putting questions to him like interogators, gleaned through the papers produced by the establishment proved by nobody and acted on the contents that were nothing more than dead letters.

30. The Disciplinary Authority, while writing the impugned order, has heavily relied upon the contents of the letter dated 11.09.2015 issued by the Executive Engineer, Electricity Distribution Division-I, Bulandshahr, which reports a story of the petitioner's involvement in the illegal shifting of the electricity line. The contents of the letter could be true but it would require, as said more than once hereinbefore, the production of relevant witnesses, including the former Executive Engineer, Electricity Distribution Division-I, Bulandshahr, who addressed the letter dated 11.09.2015 to the Higher Authority, accusing the petitioner of illegal shifting. In the absence of production of relevant witnesses, including the Executive Engineer, the respondents have fallen for a grave error in returning a finding of guilt against the petitioner, based on letters and idle papers.

31. This Court is, therefore, of opinion that the impugned order cannot be sustained and the respondents should be left free, if they so elect, to proceed afresh against the petitioner from the stage of the charge-sheet.

32. In the result, this writ petition **succeeds** and is **allowed**. The impugned order dated 20.8.2022 passed by the Managing Director, Pashcimanchal Vidyut Vitran Nigam Limited, Meerut, is hereby **quashed**. A *certiorari* is further issued, quashing the inquiry report dated 02.03.2022, submitted by the Temporary Inquiry Committee, 6th, Paschimanchal Vidyut Vitran Nigam Limited, Meerut. It will be open to the respondents, if they so elect, to proceed afresh against the petitioner from the stage of the charge-sheet, strictly in accordance with law, and bearing in mind the guidance in this

judgment. If the respondents choose to proceed afresh, they will conclude the inquiry expeditiously, wherein the petitioner shall cooperate.

33. The petitioner shall receive current emoluments, unaffected by the impugned order, since quashed, but arrears shall abide by the result of further orders that may be made, if proceedings are taken afresh against the petitioner; else, arrears, if any, shall become payable immediately.

34. There shall be no order as to cost.

(2024) 1 ILRA 1247
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2023

BEFORE

THE HON'BLE VIKAS BUDHWAR, J.

Writ-A No.16436 of 2023

Raj Singh ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Namit Srivastava, Sri Sarthak Verma

Counsel for the Respondents:
A.S.G.I., Sri Ajal Krishna, Ms. Pooja Agarwal, Sri Satendra Kumar Upadhyay

A. Service law – Selection – Post of Assistant Registrar – Shortlisting of candidates – Permissibility – 1793 candidates applied for four posts – Tool of shortlisting by fixing a criteria of first division (or 60% or higher) was resorted to to limit the number of candidates – Permissibility – Principle of not changing the games of selection in mid-way – Applicability – Held, interpretation that it is not permissible for the respondents to have changed the rules of the game once the game has commenced is preposterous as the said principle is not applicable in the cases of shortlisting. Nonetheless, nothing has been brought on record to substantiate that even otherwise the criteria adopted for shortlisting is arbitrary or illegal or not backed by any provision. (Para 17 and 22)

Writ petition dismissed. (E-1)

List of cases cited:

1. St. of Kerala Vs K.S. Govindan Nair; 2022 (0) Supreme (Ker) 387

2. Appeal (Civil) No. 1313 of 2008; K. Manjusree Vs St. of A.P. decided on 15.02.2008

3. B. Ramakichenin Vs U.O.I.; (2008) 1 SCC 362

4. Madhya Pradesh Public Service Commission Vs Navnit Kumar Potdar & ors.; (1994) 6 SCC 293

5. Banaras Hindu University Vs Dr. Alok Kumar; 2023 (2) ADJ 353

6. U.O.I.& ors. Vs T. Sundararaman & ors.; 1997 (4) SCC 664

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri Namit Srivastava, learned counsel for the writ petitioner, notice on behalf of the first respondent has been accepted by the Office of learned ASGI, Sri Ajal Krishna, learned counsel who appears for respondent No. 2 and Ms. Pooja Agarwal, learned counsel who appears for respondents No. 3, 4 and 5.

2. Since affidavits have been exchanged between the parties and the rival parties do not propose to file any further affidavit, thus, with the consent of the parties, the writ petition is being decided at the fresh stage.

3. The case of the writ petitioner is that the third respondent, Director, Indian Institute of Technology, Banaras Hindu University (hereinafter referred to as the respondent institute) got published an advertisement No. 2 of 2022-23 inviting online applications for non-faculty post in Administrative/Ministerial/Works Department/Technical Sector in the Indian Institute of Technology, Banaras Hindu University including the post of Assistant Registrar. As per same the opening date for submission of online application was 04.02.2023 and the last date of submission of online application was 28.02.2023 till 5:00 P.M. The writ petitioner claims to have applied for the post of Assistant Registrar break up whereof was 1 OBC, 1 ST, 2 Un-reserved Level 10 and the upper age limit as on the last date of submission of online application was 45 years. The essential qualification for the said post was Masters Degree with at least 55% of the marks or its equivalent Grade 'B' in the UGC seven point scale along with a good academic record. Relaxation of 5% marks (from 55% to 50%) would be provided at Masters Level in the case of SC/ST/PD candidates. So far as desirable qualifications are concerned degree in Management or LL.B, knowledge of Computer, knowledge of GOI rules, familiarity with working in technical/educational institutions of higher education was provided containing a note that the selection process may consist of written test, group discussion and interview.

4. Under the general instructions to the candidates clause 4 provided as under:-

"*4. Mere eligibility will not entitle any candidate for being called for interview/appear in the selection process. More stringent criteria may be applied for short-listing the candidates at any stage of the selection process. Applicants having higher qualification and merit may be given preference.*"

5. The writ petitioner claims to have applied for the said post and the application form has been appended as Annexure 2 at page 24 relevant extract at page 25 dated 24.02.2023 reference whereof has been given in para 5. According to the writ petitioner, he possessed the necessary qualification of 10th ICSE, CMS with 77.50 marks, 12th ISE. CMS, Lucknow with 69.80 marks, Graduation from Lucknow University from the subject Eco-Social Work AIH 2006 with 50.60 marks and Post-Graduation JIIT University JBS subject, MBA in the year 2009 with 83 marks. The writ petitioner alleges that on 28.04.2023 a communication has been issued under the caption "notice" wherein a list of applicants not eligible for the post of Assistant Registrar was published in which the name of the writ petitioner has been mentioned at serial No. 582.

6. The writ petitioner being shocked and surprised to gather knowledge that he has been not found to be eligible preferred an E Mail dated 01.05.2023 which was responded by the University on 17.05.2023 that, during the course of short listing he was not found to be eligible for the post of Assistant Registrar.

7. Questioning the said communication dated 28.04.2023 and 17.05.2023 the writ petitioner has filed the present writ petition.

8. This Court entertained the writ petition on 05.10.2023 while passing the following orders.-

"The argument of the learned counsel for the writ petitioner is that pursuant to an advertisement published by the respondent-University under the caption "Indian Institute of Technology, Banaras Hindu University, Advertisement No.02/2022-23". Amongst other posts, the post of Assistant Registrar was also advertised, which comprised of one post of OBC, one Scheduled Caste and Two Un-reserved and as per the essential qualifications it was provided that the incumbent should have Master's Degree with at least 55% of marks or its equivalent grade of B in the UGC seven-point scale, along with a good academic record providing for relaxation for SC/ST and desirable qualification was also mentioned.

According to the writ petitioner, he applied in pursuance of the said advertisement and he possesses the Graduation as well as Post-Graduation Degree. However, he was ousted, as his name did not find place in the list of applicants eligible for being put to selection.

According to the learned counsel for the writ petitioner, the writ petitioner obtained 50.60% marks in Graduation, so he has been found to be ineligible for the post of Assistant Registrar.

Learned counsel for the writ petitioner relies upon the judgment in the case of State of U.P. Vs. Karunesh Kumar, Civil Appeal No.8822-8823/2022 decided on 12.12.2022, so as to contend that the rules of the game cannot be changed, when the selection process commences.

Learned counsel for the petitioner has also placed reliance upon the supplementary affidavit filed today whereby such type of stand, at no point of time, was put to service to IIT, New Delhi.

Ms. Pooja Agarwal, who appears for the respondent-University has submitted that there was clear stipulation in the advertisement itself under the General Instructions to the Candidate, point no.4, according to which mere eligibility will not entitle any candidate for being called for interview/ appear in the selection process, as stringent criteria may be applied for short-listing the candidates at any stage of the selection process. She further submits that for the said posts, 1793 applications were filed and 652 were found to be eligible being put to selection, thus she submits that short-listing is a device, which in Service Jurisprudence is adopted or the purposes of limiting the candidates, who appear in the selection in that regard.

Since a writ of certiorari is being sought, let Ms. Pooja Agarwal who appears for the University file an affidavit by 10.10.2023.

Rejoinder, if any, may be filed by 11.10.2023.

Put up this case as fresh on 12.10.2023.

Supplementary affidavit filed today is taken on record.

Sri Ajal Krishna has appeared for the Respondent no.2."

9. A short counter affidavit has been filed on behalf of respondents No. 3, 4 and 5 sworn by the Assistant Registrar NFRC IIT B.H.U., Varanasi dated 10.10.2023 followed by a supplementary counter affidavit filed on behalf of second

respondent of the Assistant Director, Northern Region AICTE dated 30.10.2023, the writ petitioner has filed a supplementary affidavit dated 18.09.2023 and a rejoinder affidavit to the counter affidavit filed on behalf of third, fourth and fifth respondents.

10. As already noticed, the counsels for the rival parties did not propose to file any further response, thus, the writ petition is being decided at the fresh stage.

11. Sri Namit Srivastava, learned counsel for the writ petitioner while assailing the communications impugned in the writ petition has sought to argue that once as per the eligibility prescribed in the advertisement in question for the post of Assistant Registrar the writ petitioner fulfilled the same then there was no occasion for the respondents to have short listed the name of the writ petitioner so as to exclude him to participate in the selection. He submits that the only basis which has been taken for non-suiting the claim of the writ petitioner is the fact that huge number of candidates had applied for the said post, thus, in order to limit the candidates to appear in the selections the first division (or 60% or higher) in High School, Intermediate, Under Graduate and Post-graduate was taken as a tool. He submits that the games of the selections could not have been changed in the mid-way particularly when the selection process stood commenced after publication of the advertisement and, thus, according to him, the entire exercise is per se illegal arbitrary and cannot be sustained in the eyes of law. He seeks to rely upon the judgment of Kerala High Court in the case of ***State of Kerala Vs. K.S. Govindan Nair reported in 2022 (0) Supreme (Ker) 387*** as well as the judgment in the case of ***K. Manjusree Vs. State of A.P. in Appeal (Civil) 1313 of 2008 decided on 15 February, 2008.***

12. Countering the said submission, Ms. Pooja Agarwal, learned counsel who appears for the respondent-University has sought to contend against 4 vacancies which were being advertised comprising 1 OBC, 1 ST and 2 un-reserved as many as 1793 applications were received and after witnessing the said position in order to short list the candidates the respondents applied the criteria of making those applicants eligible who were having first division (or 60% or higher) in High Schools, Intermediate, Under-graduate and Post-graduate and after applying the said criteria also 652 candidates were short listed.

13. The submission of Ms. Pooja Agarwal, learned counsel who appears for the University is that there happens to be a specific clause contained in the general instructions to the candidates in the advertisement in question that, mere eligibility will not entitle any candidate for being called for interview/appear in the selection process as mere stringent criteria may be applied for short listing the candidates at any stage of selection process and applicants having higher qualifications and merits may be given preference. She seeks to rely upon the decision in the case o***f B. Ramakichenin Vs. Union of India (2008) 1 SCC 362*** so as to contend that short listing can even be resorted if there is no rule to the said effect or there is no mention in the advertisement as short listing is a criteria which is widely recognized in service jurisprudence which is used as a tool to limit the number of candidates once there are huge number of candidates against lesser post. She has also placed reliance upon the decision in the

case of ***Madhya Pradesh Public Service Commission Vs. Navnit Kumar Potdar and others*** reported in (1994) 6 SCC 293 as well as the decision in the case of ***Banaras Hindu University Vs. Dr. Alok Kumar reported in 2023 (2) ADJ 353.***

14. Sri Ajal Krishna who appears for the AICTE, second respondent has adopted the argument of Ms. Pooja Agarwal.

15. I have heard the learned counsel for the parties and perused the record carefully.

16. Undisputedly, an advertisement was published by the respondents-Institute, advertisement No. 2 of 2022-23 for various posts including the post of Assistant Registrar which are four in number 1 OBC, 1 ST and 2 un-reserved. Though the advertisement prescribed the essential and desirable qualifications on the post of Assistant Registrar but clause IV of the general instructions to the candidates of the advertisement itself provided in clear terms that mere eligibility will not entitle a candidate for being called for interview/appear in the selection process and mere stringent criteria may be applied for short listing the candidates at any stage of selection process and applicants having higher qualification and merit may be given preference.

17. Here, in the present case as apparent from the counter affidavit filed on behalf of respondent-institute it is apparent that against the 4 posts of Assistant Registrar as many as 1793 applications were received and in order to limit the number of candidates the tool of short listing was resorted to while fixing a criteria that the applicants having first division (or 60% or higher) in High School, Intermediate, Under-graduate and Post-graduate will be short listed. The counter affidavit of the respondent-institute further reveals that based on the said criteria 652 candidates were short listed.

18. Notably, clause IV to the general instructions to the candidates has not been put to challenge in the present writ petition which is a source of power for resorting to short listing and the terms and conditions and the modalities according to which short listing is to be done. The Hon'ble Apex Court in the case of Madhya Pradesh Public Service Commission (supra) had the occasion to consider the issue of short listing wherein it was specifically propounded that short listing can be resorted to even if there is no rule to the said effect for limiting the number of candidates.

19. In the case of ***B. Ramakichenin*** (supra) the Hon'ble Apex Court in paras 15, 16, 18 and 19 had observed as under.-

"15. It it well settled that the method of shortlisting can be validly adopted by the selection body vide M.P. Public Service Commission Vs. Navnit Kumar Potdar (vide paras 6, 8, 9 and 13) and Govt. of A.P. Vs. P. Dilip Kumar.

16. Even if there is no rule providing for shortlisting nor any mention of it in the advertisement calling for applications for the post, the selection body can resort to a shortlisting procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them. For example, if for one or two posts there are more than 1000 applications received from eligible candidates, it may not be possible to interview all of them. In this

situation, the procedure of shortlisting can be resorted to by the selection body, even though there is no mention of shortlisting in the rules or in the advertisement.

18. In the present case, no doubt, UPSC had resorted to an objective and rational criteria that only those who have two years' experience after getting M.Sc degree will not be considered, while those who have got such experience but only before getting M.Sc degree will not be called for the interview. Ordinarily we would not have taken exception to this procedure since it is based on an objective criteria, and ordinarily this Court does not interfere with administrative decisions vide Tata Cellular V. Union of India. As observed in the said decision, the modern approach is for courts to observe restraint in administrative matters.

19. Hence, if the method of shortlisting had not been prescribed by UPSC or in a statutory rule, it is possible that the argument of learned counsel for the respondents may have been accepted and we may not have interfered with the method of shortlisting adopted by UPSC since it appears to be based on a rational and objective criteria."

20. More so, the division Bench of this Court in the case of ***Dr. Alok Kumar*** (supra) in paras 21 and 27 further observed as under:-

"21. It is well-settled that any clause in a document or a statute is not to be read in isolation as to find its true meaning. We would have therefore, to accord consideration to other relevant provisions in the advertisement which enables the University to adopt short-listing procedure. In the advertisement it has been specifically provided that "Mere eligibility will not entitle any candidate for being called for interview. More stringent criteria may be applied for short-listing the candidates to be called for interview. Applicants having higher qualification and merit will be given preference. For teaching positions short-listing shall be done as per guidelines approved by Executive Council of the University.

27. As the shortlisting exercise is to be conducted only after receipt of applications, the shortlisting criteria may be fixed after the last date for receipt of application forms, keeping in mind the number of applications received. This position is clear from the law laid down by the Apex Court in Madhya Pradesh Public Service Commission V. Navnit Kumar Potdar's case (supra) and in B. Ramakichenin @ Balagandhi v. Union of India and others case (supra) wherein it has been clearly held that where selection is to be made only on the basis of interview, the Commission or the Selection Board can adopt any rational procedure to fix the number of candidates who should be called for interview. It has been specifically held by the Apex Court that even if there is no rule providing for shortlisting nor any mention of it in the advertisement calling for applications for the post, the Selection Body can resort to a shortlisting procedure if there are a large number of eligible candidates who apply and it is not possible for the authority to interview all of them."

21. In the case of ***Union of India & Others Vs. T. Sundararaman & Others 1997 (4) SCC 664*** the Hon'ble Apex Court in paras 2 and 4 has observed as under:-

"2. In the present case 37 applications were received for the three

posts. The Commission thereupon shortlisted the candidates to be called for interview on the basis of 4 years' experience or more. As a result, 20 candidates were called for interview. Respondent No. 1 did not qualify for shortlisting and hence he was not called for interview.

4. The Tribunal has clearly erred in doing so. Note 21 to the advertisement expressly provides that if a large number of applications are received the Commission may shortlist candidates for interview on the basis of higher qualifications although all applicants may possess the requisite minimum qualifications. In the case of M.P. Public Service Commission Vs. Navnit Kumar Potdar this Court has upheld shortlisting of candidates on some rational and reasonable basis. In that case, for the purpose of shortlisting, a longer period of experience than the minimum prescribed was used as a criterion by the Public Service Commission for calling candidates for an interview. This was upheld by this Court. In the case of Govt. of A.P. Vs. P. Dilip Kumar also this Court said that it is always open to the recruiting agency to screen candidates due for consideration at the threshold of the process of selection by prescribing higher eligibility qualification so that the field of selection can be narrowed down with the ultimate objective of promoting candidates with higher qualifications to enter the zone of consideration. The procedure, therefore, adopted in the present case by the Commission was legitimate. The decision of the Tribunal is, therefore, set aside and the appeal is allowed. There will, however, be no order as to costs."

22. More so, the interpretation so sought to be suggested by the learned counsel for the writ petitioner that it is not permissible for the respondents to have changed the rules of the game once the game has commenced is preposterous as the said principle is not applicable in the cases of shortlisting. Nonetheless, nothing has been brought on record to substantiate that even otherwise the criteria adopted for shortlisting is arbitrary or illegal or not backed by any provision. Insofar as the judgment in the case of ***K. Manjusree*** (supra) and ***K. S. Govindan Nair*** (supra) are not applicable in the facts of the case.

23. Resultantly, this Court does not find any good ground to interfere with the communications/orders impugned.

24. The writ petition is, accordingly, dismissed.

(2024) 1 ILRA 1253
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 17720 of 2023

Adarsh Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amitabh Patel, Sri Raj Kumar Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Constitution of India – Article 14 – UP Qualifying Service for Pension Validation Act, 2021 – *Prem Singh's* decision – Overruling the decision through the legislation – Competence of legislature – Held, once the highest Court

of the land has declared a provision to be illegal to make pensionary benefits available to the employees, the legislature may not enjoy that authority to reverse the legal preposition and resultant effect and that too retrospectively – Legislature cannot blindly validate a procedure which has been held to be invalid by a judicial pronouncement, nor the legislature by bringing in a provision with retrospective effect, can validate a provision which is contrary to the principles enshrined under Article 14 of the Constitution. (Para 11 and 12)

B. Service law – Regularization – Pensionary beneficiary – Entitlement – Principle of legitimate expectation – Applicability – Held, St. has to set an example of a model employer for other private entrepreneurs – Petitioner was entitled to regularization on account of his previous service so rendered and therefore, it is legitimately expected from the Government that it will not deny claim for pensionary benefits. (Para 13 and 15)

C. Service law – UP Qualifying Service for Pension Validation Act, 2021 – Pensionary beneficiary – Qualifying service – Not counting the service rendered as daily wage employee in the qualifying service – Validity challenged – Held, for the purposes of benefit of pension under the Old Pension Scheme, to the extent period falls short of qualifying service for pension in those cases where regularization was done prior to 2005, period of service rendered as daily wage/ casual labour, ad-hoc employee or work charge employee counted towards qualifying period for pension and those who have been regularized after 2005, in their respect that much period rendered as daily wager/ casual/ ad-hoc capacity as it makes them qualify for pension, should be taken into account. (Para 20)

Writ petition allowed. (E-1)

<u>List of cases cited:</u>

1. Civil Appeal No. 10806 of 2017; Habib Khan Vs St. of Uttrakhand decided on 23.08.2017

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

3. Writ A No.- 5483 of 2022; Kallu Ali Vs St. of U.P. & ors. decided on 18.08.2022

4. Special Leave to Appeal (C) No. 1109 of 2022; St. of Gujarat & ors. Vs Talsibhai Dhanjibhai Patel decided on 18.02.2022

5. Special Appeal No. 152 of 2021; St. of UP through Secretary Lok Nirman Vibhag & ors. Vs Bhanu Pratap decided on 14.07.2021

6. Writ A No. 746 of 2023; Awadhesh Kumar Srivastava Vs St. of U.P. & ors. decided on 03.07.2023

7. Prem Singh Vs St. of U.P. & ors.; (2014) 1 UPLBEC 760

8. A. Manjula Bhashini & ors. Vs Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd. & anr.; (2009) 8 SCC 431

9. St. of U.P. & ors. Vs Putti Lal; (1998) 1 UPLBEC 313

10. St. of U.P. & ors. Vs Putti Lal; (2006) 9 SCC 337

11. U.O.I. Vs Hindustan Development Corporation; (1993) 3 SCC 499

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

1. Heard learned counsel for the parties and perused the records.

2. It is submitted on behalf of the petitioner that petitioner was initially appointed as a Seasonal Collection Peon on 01.07.1976 in Tehsil-Sorawn, District-Allahabad. The petitioner approached this Court by filing Writ Petition No. 51899 of 2004 seeking regularization, in which an interim order was passed on 02.02.2009

directing the respondents to permit the petitioner to continue to work and for payment of regular salary. The petitioner continued to work thereafter. Subsequently, when the claim of the petitioner for regularization was not being considered, petitioner filed Contempt Petition No. 1036 of 2010 and so in terms of the order of writ Court, the petitioner was regularized.

3. It is claimed by the petitioner that he deserves to be given Old Pension Scheme by counting his period of work rendered previously as ad-hoc/ daily wage with respondents towards qualifying service so as to make Old Pension Scheme admissible and in support of his argument, learned Advocate has placed reliance upon a number of decisions of this Court and of Supreme Court in the case of **Habib Khan v. State of Uttrakhand** passed in **Civil Appeal No.- 10806 of 2017** decided on 23rd August, 2017. The judgment of the Supreme Court in the case of **Prem Singh v. State of U.P.: (2019) 10 SCC 516** and **Kallu Ali v. State of U.P. and others** passed in **Writ - A No.- 5483 of 2022** decided on 18th August, 2022 and most importantly the judgment of the Supreme Court in the case of **State of Gujarat and others v. Talsibhai Dhanjibhai Patel** passed in **Special Leave to Appeal (C) No.- 1109 of 2022.**

4. Besides above, he submits that considering the issue of applicability of the Old Pension Scheme despite the amending Act, 202 coming into force, a division Bench of this Court in the case of ***State of UP Through Secretary Lok Nirman Vibhag & ors vs. Bhanu Pratap in Special Appeal No.152 of 2021*** vide order dated 14.07.2021 held that unless and until the initial appointment is disputed to be not being in accordance with law, a person regularised in service subsequently, cannot be held disentitled to pension. He submits that this judgment of Special Appellate Bench was appealed against before the Supreme Court in Special Leave to Appeal (C) No.10381 of 2022, which also came to be dismissed and, therefore, State of Uttar Pradesh on its request had been granted eight weeks' time to comply with the order of the High Court. He also relies upon a judgment of a coordinate bench in ***Awadhesh Kumar Srivastava v. State of U.P. & 4 Ors., Writ - A No. 746 of 2023*** delivered on 03.07.2023.

5. A counter affidavit has been filed by the State opposing the claim of the petitioner in light of the provisions of the Uttar Pradesh Qualifying Service for Pension and Validation Ordinance, 2020, which has been subsequently enacted as an Act being Act No. 1 of 2021. According to counter affidavit petitioner would not be entitled to payment of any pension in view of the fact that the services of the petitioner were regularized in the year 2010 and the petitioner has not rendered service for more than 10 years in substantive capacity.

6. This above issue, in reply it is submitted is no more res integra, as this Court, while interpreting the provision of Section 2 of the Ordinance, 2020, now an Act, provided that the services rendered by a workman even on temporary basis shall be considered and counted as a qualifying service while determining the eligibility for payment of pension.

7. Rival submissions fall for consideration.

8. Supreme Court in the case of **Prem Singh Vs. State of U.P. and others, reported in (2014) 1 UPLBEC 760** has

dealt with the Section 3(8) of U.P. Government Servant Retirement Rules, 1961 in question and held relevant provision to be discriminatory, unjust and bad for impermissible classification vide para 31, 32, 33, 36 & 37 thus:

"31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work- charged establishment.

***32**. In view of the note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work charged, contingencies or non pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.*

*33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularization had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in Note to Rule 3(8) of 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. **In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.***

36. There are some of the employees who have not been regularized in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularized under the Government instructions and even as per the decision of this Court in Secretary, State of Karnataka & Ors. v. Uma Devi 2006 (4) SCC 1. This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one time measure, the services be regularized of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularized. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

37. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

(emphasis added)

9. It transpires that after the judgment of Supreme Court an ordinance came to be issued by the State Government in the year 2020 which later on came to be converted into a legislative enactment being Act No. 1 of 2021 namely UP. Qualifying Service for Pension Validation Act, 2021, wherein, the previous services rendered were not made admissible towards qualifying service, if not upon temporary or permanent post. The amendment was made with retrospective effect defining the words 'qualifying service'. Thus, vide a new definition a person appointed on a temporary or permanent post was held to be entitled to get his such service period to count towards qualifying service. The legislative intendment behind the amendment became an issue both before Division Bench in ***State of UP Through Secretary Lok Nirman Vibhag & ors vs. Bhanu Pratap in Special Appeal No.152 of 2021*** decided vide order dated 14.07.2021 and a coordinate bench in ***Awadhesh Kumar Srivastava v. State of U.P. & 4 Ors., Writ - A No. 746 of 2023*** delivered on 03.07.2023. In the case of **Bhanu Pratap** *(supra)* in the concluding part of the judgment where the Court dealt with status of that petitioner/ respondent to be of a work charge employee only, held him entitled to pensionary benefits by counting the period spent as workcharge employee towards qualifying service. The Supreme Court held thus:

"It is clear from the perusal of Section 2 of the Act of 2021 that it would

have effect notwithstanding anything contained in U.P. Retirement Benefit Rules, 1961 or Regulation 361 and 370 of the Civil Service Regulation. Careful reading thereof, however, reveals that "Qualifying Service" has been defined to mean the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post.

Admittedly, the petitioner was appointed on 10.05.1989 as work charge employee at Azamgarh. His services were however regularised on 15.6.2011. The regularisation of service was against the permanent post and it is not that his initial appointment was not in accordance to service Rules.

In light of the aforesaid, period spent in service may be on temporary basis while working as a work charge employee, proceeded with regularisation, benefit of past services cannot be denied."

10. In **Awadhesh Kumar Srivastava v. State of U.P. & 4 Ors., Writ - A No. 746 of 2023** a coordinate bench of this Court dealing with amended provision under Act No. 1 of 2021 and its scope to neutralize the effect of the judgment in Prem Singh's case, it held that such an amendment cannot do so. In a very unequivocal terms the Court held that U.P. Act No. 1 of 2021 does not qualify the three tests laid down by the Supreme Court previously in the judgments referred to, and dismissed by his Lordships to negate the benefits of the judgment of Supreme Court in **Prem Singh's** case *(supra)*. The relevant paragraph no. 46 of the judgment is reproduced hereunder:

"46. In such view of the fact, this Court finds that U.P. Act No. 1 of 2021does not qualify the three tests laid down by the Apex Court in the judgements referred above to negate the benefit of the judgement of the Apex Court in Prem Singh's case (supra)."

(emphasis added)

11. I am also of the view that once the highest Court of the land has declared a provision to be illegal to make pensionary benefits available to such employees, the legislature may not enjoy that authority to reverse the legal preposition and resultant effect and that too retrospectively.This is so because the validity of a legislative Act is also to be judged on the test as to whether the enactment is consistent with the provisions of Chapter III of the Constitution that contains Article 14 of the Constitution. Citing various previous authorities of the Court in the case of A. Manjula Bhashini & Ors v. Managing Director, Andhra Pradesh Women's Cooperative Finance Corporation Ltd. & Anr, (2009) 8 SCC 431 it was observed "*that the legislature cannot assume power of adjudicating a case by virtue of its enactment of the law without leaving it to the judiciary to decide it with reference to the law in force. The legislature also is incompetent to overrule the decision of a court without properly removing the base on which the judgment is founded."*

12. The principles enunciated in the said judgment and various other judgments are to the effect that the legislature cannot blindly validate a procedure which has been held to be invalid by a judicial pronouncement, nor the legislature by bringing in a provision with retrospective effect, can validate a provision which is

contrary to the principles enshrined under Article 14 of the Constitution. Whatever is arbitrary, discriminatory and begets an impermissible classification, stands hit by Article 14 of Chapter III of the Constitution.

13. The concept of regularization of daily wage employees/ casual labourers/ temporary and ad-hoc employees is to give them substantive appointment by offering vacant position in a cadre or creating vacancies to increase cadre strength to accommodate such employees. The very idea behind regularization is to bring certainty in employment and to reward them for their continued working with the establishment as they have spent their heydays in service and are rendered overaged for any new employment. This is also important for an employer to give such an employee a financial security when it is State. State has to set an example of a model employer for other private entrepreneurs. I may quote here the observations made by the Division Bench of this Court in the case of **State of U.P. & Ors v. Putti Lal, (1998) 1 UPLBEC 313** vide its para 11 and 12 that runs as under:

"11. In this connection reference may also be made to the Industrial Disputes Act, 1947 (herein after referred to as 'the Act'), Section 2(ra) of which has defined "unfair labour practice" as under :

"2 (ra), "unfair labour practice" means any of the practices specified in the Fifth Schedule;"

Serial No. 10 of "unfair labour practice" contained in Fifth Schedule appended to the Act, being relevant, in this connection, is reproduced below:

"10. To employ workmen as "bad lies", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen."

By the said provision employment of persons as bad lies, casual or temporary for years has been declared to be "unfair labour practice". Almost similar definition of "unfair labour practice", contained in Maharashtra Act came up for consideration in Chief Conservator of Forest v. Jagannath Maniti Kondhare (MANU/SC/0750/1996) wherein the Supreme Court affirmed the decision of Industrial Court holding that employment of the employees on casual or temporary basis for several years (5 to 6 years is that case) amounts to unfair labour practice. The Supreme Court also rejected the Government's plea about its inability to regularise the service of Daily Wagers on account of paucity of funds holding as under :

"28. In so far as the financial strain on state exchequer is concerned, which submissions sought to be buttressed by Shri Dholakia by stating that in the Forests Department itself the casual employees are about 1.4 lacs and if all of them were to be regularised and paid at the rate applicable to permanent workmen, the financial involvement would be in the neighbourhood of Rs. 300 crores a very high figure indeed. We have not felt inclined to bear in mind this contention of Shri Dholakia as the same has been brought out almost from the hat. The argument relating to financial burden is one of despair or in terrorem. We have neither been impressed by the first nor frightened by the second, inasmuch as we do not intend that the view to be taken by

us in these appeals should apply, proprio vigore, to all casual labourers of the Forest Department or any other Department of the Government.

29. We wish to say further that if Shri Bhandare's submission is taken to its logical end, the justification for paying even minimum wages could wither away, leaving any employer, not to speak of model employer like the State, to exploit unemployed persons. To be fair to Shri Bhandare it may, however, be stated that the learned counsel did not extend his submission this far, but we find it difficult to limit the submission of Shri Bhandare to payment of, any fair wages, as distinguished from minimum wages. We have said so because if a pay scale has been provided for permanent workmen that has been done by the State Government keeping in view its legal obligation and must be due which had been recommended by the State Pay Commission and accepted by the Government. We cannot deny this relief of permanency to the respondents-workmen only because in that case they would be required to be paid wages meant for permanent workers. This right flows automatically from the relief of regularisation to which no objection can reasonably be taken, as already pointed out, We would, however, observe that the relief made available to the respondents is not one which would be available ipso facto to all the casual employees either of the Forest Department or any other Department of the State. Claim of casual employees for permanency or for higher pay shall have to be decided on the merits of their own cases."

In the aforesaid case the Supreme Court held that Forest Department is an industry and casual/ daily wagers are workmen under the Act.

12. In pursuance of the directions issued by this Court pending these cases the Government of U. P. has submitted more than one scheme for regularisation of the petitioners, but those Schemes hardly contain any hope for their regularisation. It has been stated therein that the petitioners can be considered for regularisation against available; vacancies after amending service rules. Available vacancies being few no substantial help can be expected from them. That apart, the Government while framing those Schemes has not applied its mind to the questions dealt with hereinabove. These are aspects which are to be considered by the Government before framing Scheme for absorption of the petitioners. In the present case the appropriate pleadings are also not there, so as to declare the employment of the petitioners as daily wager for considerably long period as "unfair labour practice". We, are, therefore, not expressing any final opinion on this question also. The questions dealt with hereinabove are to be considered and decided by the Government before framing the Scheme for regularisation/absorption of the petitioners and other similarly placed employees."

14. It is in the above background that the Supreme court on appeal required State of Uttar Pradesh to frame rules for regularization and it is for that reason that regularization Rules 2001 namely Uttar Pradesh Regularisation of Daily Wagers (Appointment on Group 'D' Posts) Rules, 2001 were framed by the State Government and the Court expressed its view that in that case those who are working on daily wage basis or casual employees will be

regularized and till their regularization was considered, they would be paid minimum of pay scales as admissible to regular group 'D' employees. Vide paras 24 and 25 Supreme Court in the case of **State of U.P. & Others v. Putti Lal, (2006) 9 SCC 337:**

"3. On behalf of the employees an IA had been filed claiming that they should at least be allowed their regular wages during the pendency of the appeals, but by order dated 27-9-1999 that prayer was rejected and it was held that the persons working will be paid only the amount payable to a daily-wager. When these matters had been posted for hearing before the Court on 1-5-2001, after hearing the parties for a considerable length of time, the Court felt that the impugned direction of the High Court for providing a scheme for regularisation of all the daily-wage workers/muster-roll employees under the Forest Department who have rendered 10 years of service or more, should be regularised by making appropriate scheme. The Court directed that the scheme should be framed within three months from the date of the order. As the State of U.P. was bifurcated into two States and the State of Uttaranchal had come into existence, by a subsequent order the State of Uttaranchal was also impleaded as a party and it had been granted time to file its response. Pursuant to the aforesaid direction of the Court dated 1-5-2001 the State of U.P. has framed a set of rules in exercise of power conferred under the proviso to Article 309 of the Constitution called "the Uttar Pradesh Regularisation of Daily Wagers (Appointment on Group 'D' Posts) Rules, 2001". It appears that a similar rule has been framed for regularisation of Group 'C' daily-wage employees. Both these statutory rules would govern the case of all daily-wagers appointed in any department including the Forest Department, which Department was before us pursuant to the direction of the Division Bench of the Allahabad High Court. Since a statutory rule has been framed indicating the manner in which the daily-wagers can be regularised, question of framing any further scheme by the State of Uttar Pradesh does not arise.

5. In several cases this Court applying the principle of equal pay for equal work has held that a daily-wager, if he is discharging the similar duties as those in the regular employment of the Government, should at least be entitled to receive the minimum of the pay scale though he might not be entitled to any increment or any other allowance that is permissible to his counterpart in the Government. In our opinion that would be the correct position and we, therefore, direct that these daily-wagers would be entitled to draw at the minimum of the pay scale being received by their counterparts in the Government and would not be entitled to any other allowances or increment so long as they continue as daily-wagers. The question of their regular absorption will obviously be dealt with in accordance with the statutory rules already referred to."

15. In the matters like the present one, I find that the petitioner was entitled to regularization on account of his previous service so rendered and therefore, it is legitimately expected from the Government that it will not deny claim for pensionary benefits to such employees. In **Union of India v. Hindustan Development Corporation (1993) 3 SCC 499** defining the concept of legitimate expectation the Court vide para 35 observed thus:

"If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory unfair or based, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim biased on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It can be one of the ground to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. It depends very much on the facts and the recognised general principles of administrative law applicable to such facts and the concept of legitimate expectation which is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action, must be restricted to the general legal limitations applicable and binding the manner of the future exercise of administrative power in a particular case. It follows that the concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits," particularly when the element of speculation and uncertainty is inherent in that very concept."

16. Now if such employees who have rendered 10 to 20 years of service and are being regularized, it would be equally unfair, immoral and unethical to ignore past services rendered to deny them claim for retirement dues. In any ecosystem of public employment, where financial security and social justice factor framing up of a policy to attach permanency to workforce, it would be quite unethical to deny them such retirement benefits to which they would have been otherwise entitled to, had they been appointed substantively at initial stage. One must not forget that regularization, as a concept in service jurisprudence, is an acknowledgement of past services rendered for the reason that there was work available permanently and that was why employment was offered, may be on daily wage basis or fixed pay to meet the requirement in the establishment. So in my considered view, such period rendered in the service of an establishment should be taken into account towards qualifying service in respect of those employees whose period of such service has been since prior to the abolition of old pension rules, as such period of service and availability of work has factored their regularization.

17. In the case of **State of Gujarat & Ors v. Talsibhai Dhanjibhai Patel (Special Leave to Appeal (C) No. 1109 of 2022)** decided on 18th February, 2022, Supreme Court while dismissing the special leave to appeal of the State of Gujarat, has observed thus:

"It is unfortunate that the State continued to take the services of the respondent as an ad-hoc for 30 years and thereafter now to contend that as the services rendered by the respondent are ad-hoc, he is not entitled to pension/ pensionary benefit. The State cannot be permitted to take the benefit of its own wrong. To take the Services continuously for 30 years and thereafter to contend that an employee who has rendered 30 years continuous service shall be eligible for pension is nothing but unreasonable. As a welfare State, the State as such ought not to have taken such a stand.

In the present case, the High Court has not committed any error in directing the State to pay pensionary benefits to the respondent who has retired after rendering more than 30 yeas service.

Hence, the Special Leave Petition stands dismissed.

Pending application(s), if any, shall stand disposed of."

(emphasis added)

18. Further, Supreme court in the case of **Uday Pratap Thakur & Anr. v. State of Bihar** decided on 28th April 2023, vide para 6 has also dealt that the judgment of **Prem Singh** *(supra)* and has observed that minimum period that may be required to make a regularized employee entitled for pension can be taken into account towards qualifying service. Para 6.2 and 6.3 of the judgment relevant for the purpose of this case runs as under:

6.2 Insofar as the submission on behalf of the appellants that their entire services rendered as work charged should be considered and/or counted for the purpose of pension / quantum of pension is concerned, the same cannot be accepted. If the same is accepted, in that case, it would tantamount to regularizing their services from the initial appointment as work charged. As per the catena of decisions of this Court, there is always a difference and distinction between a regular employee appointed on a substantive post and a work charged employee working under work charged establishment.

Civil Appeal No. 3155 of 2023. The work charged employees are not appointed on a substantive post. They are not appointed after due process of selection and as per the recruitment rules. Therefore, the services rendered as work charged cannot be counted for the purpose of pension / quantum of pension. ***However, at the same time, after rendering of service as work charged for number of years and thereafter when their services have been regularized, they cannot be denied the pension on the ground that they have not completed the qualifying service for pension.*** *That is why, the service rendered as work charged is to be counted and/or considered for the purpose of qualifying service for pension, which is provided under Rule 5(v) of the Rules, 2013.*

6.3 Now, insofar as the reliance placed upon the decision of this Court in the case of Prem Singh (supra) by the learned counsel appearing on behalf of the appellants is concerned, the reliance placed upon the said decision is absolutely misplaced. In the said case, this Court was considering the validity of Rule 3(8) of the U.P. Retirement Benefit Rules, 1961, under which the entire service rendered as work charged was not to be counted for qualifying service for pension. To that, this Court has observed and held that after rendering service as work Civil Appeal No. 3155 of 2023 charged for number of years in the Government establishment / department, denying them the pension on the ground that they have not completed the qualifying service for pension would be unjust, arbitrary and illegal. Therefore, this Court has observed and held that their services rendered as work charged shall be considered / counted for qualifying service. This Court has not observed and held that the entire service rendered as work charged shall be considered / counted for the quantum of pension /

pension. The decision of this Court in the case of Prem Singh (supra), therefore, would be restricted to the counting of service rendered as work charged for qualifying service for pension."

(emphasis added)

19. Although above judgment discusses the principle to interpret the relevant rules framed by State of Bihar but principle that govern the law, remains the same in so far as entitlement to pension is concerned and interpretation of rule 3(8) of the amended Rules, 1961.

20. In view of the above, therefore, for the purposes of benefit of pension under the Old Pension Scheme, to the extent period falls short of qualifying service for pension in those cases where regularization was done prior to 2005, period of service rendered as daily wage/ casual labour, ad-hoc employee or work charge employee counted towards qualifying period for pension and those who have been regularized after 2005, in their respect that much period rendered as daily wager/ casual/ ad-hoc capacity as it makes them qualify for pension, should be taken into account.

21. In view of the aforesaid, this writ petition deserves to be allowed with a direction in the nature of mandamus to the respondents to count the services rendered by the petitioner from the year 01.07.1976 up to 2010 (the date and year of regularization) as qualifying service for pension and steps shall be taken for calculation and payment of pension in light of the directions issued above. The respondents shall also consider other claims of the petitioner for leave encashment as well as benefit of 7th Pay Commission while determining the quantum of amount payable to the petitioner, as directed above. A writ of *mandamus* is accordingly issued to the competent respondent to do needful in the matter accordingly within a period of three months of production of certified copy of this order.

22. This petition thus stands **allowed** as above with no order as to cost.

(2024) 1 ILRA 1264
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 19191 of 2023

Hemant Kumar Rai ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Samarth Singh, Sri Hritudhwaj Pratap Sahi, Sri V.K. Singh (Sr. Adv.)

Counsel for the Respondent
C.S.C.

A. Service Law – UP Government Servants Conduct Rules, 1956 – UP Government Servants (Discipline and Appeal) Rules, 1999 – Rule 7 –Punishment – Withholding the annual increments – Disciplinary proceeding – No oral enquiry was held – Neither any date was fixed, nor any place was disclosed for the petitioner to appear before the enquiry officer – Effect – Enquiry report only records the charge and then refers to the explanation offered by the petitioner and then finally concludes that the petitioner was guilty of the charges – Permissibility – Held, oral enquiry is *sine quo non* which is prescribed for under rule 7 of the Rules, 1999 in respect of major penalties – Since

the order impugned is based upon the enquiry reports that are in fact *de hors* the procedure prescribed and cannot be sustained in law, the order impugned, which is a resultant action based upon such enquiry reports, is not liable to be sustained. (Para 19, 22 and 26)

Writ petition allowed. (E-1)

List of cases cited:

1. Salahuddin Ansari Vs St. of U.P. & ors.; 2008 (4) ADJ 58

2. Subhash Chandra Sharma Vs Managing Director; 2000 (1) UPLBEC 541

3. St. of U.P. & anr. Vs T.P. Lal Srivastava; 1997 (1) LLJ 831

4. Special Appeal no. 631 of 2007; Janardan Prasad Yadav Vs St. of U.P. & ors. decided on 20.02.2020

5. Chamoli District Cooperative Bank Ltd. Vs Raghunath Singh Rana & ors.; AIR 2016 SC 2510

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

1. In view of the fact that original records relating to disciplinary proceedings in question have been produced before the Court, both the learned counsel for the petitioner and learned Additional Chief Standing Counsel agree that this petition can be heard and decided at this stage itself.

2. Heard Sri V.K. Singh, learned Senior Advocate assisted by Sri Samarath Singh, learned counsel for the petitioner and Sri P.K. Srivastava, learned Additional Chief Standing Counsel for the State.

3 . Sri Hemant Kumar Rai, the present petitioner, is aggrieved by the punishment order dated 09.10.2023 passed by the State Government inflicting upon him major penalty in the nature of withholding two annual increments with cumulative effect and further directing recovery of a sum of Rs. 44,84,006.00 for the loss caused to the Government.

4. The disciplinary authority hold petitioner guilty for not discharging duties of his office during the relevant period and thus by his act and conduct he violated the conduct rules under U.P. Government Servants Conduct Rules, 1956. Petitioner has been held guilty on the basis of findings returned against him by the enquiry officer in his report dated 24.09.2021.

5. The ground raised for assailing the order is that in the matter of disciplinary proceedings initiated against him under the U.P. Government Servants (Discipline and Appeal) Rules, 1999, inquiry as required to be held under rule 7 of the said Rules, was not held as per the procedure prescribed and therefore, the disciplinary authority was not justified in accepting the report holding the petitioner guilty for the findings so returned and imposing major penalty.

6. It is argued that the oral enquiry as contemplated under rule 7 of 1999 Rules by recording statement of petitioner as a delinquent employee as well as that of the departmental witnesses had not taken place and therefore, the enquiry stood vitiated in law in the light of settled legal proposition relating to departmental enquiry in the matters of major penalty.

7. Learned counsel for the petitioner in support of his argument has relied the judgment of Supreme Court in the case of **Salahuddin Ansari v. State of U.P. & Others, 2008 (4) ADJ 58** and submits that

when the enquiry itself is not sustainable the punishment order based upon such enquiry is equally not sustainable and is liable to go.

8. Per contra it is argued by learned Additional Chief Standing Counsel that the petitioner had been accorded proper opportunity to appear before the enquiry officer to submit reply and face enquiry but the petitioner himself chose to only submit reply and he having not made any request for oral enquiry, it would be taken that the accused acquiesced to the procedure adopted by the enquiry officer. It is further argued that the petitioner has been given proper show cause notice to which he had given reply and disciplinary authority imposed penalty after having considered his reply and so now petitioner cannot complain of not being afforded proper opportunity to defend his case.

9. In compliance of the earlier order passed by this Court dated 22.11.2023 original records have been produced before the Court and have been examined by the Court.

10. Before coming to the argument advanced by learned counsel for the petitioner, it is necessary to refer to certain crucial fact aspects involved in the matter of departmental enquiry qua the case in hand.

11. Initially petitioner while working as Assistant Commissioner, Commercial Tax, Gorakhpur was served with a charge sheet of embezzlement of certain money by exercising power beyond the authority vested in him which resulted in the loss of public money and thus, petitioner was charged with misconduct under the U.P. Conduct Rules, 1956. This charge sheet was issued to the petitioner on 25.06.2018 to which he did submit reply but the entire departmental enquiry was held ex parte in the sense that petitioner was not served with any notice to appear before the enquiry officer. After the enquiry report was duly submitted by the enquiry officer on 15.12.2015, petitioner was issued with a show cause notice on 07.03.2019 along with the enquiry report to which petitioner submitted his reply on 28.03.2019.

12. It is pleaded in the writ petition that in reply to the show cause notice, petitioner reiterated that he was not afforded any opportunity to participate in the enquiry proceedings to get his statement recorded or to get the other witnesses examined even though he had denied charges. It is further pleaded in the writ petition that while his reply was pending consideration that on 22.02.2021 upon permission being accorded by the higher authority petitioner was issued with the supplementary charge sheet. It transpires from the permission granted by the State Government dated 16.02.2021 that a punishment was earlier sought to be imposed upon the petitioner pursuant to the first round of departmental proceedings for withholding two annual increments with cumulative effect to make good the financial loss caused to the State, however, the U.P. Public Service Commission disagreed with the proposed punishment of recovery of Rs. 44,84,046.00 because there was no such charge leveled in the charge sheet and so petitioner had no opportunity to meet the charges.

13. Thus, the respondents proceeded to hold enquiry pursuant to a supplementary charge sheet served upon the petitioner on 12.03.2021 to which petitioner duly submitted his reply,

comprehensive enough, on 15.09.2021 denying the charges and also pleaded that he had no liability in the matter as the tax liability was upon the Firm, in the matter of which tax appeal filed by the Firm came to be allowed and the matter was remitted to be heard afresh.

14. Hence the pleading was that once the tax liability of Firm was set aside in appeal, there cannot be said to any loss caused to public exchequer as such. After the departmental enquiry was held report was sent on 24.09.2021 and petitioner was issued with show cause notice on 03.10.2021. Petitioner again submitted his reply questioning the enquiry report being de hors the procedure prescribed, as no oral enquiry was held. However, the disciplinary authority proceeded to impose the major penalty by the order impugned which is also questioned in this petition.

15. In order to appreciate the argument of learned counsel for the petitioner, first I proceed to examine the relevant enquiry rules as provided for under the Rules, 1999. Rule 7 of the enquiry rules provided for enquiry to be held for major penalty and the entire rule 7 is reproduced hereunder:

"7- Procedure for imposing major penalties- Before imposing any major penalty on a Government Servant, an inquiry shall be held in the following manner:

(i) The Disciplinary Authority may himself inquiry into the charges or appoint an Authority Subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The Facts constituting the misconduct on which it is proposed to take action shall be reduced in the from of definite charge or charges to be called charge -sheet. The charge-sheet shall be approved by the Disciplinary Authority.

Provided that where the Appointing Authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary, as the case may be, of the concerned department.

(iii) The charge farmed shall be so precise and clear as to give sufficient indication to the charged Government Servant of the facts and circumstances against him. The proposed documentary evidences and the name of the witnesses proposed to prove the same along with oral evidence, if any, shall be mentioned in the charge-sheet.

(iv) The charge Government Servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file written statement on the specified date, it will be presumed that he has none to furnish and inquiry officer shall proceed to complete the inquiry ex-parte

(v) The charge-sheet, along with the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government Servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served

in aforesaid manner, the charge- sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charge Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government Servant appears and admits (vii) charges, the Inquiry Officer shall submit his report to the Disciplinary Authority on the basis of such admission.

(vii) ***Where the charged Govenment Servant denies the charge the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charge Government Servant who shall be given opportunity to cross- examine such witnesses. After recording the aforesaid evidences, the Inquiry officer shall call and record the oral evidence which the charged Government Servant desired in his written statement to be produced in h is defence:***

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The inquiry officer may summon any witnesses to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental inquiries (Enforcement of Attendance of witnesses and production of documents) Act 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government Servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date the Inquiry Officer shall proceed with the inquiry exparte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government Servant.

(xi) The disciplinary Authority, if it considers if necessary to do so, may by an order appoint a Government Servant or a legal practitioner to be known as "Presenting Officer" to present on its behalf the case in support of the charge. The Government servant may take the assistance of any other

(xii) Government Servant to present the case on this behalf but not engage a legal practitioner for the purpose unless the presenting office appointed by the Disciplinary Authority is a legal practitioner of the disciplinary Authority having regard to the circumstance of the case so permits.

Provided that the rule shall not apply in following cases:

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge. or

(ii) Where the Disciplinary Authority is satisfied, that for reason to be recorded by it in writing, that it is not reasonably practicable to held an inquiry in the manner provided in these rules; or

(iii) Where the Governor satisfied that, in the interest of the security of the state, it is not expedient to hold an inquiry in the manner provided in these rules."

(emphasis added)

16. From the perusal of aforesaid rule, it is explicit that in the event delinquent employee denies the charges, the disciplinary authority shall proceed to hold oral enquiry by fixing dates, inviting the petitioner to get his statement recorded and then on his request the enquiry officer also call for departmental witnesses to be examined. The enquiry officer on his own may also call for departmental witnesses to be examined. For not requiring the departmental witness to remain present for examination, the enquiry officer is required to record specific reasons.

17. Thus, from the above, it is obvious that the rules do provide holding of oral enquiry. A division bench of this Court in the case of **Salahuddin Ansari v. State of U.P. & Others, 2008 (4) ADJ 58** has followed an earlier judgment of the Court in the case of **Subhash Chandra Sharma v. Managing Director 2000 (1) UPLBEC 541**, wherein, it was held that in the event no oral enquiry was held it would amount to violation of principles of natural justice. The division bench then referred to the judgment in the case of **State of U.P. & Another v. T.P. Lal Srivastava, 1997 (1) LLJ 831,** wherein, the Supreme Court has held that even if there is reply to the charge sheet, the enquiry officer would still be under obligation to hold oral enquiry and submit report as to whether charge was proved or not. Thus, vide para 13 and 14 the Court held thus:

"13. The aforesaid exposition of law makes it clear that the delinquent employee has a right to defend himself at different stages. When the charge-sheet is served upon him, he has a right to submit his reply and in case he does not submit reply, that itself would not amount to admission of guilt or that the charge stand proved. If the allegations are serious and may result in major penalty, the disciplinary authority may appoint Inquiry Officer. Such Inquiry Officer, thereafter would have to fix a date for oral evidence. At this stage the delinquent employee has a right to participate in the oral inquiry, examine witnesses, if produced by the department, and after the evidence of the department is completed, the delinquent employee may produce evidence in his defence. During the course of oral inquiry, the delinquent employee has right to participate at every stage and date and if there is any failure in participation on one or more occasions, the Inquiry Officer cannot deny him participation from the subsequent stage. The delinquent employee can participate at subsequent other stage also. The Inquiry Officer, after completion of oral inquiry, will submit its report after discussing the entire material and if any charge is proved, the disciplinary authority shall supply a copy of the inquiry report to the delinquent employee and he would again have a right to submit reply to the inquiry report.

14. Non holding of oral inquiry, therefore, is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment."

(emphasis added)

18. This above view came to be reiterated in **Janardan Prasad Yadav v. State of U.P. and Others.** In the said judgment the division bench also followed the Supreme Court judgment in the case of **Chamoli District Cooperative Bank AIR 2016 SC 2510** and vide para 21 held thus:

"21. The Apex Court in State of Uttranchal and Ors. v. Kharak Singh reported in (2008) 8 SCC 236 had occasion to examine various contours of natural justice which need to be specified in a departmental inquiry. The Apex Court noticed earlier judgments where principles were laid down as to how inquiry is to be conducted. It is useful to refer paragraphs 9, 10, 11, 12, 13 and 15, which are to the following effect:

.....9. Before analyzing the correctness of the above submissions, it is useful to refer various principles laid down by this Court as to how enquiry is to be conducted and which procedures are to be followed.

10. The following observations and principles laid down by this Court in Associated Cement Co. Ltd. v. The Workmen and Anr. [1964] 3 SCR 652 are relevant:

..... In the present case, the first serious infirmity from which the enquiry suffers proceeds from the fact that the three enquiry officers claimed that they themselves had witnessed the alleged misconduct of Malak Ram. Mr. Kolah contends that if the Manager and the other officers saw Malak Ram committing the act of misconduct, that itself would not disqualify them from holding the domestic enquiry. We are not prepared to accept this argument. If an officer himself sees the misconduct of a workman, it is desirable that the enquiry should be left to be held by some other person who does not claim to be an eye-witness of the impugned incident. As we have repeatedly emphasised, domestic enquiries must be conducted honestly and bona fide with a view to determine whether the charge framed against a particular employee is proved or not, and so, care must be taken to see that these enquiries do not become empty formalities. If an officer claims that he had himself seen the misconduct alleged against an employee, in fairness steps should be taken to see that the task of holding an enquiry is assigned to some other officer. How the knowledge claimed by the enquiry officer can vitiate the entire proceedings of the enquiry is illustrated by the present enquiry itself.....

..... It is necessary to emphasise that in domestic enquiries, the employer should take steps first to lead evidence against the workman charged, give an opportunity to the workman to cross-examine the said evidence and then should the workman be asked whether he wants to give any explanation about the evidence led against him. It seems to us that it is not fair in domestic enquiries against industrial employees that at the very commencement of the enquiry, the employee should be closely cross-examined even before any other evidence is led against him. In dealing with domestic enquiries held in such industrial matters, we cannot overlook the fact that in a large majority of cases, employees are likely to be ignorant, and so, it is necessary not to expose them to the risk of cross-examination in the manner adopted in the present enquiry proceedings. Therefore, we are satisfied that Mr. Sule is right in contending that the course adopted in the present enquiry

proceedings by which Malak Ram was elaborately cross-examined at the outset constitutes another infirmity in this enquiry.

11) In ECIL v. B. Karunakar, (1993) 4 SCC 727, it was held:

(1) Where the enquiry officer is other than the disciplinary authority, the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. If the disciplinary authority decides to drop the disciplinary proceedings, the second stage is not even reached.

While the right to represent against the findings in the report is part of the reasonable opportunity available during the first stage of the inquiry viz., before the disciplinary authority takes into consideration the findings in the report, the right to show cause against the penalty proposed belongs to the second stage when the disciplinary authority has considered the findings in the report and has come to the conclusion with regard to the guilt of the employee and proposes to award penalty on the basis of its conclusions. The first right is the right to prove innocence. The second right is to plead for either no penalty or a lesser penalty although the conclusion regarding the guilt is accepted. It is the second right exercisable at the second stage which was taken away by the Forty-second Amendment. The second stage consists of the issuance of the notice to show cause against the proposed penalty and of considering the reply to the notice and deciding upon the penalty. What is dispensed with is the opportunity of making representation on the penalty proposed and not of opportunity of making representation on the report of the enquiry officer. The latter right was always there. But before the Forty-second Amendment of the Constitution, the point of time at which it was to be exercised had stood deferred till the second stage viz., the stage of considering the penalty. Till that time, the conclusions that the disciplinary authority might have arrived at both with regard to the guilt of the employee and the penalty to be imposed were only tentative. All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence in respect of the charges.

* * *

Article 311(2) says that the employee shall be given a "reasonable opportunity of being heard in respect of the charges against him". The findings on the charges given by a third person like the enquiry officer, particularly when they are not borne out by the evidence or are arrived at by overlooking the evidence or misconstruing it, could themselves constitute new unwarranted imputations. The proviso to Article 311(2) in effect accepts two successive stages of differing scope. Since the penalty is to be proposed after the inquiry, which inquiry in effect is to be carried out by the disciplinary

authority (the enquiry officer being only his delegate appointed to hold the inquiry and to assist him), the employee's reply to the enquiry officer's report and consideration of such reply by the disciplinary authority also constitute an integral part of such inquiry.

Hence, when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

12) In Radhey Shyam Gupta v. U.P. State Agro Industries Corporation Ltd. and Anr. (1999) 2 SCC 2, it was held:

34. But in cases where the termination is preceded by an enquiry and evidence is received and findings as to misconduct of a definitive nature are arrived at behind the back of the officer and where on the basis of such a report, the termination order is issued, such an order will be violative of the principles of natural justice inasmuch as the purpose of the enquiry is to find out the truth of the allegations with a view to punish him and not merely to gather evidence for a future regular departmental enquiry. In such cases, the termination is to be treated as based or founded upon misconduct and will be punitive. These are obviously not cases where the employer feels that there is a mere cloud against the employee's conduct but are cases where the employer has virtually accepted the definitive and clear findings of the enquiry officer, which are all arrived at behind the back of the employee -- even though such acceptance of findings is not recorded in the order of termination. That is why the misconduct is the foundation and not merely the motive in such cases.

13) In Syndicate Bank and Ors. v. Venkatesh Gururao Kurati (2006) 3 SCC 150, the following conclusion is relevant:

18. In our view, non-supply of documents on which the enquiry officer does not rely during the course of enquiry does not create any prejudice to the delinquent. It is only those documents, which are relied upon by the enquiry officer to arrive at his conclusion, the non-supply of which would cause prejudice, being violative of principles of natural justice. Even then, the non-supply of those documents prejudice the case of the delinquent officer must be established by the delinquent officer. It is well-settled law that the doctrine of principles of natural justice are not embodied rules. It cannot be put in a straitjacket formula. It depends upon the facts and circumstances of each case. To sustain the allegation of violation of principles of natural justice, one must establish that prejudice has been caused to him for non-observance of principles of natural justice.

15. From the above decisions, the following principles would emerge:

i) The enquiries must be conducted bona fide and care must be

taken to see that the enquiries do not become empty formalities.

ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

(emphasis added)

19. Thus, it is very much clear that oral enquiry is sine quo non which is prescribed for under rule 7 of the Rules, 1999 in respect of major penalties.

20. In view of the above settled legal proposition, now I proceed to examine the original records produced before the Court.

21. In so far as the enquiry report is concerned pursuant to the first charge sheet, I would not have gone into that but since the second charge sheet is an additional charge sheet only for the reason that Public Service Commission had refused to accord its approval to the proposed punishment pursuant to the earlier charge sheet and the additional charge means in additional to the charges already leveled against the petitioner and since this time additional charge was only in respect of the financial loss, even the procedure followed in the first enquiry report is also required to be considered.

22. Now looking to the first enquiry report as is available in the original records, I find that enquiry officer did not provide any opportunity to the petitioner to participate in the enquiry as neither any date was fixed, nor any place was disclosed for the petitioner to appear before the enquiry officer. The enquiry report only records the charge and then refers to the explanation offered by the petitioner and then finally concludes that the petitioner was guilty of the charges. The covering letter of the enquiry officer discloses that delinquent employee sought time to furnish reply and ultimately submitted reply on 07.10.2018. Between 07.10.2018 and 15.12.2018 the enquiry officer could have fixed dates for the petitioner to appear and further would have given an opportunity to him to ask for any departmental witness to be examined but no such exercise had been undertaken, at least the records are silent. Even if the petitioner did not ask for any oral enquiry in view of settled legal position as discussed above, enquiry officer was hide bound in law to hold an oral enquiry. From the reply submitted by the petitioner to the earlier charge sheet which is available on record and as is also

reflected from the enquiry report that he had denied the charges.

23. In such circumstances therefore, it was imperative on the part of enquiry officer to have held oral enquiry but he failed to do so and submitted report upon which punishment order was proposed to be passed but was disapproved by the U.P. Public Service Commission. It is after the U.P. Public Service Commission had refused to accord approval that the State Government proceeded to approve an additional charge and to hold a separate enquiry in respect of such additional charge while maintaining the earlier held departmental enquiry. Resultantly petitioner was served with an additional charge sheet on 12.03.2021. It appears that a new officer took over as Additional Commissioner Grade-2 namely Mr. Anil Kumar Srivastava in June 2021 and so he wrote a letter on 15.07.2021 to the petitioner to peruse the records if he wanted on 22.07.2021 by putting in his appearance so that enquiry report could be submitted. Petitioner did appear before the enquiry officer and submitted reply on 15.07.2021 denying the charges. Now after the petitioner submitted his reply on 15.07.2021, the original records shows that the petitioner had appeared before the enquiry officer. The record also shows that on 13.07.2021 the Joint Commissioner, Head Quarter, Lucknow wrote to the enquiry officer to conclude the enquiry and submit report within 15 days.

24. The reminder was made on 26.08.2021 and a similar letter was got issued from the Headquarter of the department on 27.08.2021. Thus, it appears disciplinary authority compelled the enquiry officer to somehow submit a report in respect of additional charge sheet and so the enquiry officer did submit report dated 24.09.2021. From the order/ note sheet that has been placed on the top of the record does not show that any date or time had been fixed for the delinquent employee to appear for his oral statement, even though he had denied the charges. The covering letter of the enquiry officer records that petitioner had appeared pursuant to the subsequent notice dated 14.09.2021 and wanted a week's time to submit reply but he had also submitted a written reply in his defence on 15.09.2021. Beyond that, there is nothing in the covering letter to demonstrate that any date was fixed or time schedule was given and place was notified by the enquiry officer to hold any oral enquiry. Neither the petitioner's statement as delinquent employee was recorded, nor the departmental witnesses, if any, was examined. This second enquiry report thus also stands vitiated for the same reason for which the first enquiry report stood vitiated.

25. Now based upon this enquiry report the respondents proceeded to give a show cause notice to the petitioner to which petitioner replied but the disciplinary authority ultimately held petitioner guilty of the charges on the basis of enquiry report and awarded punishment which is now impugned herein in this petition. The order dated 30.05.2018 which is an order of punishment clearly records the findings returned by the enquiry officer in his report dated 18.09.2019 and also the subsequent report dated 24.09.2021 on the additional charge sheet and then proceeded to pass order of punishment. The only document available for the respondent State to hold the petitioner guilty of the charges are the two enquiry reports and nothing more. In every para of the order impugned, the findings returned by the enquiry officer has

been referred to and relied to hold the petitioner guilty of the charges so as to inflict upon him with the punishment under the order impugned.

26. Now since the order impugned is based upon the enquiry reports that are in fact de hors the procedure prescribed and cannot be sustained in law, I am equally not able to sustain the order impugned which is a resultant action based upon such enquiry reports.

27. In the circumstances, therefore, it would be more appropriate that the enquiry into the charges is held after and the petitioner is given opportunity to get his statement recorded and also get the departmental witnesses examined, if he so desires.

28. In view of the above, writ petition succeeds and is **allowed.** Both the enquiry reports dated 18.09.2019 and 24.09.2021 as well as the order impugned dated 09.10.2023 are hereby quashed. The matter is remitted to the stage of enquiry. Petitioner shall be appearing before the disciplinary authority along with the copy of this order and the disciplinary authority thereafter, will be holding oral enquiry in accordance with law and in the light of Government Order dated 19th July 2022. Petitioner's reply is already there with the enquiry officer and this time the enquiry officer shall fix a date, time and notify the place where he would be holding enquiry and requiring the petitioner to get his statement recorded. The petitioner will have an opportunity to present list of witnesses to whom he may like to cross examine. This time the enquiry officer shall record oral statements, examination and cross examination of witnesses as per the procedure prescribed under the Rules, 1999. After the enquiry report is submitted, it will be open for the respondents to proceed afresh in the light of findings returned by the enquiry officer and the reply, if any, submitted by the petitioner after show cause notice if issued to him.

29. Original records are returned to learned Additional Chief Standing Counsel.

(2024) 1 ILRA 1275
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Writ-A No. 30954 of 2017

Jai Mangal Ram ...Petitioner
Versus
U.P. State Public Service Tribunal, Lko & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash Pandey, Sri Ajay Yadav, Sri Rahu Yadav, Sri Vinod Kumar Singh, Sri Vishwadeep Patel

Counsel for the Respondents:
C.S.C.

A. Service Law – Punishment – Dismissal from service – Charge of misbehaving with senior officer in an intoxicated condition – Neither the blood test nor the urine test was conducted before giving report by the concerned Medical Officer. Report was made only on the basis of smell – Medical Officer has also not been examined by the Department during the disciplinary proceedings – Effect – Held, mere external examination is not sufficient proof to hold a person guilty of consuming alcohol and it cannot be concluded that he was in intoxicated

condition. Therefore, the charge against the petitioner with regard to the consumption of alcohol during the duty hours, has not been proved by the department. (Para 7, 14 and 18)

B. Service Law – Punishment – Dismissal from service – Disciplinary enquiry – Predetermined show cause notice – Disciplinary Authority has already made up his mind to accept the finding of inquiry report – Permissibility – Held, very purpose of giving show cause notice is frustrated and such show cause notice is vitiated and is in clear violation of principles of natural justice – Before making opinion with regard to the punishment, which is proposed to be imposed on a delinquent officer, the delinquent has to be given opportunity to submit his representation/reply to inquiry the report. (Para 20)

C. Service Law – Dismissal from service – Disproportionate punishment – Departmental enquiry – Fact of abusing to the superior officer has not been conclusively proved – Effect – Held, punishment must be proportionate to the misconduct established against a delinquent employee – The punishment imposed on the petitioner on the basis of the allegations which are not proved, is disproportionate to the charges leveled against the petitioner – High Court set aside the punishment order by reinstating the petitioner in service with continuity alongwith 50% back wages for the period he was out of service. (Para 19, 22 and 27)

Writ petition allowed. (E-1)

List of cases cited:

1. Delhi Judicial Service Association Vs St. of Guj.; Cr.L.J. (1991) 3086

2. Bachubhai Hassanalli Karyani Vs St. of Mah.; (1971) 3 SCC 930

3. Munna Lal Vs U.O.I.; (2010) 15 SCC 399

4. Writ A No. 2230 of 2014; Shiv Raj Singh Vs St. of U.P. & ors. decided on 28.3.2018

5. Himachal Pradesh St. Electricity Board Ltd. Vs Mahesh Dahiya; (2017) 1 SCC 768

6. Civil Appeal No. 8349 of 2010 arising out of SLP (C) No. 19318/2007; Mohd. Yunus Khan Vs St. of U.P. &
ors. decided on 28.09.2010

7. St. of Mysore Vs K. Manche Gowda; (1964) 4 SCR 540

8. Bhagat Ram Vs St. of H.P.; (1983) 2 SCC 442

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

1. Heard Sri Shivam Pandey learned counsel holding brief of Sri Rahul Chaudhary learned counsel for the petitioner and Sri Piyush Srivastava learned Standing Counsel for the State.

2. The present petition has been filed challenging the impugned orders dated 07.05.2012, 25.09.2012, 29.05.2012 and also challenging the order dated 11.01.2016 passed by the U.P. State Public Service Tribunal in Claim Petition No. 1245 of 2013 and also order dated 29.05.2017 whereby the review petition filed by the petitioner has been rejected.

3. The brief facts of the instant case are that the petitioner herein was working as a constable in the Police Line, Varanasi. The allegation against the petitioner is that he misbehaved with his senior officer, Mr. Devi Dayal, being in an intoxicated condition, for which the complaint was made against him and he was placed under suspension and the following charge was framed against him.

"आप पुलिस लाईन वाराणसी में कार्यरत है। दिनांक 15.12.2010 को समय लगभग 17.30 बजे श्री देवीदयाल, प्रतिसार निरीक्षक (द्वितीय) पुलिस लाईन, वाराणसी के

सामने नशे की हालत में अशोभनीय हरकत एवं अमर्यादित आचरण किये। पुलिस लाईन में आप नशीले पदार्थ का सेवन किये हुए पाये गये, जिसके फलस्वरूप आपका चिकित्सीय परीक्षण उ०नि० स०पु० श्री पंचराम कन्नौजिया, आरक्षी 1423 ना०पु० प्रमोद कुमार, आरक्षी 2213 ना०पु० दधिचन्द्र, पुलिस लाईन, वाराणसी द्वारा पं० दीनदयाल राजकीय चिकित्सालय, वाराणसी से कराया गया। चिकित्सीय परीक्षण में शराब पीने की पुष्टि हुई। आप डियूटी के दौरान शराब पीने तथा पुलिस जैसे अनुशासित बल में रहते हुए पुलिस रेगुलेशन के पैरा-373 ए का पालन न करने के दोषी पाये गये, जिनके सम्बन्ध में उ०प्र० अधीनस्थ श्रेणी के पुलिस अधिकारी/कर्मचारी की (दण्ड एवं अपील) नियमावली- 1991 के नियम 14(1) के तहत विभागीय कार्यवाही का निर्णय लिया गया। उ०प्र० अधीनस्थ श्रेणी के पुलिस अधिकारी की (दण्ड एवं अपील) नियमावली- 1991 के नियम 14(1) के अन्तर्गत विभागीय कार्यवाही सम्पादित किये जाने हेतु मुझे नामित किया गया है।"

4. In reply to the said charges, the petitioner herein submitted his explanation dated 11.01.2011 and categorically submitted that on the date of alleged incident, he has not consumed the alcohol, as alleged, nor he has misbehaved with his senior. The petitioner has specifically submitted that he was sick for sometime, for which he used to consume the Ayurvedic medicines (Drakshasav) and on the date of alleged incident as well, he had consumed the baidhyanath (Drakshasav), which includes alcohol and a report was got prepared with mala fide intention against the petitioner herein. It is further submitted by the petitioner that before preparing the report with regard to his intoxication condition neither the urine test nor the blood test were conducted to arrive at the specific finding as to whether the petitioner had consumed the liquor and the medical report was prepared only by the external examination. After the explanation was submitted, the enquiry was conducted by the Circle Officer, Kotwali, Varanasi and vide enquiry report dated 27.05.2011, the Enquiry Officer found the allegations against the petitioner as true and proved and proposed for punishment of dismissal of the petitioner from service in the following terms:

"इस प्रकार उपलब्ध साक्ष्यों एवं अभिलेखों के अवलोकन से यह स्पष्ट है की दिनांक 15.12.2010 को आरोपी जो पुलिस लाईन में दलेल कर रहा था कि समय 17.30 बजे सायंकाल प्रतिसार निरीक्षक कार्यालय के पास जोर जोर से गालियाँ दे रहा था तथा अशोभनीय हरकत एवं व्यवहार कर रहा था तथा कारण पूछने पर और भी उत्तेजित होकर गालियाँ दे रहा था तथा नशे की हालत में प्रतीत हो रहा था को एस०आई०ए०पी० श्री पंचम राम कन्नौजिया व कां० 1423 ना०पु० प्रमोद कुमार व कां०2213 ना०पु० दधिचन्द्र के साथ पं० दीनदयाल अस्पताल वाराणसी में चिकित्सीय परीक्षण हेतु भेजा गया। चिकित्सक की रिपोर्ट से आरोपी एल्कोहल (शराब) पिये हुए पाया गया। आरोपी के चरित्र पंजिका से पाया गया कि वर्ष 2002, वर्ष 2003, वर्ष 2006 तथा वर्ष 2007 में वार्षिक मन्तव्य में शराब पीने की शिकायत/अभ्यस्त हाल अंकित है। वर्ष 2008 में पत्रावली संख्या- द-149/2008, दिनांक 19.07.2008 को तत्कालीन वरिष्ठ पुलिस अधीक्षक, वाराणसी द्वारा सेवा से आरोपी को पदच्युत किया गया था। बाद में आरोपी द्वारा सिविल मिस याचिका संख्या- 53039/2009 माननीय उच्च न्यायालय, इलाहाबाद में दाखिल किया गया, जिस पर जयमंगल राम बनाम स्टेट में दिनांक 29.07.2008 के परिप्रेक्ष्य में पत्रावली संख्या- प-

779/2009 दिनांक 22.05.2010 को बहाल किया गया है, जो वर्तमान में निलम्बित है।

अतः आरोप आरक्षी 742 ना०पु० जयमंगल राम (निलम्बित) को शराब का सेवन कर पुलिस लाईन परिसर में गाली गलौज कर स्वेच्छाचारिता एवं अनुशासनहीनता का दोषी पाते हुए उ०प्र० अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड एवं अपील) नियमावली 1991 के नियम 4(1) क(एक) के अन्तर्गत सेवा से पदच्युत (डिसमिस) किया जाना प्रस्तावित किया जाता है।"

5. Subsequent to the enquiry report, the Deputy Inspector General of Police, Varanasi, issued a show cause notice dated 10.06.2011, against the petitioner in the following terms:

"वर्ष 2010 में जब आप इस जनपद की पुलिस लाईन में नियुक्त थे दिनांक 15.12.2010 को समय लगभग 17.30 बजे देवी दयाल प्रतिसार निरीक्षक, द्वितीय पुलिस लाईन वाराणसी के सामने नशे की हालत में अशोभनीय हरकत एवं अमर्यादित आचरण किये। पुलिस लाईन में आप नशीले पदार्थ का सेवन किये हुए पाये गये, जिसके फलस्वरूप आपका चिकित्सीय परीक्षण उ०नि० स०पु० श्री पंचम राम कन्नौजिया, आरक्षी 1423 ना०पु० प्रमोद कुमार, आरक्षी 2213 ना०पु० दधिचन्द, पुलिस लाईन वाराणसी द्वारा पंडित दीनदयाल राजकीय चिकित्सालय, वाराणसी में कराया गया। चिकित्सीय परीक्षण में आप द्वारा शराब पीने की पुष्टि हुई। आप ड्यूटी के दौरान शराब पीने तथा पुलिस जैसे अनुशासित बल में रहते हुए पुलिस रेगुलेशन के पैरा 371 ए, का पालन न करने के दोषी पाये गये"

आपके उक्त कृत्य के लिए तत्कालीन पुलिस उपमहानिरीक्षक, वाराणसी द्वारा आपके विरुद्ध उ०प्र० अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड एवं अपील) नियमावली-1991 के नियम- 14(1) के अन्तर्गत विभागीय कार्यवाही पुलिस उपाधीक्षक, श्री धर्म सिंह मार्छाल को आवंटित की गयी, जिनके गैर जनपद स्थान्तरण जाने के उपरान्त प्रश्नगत विभागीय कार्यवाही श्री अरविन्द कुमार मौर्य, पुलिस उपाधीक्षक/सी०ओ० कोतवाली, वाराणसी को आवंटित हुई। पीठासीन अधिकारी द्वारा नियमानुसार विभागीय कार्यवाही प्रारम्भ कर आपका बचाव का पूरा अवसर प्रदान करते हुए विभागीय कार्यवाही पूर्ण करते हुए अपनी फाइण्डिंग दिनांकित 27.05.2011 कार्यालय को प्रेषित की गई, जिसमें आपका दोष पूर्णतया प्रमाणित पाते हुए आपको उ०प्र० अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड एवं अपील) नियमावली- 1991 के नियम 4(1) (क)(एक) के ***अन्तर्गत सेवा से पदच्युत (डिसमिस) करने की संस्तुति की गई है जिसमे मैं सहमत हूँ।***

अतः आप इस कारण बताओ नोटिस प्राप्ति के 15 दिवस के अन्दर अपना लिखित स्पष्टीकरण प्रेषित करें एवं कारण बतायें कि क्यों न आपके उक्त कृत्य के लिए उ०प्र० अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड एवं अपील) नियमावली- 1991 के नियम 4(1)(क)(एक) के अन्तर्गत आपको सेवा से पदच्युत (डिसमिस) कर दिया जाय।

यदि आपका स्पष्टीकरण निर्धारित अवधि में प्राप्त नहीं होगा तो यह मानकर कि इस सम्बन्ध में आपको कुछ नहीं कहना है, तथा लगाये आरोप आपको स्वीकार है तथा आपके स्पष्टीकरण की और अधिक प्रतीक्षा न करके एकपक्षीय अन्तिम आदेश पारित कर दिया जायेगा। आपको आश्वस्त किया जाता है कि आपके स्पष्टीकरण के प्राप्त होने पर उस पर सहानुभूतिपूर्वक विचार करते हुए गुणदोष के आधार पर निर्णय लिया जायेगा। फाइण्डिंग

(उपपत्ति) की एक प्रति संलग्न कर प्रदान की जाती है।

ह० अ०
10.06.2011
पुलिस उपमहानिरीक्षक,
वाराणसी।"

6. In response to the show cause notice dated 10.06.2011, the petitioner herein submitted a detailed reply to the said show cause notice wherein it was specifically pleaded by the petitioner that the said show cause notice was issued to the petitioner herein with a predetermined mind, wherein the DIG has agreed with the proposed punishment of dismissal. Therefore, the said show cause notice was a merely formality. Thereafter, the Senior Superintendent of Police, vide order dated 07.5.2012, passed the order of dismissal of the petitioner from service. Against the said order dated 07.05.2012, the petitioner herein preferred an appeal before the Deputy Inspector General of Police on 02.07.2012, wherein in the memo of appeal, the petitioner herein has categorically stated the said show cause notice has been issued with a predetermined mind, wherein it was stated that the recommendations have been made for the termination of service of the petitioner with which he is in agreement. Vide order dated 25.09.2012. The said appeal of the petitioner herein was dismissed by the Deputy Inspector General of Police, Varanasi. Against the order of dismissal of the said appeal, the petitioner herein filed a review petition, which was also dismissed vide order dated 29.05.2013. Aggrieved by the aforesaid order of dismissal from service and the dismissal of the appeal and the review application, the petitioner herein preferred the direction Petition No. 1245 of 2013, before the State Administrative Services Tribunal, Lucknow, which was dismissed vide order dated 11.01.2016. Against the order dated 11.01.2016, the petitioner herein filed review petition no. 15 of 2016, which was also dismissed vide order dated 29.05.2017. Hence the present petition.

7. Learned counsel for the petitioner submits that in the instant case the petitioner herein has been charged and found guilty on the basis of a complaint made by the one Mr. Devi Dayal, Inspector posted in the Police Line to the effect that the petitioner has misbehaved with him in an intoxicated condition. In the instant case, to prove the fact that the petitioner herein was in an intoxicated condition, a medical report was obtained from the Medical Officer only on the external examination of the petitioner herein. However, neither the blood test nor the urine test was conducted before giving such report by the concerned Medical Officer and the Medical Officer has also not been examined by the Department during the entire proceedings against the petitioner herein. Therefore, the said medical report cannot be relied upon to establish the fact that the petitioner was in an intoxicated condition. To substantiate his arguments on the aforesaid point, the learned counsel for the petitioner has relied upon the judgement of the apex court in ***Delhi Judicial Service Association vs. state of Gujarat : Supreme Court's Cr. L.J. 1991, Page No. 3086***. In the entire proceedings against the petitioner the enquiry officer as well as the superior officer acted in a predetermined mind against the petitioner herein.

8. Learned counsel for the petitioner has further submitted that during the

investigation against the petitioner herein, none of the witnesses have supported the incident except the complainant, Mr. Devi Dayal. Rather from the statements of the witnesses during the enquiry, it is apparent that the incident has not at all taken place at Police Line as has been alleged during the investigation. He has referred to the statements of Sri Panchram Kanaujiya, Pramod Kumar, Dadhichandra etc. Therefore, the entire proceedings were conducted in predetermined mind and the enquiry report is not sustainable in law. Learned counsel for the petitioner has further submitted that while issuing notice for showing cause as to why the penalty of dismissal from service may not be imposed against the petitioner herein, the Deputy Inspector General of Police has stated that "*सेवा से पदच्युत (डिसमिस) करने की संस्तुति की गई है जिसमे मैं सहमत हूँ।*". The aforesaid averments in the show cause notice clearly demonstrates the predetermined mind of the DIG, Police, Varanasi. Therefore, the entire proceedings against the petitioner was vitiated and was conducted in a predetermined mind. Therefore, the same is illegal and is liable to be quashed.

9. Learned counsel for the petitioner further submitted that while passing the punishment order the Senior Superintendent of Police has taken into consideration the conduct of previous entries made in the character roll of the petitioner herein, for which no notice has been issued to the petitioner herein. Had the notice with regard to the previous conduct of the petitioner or the entries in the character roll of the petitioner would have been indicated in the show cause notice, the petitioner could have replied the same appropriately. However, while passing the dismissal order, the previous entries in the Character Roll of the petitioner have been considered but no opportunity has been afforded to the petitioner to counter the same. Learned counsel for the petitioner further submits that the punishment of dismissal is disproportionate to the misconduct alleged to have been committed by the petitioner herein.

10. Learned counsel for the State submitted that the police forces are the disciplined force. Therefore, any misbehaviour by the police personnel against their superior officer is not permitted. The petitioner has been found in an intoxicated condition and was misbehaving with his superior officers due to intoxication and the charges were proved against him in a detailed enquiry conducted by the Enquiry Officer, giving full opportunity of hearing to the petitioner herein. So far as the non-examination of Medical Officer is concerned, the learned counsel for the State submitted that the petitioner was apparently in intoxicated condition, which is supported by the witnesses and the medical report as well. In the disciplinary proceedings, the doctors are not required to be examined as the same was not a criminal trial where the allegations are required to be proved beyond reasonable doubt. In the disciplinary proceedings, the probability and preponderance of the allegations are sufficient to prove the charges against the delinquent officer.

11. Learned counsel for the State submitted that alongwith show cause notice the enquiry report was given to the petitioner herein while calling for his response on the enquiry report wherein there is reference to the previous conduct of the petitioner herein. Therefore, merely because the previous conduct has not been

mentioned in the show cause notice the same cannot be faulted because of the fact that the previous conduct of the petitioner was already mentioned in the enquiry report, which was in due notice of the petitioner herein.

12. Looking at the previous conduct coupled with the conduct of the petitioner in the instant case, the punishment of dismissal from service has been awarded in the instant case, which cannot be said to be disproportionate punishment. Therefore, the learned counsel for the State has prayed for dismissal of the instant petition.

13. We have considered the rival submissions made by the learned counsels for the parties and have carefully perused the record of the case.

14. We proceed to consider the first submission made by the learned counsel for the petitioner with regard to the intoxication of the petitioner herein at the time of incident, without the urine test or the blood test, for which the finding has been recorded against the petitioner, only because of the smell of the alcohol found by the doctor, which is not sufficient to prove the intoxication of the petitioner herein.

15. In ***Bachubhai Hassanalli Karyani v. State of Maharashtra : (1971) 3 SCC 930,*** the Apex Court, on the facts that the doctor had admitted that a person could smell of alcohol without being under the influence of drinking and without the urine test or the blood test, held that it cannot be concluded that the appellant was intoxicated at the time of incident.

16. In ***Munna Lal v. Union of India, (2010) 15 SCC 399***, where the person was suspected of being in a drunken condition due to the smell of alcohol, he was taken for the medical check-up and the doctor on duty examined and there was suspicion of mild smell of alcohol on the medical examination. On such facts, it was held by the Apex Court that in the absence of any positive evidence, the charges levelled against the applicant of consuming the alcohol was not proved satisfactorily.

17. In ***Writ A No. 2230 of 2014 (Shiv Raj Singh vs. State of U.P.,and 6 Others)*** a Division Bench of this Court vide judgement dated 28.3.2018 has held that without the blood and urine sample of the person, it cannot be concluded that he has consumed alcohol and in the absence of such report of blood or urine sample, merely on the basis of the external examination of a person, such medical report cannot be relied upon and no major punishment could be awarded.

18. In the instant case the petitioner herein was taken to the medical officer who has only externally examined the petitioner and having found the smell of alcohol concluded that the petitioner herein had consumed the alcohol. Therefore, mere external examination is not sufficient proof to hold a person guilty of consuming alcohol and it cannot be concluded that he was in intoxicated condition. Therefore, the charge against the petitioner with regard to the consumption of alcohol during the duty hours, is in the considered opinion of this Court, has not been proved by the department, therefore, it cannot be held that the petitioner was guilty of the charge of consuming the alcohol during the duty hours.

19. So far as the other charge with regard to misbehaviour by the petitioner

with his superior officer is concerned, the witness Yogendra Nath in his cross-examination during the inquiry has admitted that he has not heard the petitioner using abusive language or misbehaviour by the petitioner herein. The other witness, Sri Pancham Lal Kanujia, in his cross-examination has admitted that the petitioner was shouting and hurling abuses below the Banyan tree, adjoining the office of R.I.-II. However, on further cross-examination, he has admitted the fact that on 01.01.2011 when counting was going on the nephew of the petitioner, namely, Anil Kumar Anchal, who was a constable, was abused by the Counting Clerk, namely Akhilesh Kumar, when Anil Kumar Anchal said that he don't know with regard to the Dak duty then Counting Clerk asked him to go to the Banglow of DIG and to bring the Dak. On this, he showed indiscipline. Thereafter, the petitioner came there and argued in favour of his nephew, namely Anil Kumar Anchal. In further cross-examination, Sri Pancham Kumar Ram, Kanaujia has admitted that he has not not made any entry with regard to any abuses hurled by the petitioner herein. Another constable-witness, namely Promod Kumar has admitted in cross-examination that there was no resistance on the part of the petitioner while he was asked to sit on the vehicle for medical test, he did not resist the same and he has also shown his ignorance as to what has happened inside the Hospital during his medical examination. Another witness- constable, Dadhichand has admitted in the cross-examination that no abuses were hurled by the petitioner in front of him. Shri Devi Dayal, the Inspector, in his cross-examination has admitted that he was alone in the evening and was sitting in his office and has not heard any abuses hurled by the petitioner rather, he has said that there was adjoining store and the G.D. Office, therefore some persons might have heard but none of such witness has been produced who has admitted that any abuses were hurled by the petitioner herein to Devi Dayal, Inspector, in presence of anyone inside the office. Therefore, from the aforesaid evidence, it is apparent that the fact of abusing to the superior officer has not been conclusively proved during the departmental inquiry conducted against the petitioner herein. Therefore, from the aforesaid inquiry report it is apparent that neither the charge of consuming alcohol nor the misbehaviour is proved during the departmental inquiry and he has been held guilty only on the statement of the Inspector, Mr. Devi Dayal. The petitioner has explained the fact that since he was taking the Ayurvedic medicines, therefore, there is possibility of smell of alcohol. However, he had not consumed the alcohol and from the story as emerged from the cross-examination of the witnesses, it has emerged that there was some dispute between the Counting Clerk, namely Akhilesh Kumar and the nephew of the petitioner-constable, Anil Kumar, with regard to assigning some duty, for which the petitioner herein has intervened and this may be a reason of false dismissal of the petitioner from service, without there being any proof of misbehaviour or abusive language used by the petitioner. It has been further argued that after the inquiry report, the DIG has issued a show cause notice with predetermined mind that there is a recommendation for dismissal of his service to which the DIG has already been agreed. Therefore, the show cause notice was mere a formality. After the conclusion of the inquiry report, it was obligatory on the part of the Disciplinary Authority to give a show cause notice before making up his mind with regard to the punishment proposed by the Enquiry Officer. In

Himachal Pradesh State Electricity Board Ltd. vs. Mahesh Dahiya : (2017) 1 SCC 768, the abuse has held as under :

"23. The basis of coming to the conclusion by both the learned Single Judge and the Division Bench that disciplinary authority has violated the principle of natural justice is based on the fact that although the enquiry report was sent to the writ petitioner by the letter dated 2-4-2008, the disciplinary authority-cum-whole-time members have already come to the opinion on 25-2-2008 that the writ petitioner be punished with major penalty. The Division Bench of the High Court has placed reliance on Union of India v. R.P. Singh [Union of India v. R.P. Singh, (2014) 7 SCC 340 : (2014) 2 SCC (L&S) 494] .

24. In the above case the issue was as to whether non-supply of the copy of advice of UPSC to the delinquent officer at pre-decision stage violates the principle of natural justice. This Court placed reliance on the Constitution Bench judgment in ECIL v. B. Karunakar [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184] and laid down the following in para 21 : (R.P. Singh case [Union of India v. R.P. Singh, (2014) 7 SCC 340 : (2014) 2 SCC (L&S) 494] , SCC p. 349)

"21. At this juncture, we would like to give our reasons for our respectful concurrence with S.K. Kapoor [Union of India v. S.K. Kapoor, (2011) 4 SCC 589 : (2011) 1 SCC (L&S) 725] . There is no cavil over the proposition that the language engrafted in Article 320(3)(c) does not make the said article mandatory. As we find, in T.V. Patel case [Union of India v. T.V. Patel, (2007) 4 SCC 785 : (2007) 2 SCC (L&S) 98] , the Court has based its finding on the language employed in Rule 32 of the Rules. It is not in dispute that the said Rule from the very inception is a part of the 1965 Rules. With the efflux of time, there has been a change of perception as regards the applicability of the principles of natural justice. An enquiry report in a disciplinary proceeding is required to be furnished to the delinquent employee so that he can make an adequate representation explaining his own stand/stance. That is precisely what has been laid down in B. Karunakar case [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184] . We may reproduce the relevant passage with profit : (B. Karunakar case [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184] , SCC p. 756, para 29)

'29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.'"

There can be no dispute to the above proposition.

25. The Constitution Bench in ECIL v. B. Karunakar [ECIL v. B. Karunakar, (1993) 4 SCC 727 : 1993 SCC (L&S) 1184] after elaborately considering

the principle of natural justice in the context of the disciplinary inquiry laid down the following in paras 29, 30(iv) and (v) : (SCC pp. 756-58)

"29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30. ... (iv) In the view that we have taken viz. that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan case [Union of India v. Mohd. Ramzan Khan, (1991) 1 SCC 588 : 1991 SCC (L&S) 612] should apply to employees in all establishments whether Government or non-government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of

natural justice" which in itself is antithetical to justice."

26. Present is not a case of not serving the enquiry report before awarding the punishment rather the complaint has been made that before sending the enquiry report to the delinquent officer, the disciplinary authority has already made up its mind to accept the findings of the enquiry report and decided to award punishment of dismissal. Both the learned Single Judge and the Division Bench on the aforesaid premise came to the conclusion that the principle of natural justice has been violated by the disciplinary authority. The Division Bench itself was conscious of the issue, as to whether, inquiry is to be quashed from the stage where the inquiry officer/disciplinary authority has committed fault i.e. from the stage of Rule 15 of the CCS (CCA) Rules as non-supply of the report. Following observations have been made in the impugned judgment [H.P. SEB v. Mahesh Dahiya, 2015 SCC OnLine HP 818] by the Division Bench in para 21 : (Mahesh Dahiya case [H.P. SEB v. Mahesh Dahiya, 2015 SCC OnLine HP 818] , SCC OnLine HP)

"21. Having said so, the core question is — whether the inquiry is to be quashed from the stage where the inquiry officer/disciplinary authority has committed fault i.e. from the stage of Rule 15 of the CCS (CCA) Rules i.e. non-supply of enquiry report, findings and other material relied upon by the inquiry officer/disciplinary authority to the writ petitioner-respondent herein to explain the circumstances, which were made basis for making foundation of enquiry report or is it a case for closure of the inquiry in view of the fact that there is not even a single iota of evidence, prima facie, not to speak of proving by preponderance of probabilities, that the writ petitioner has absented himself wilfully and he has disobeyed the directions?"

31. Both the learned Single Judge and the Division Bench have heavily relied on the fact that before forwarding the copy of the report by the letter dated 2-4-2008 the disciplinary authority-cum-whole-time members have already formed an opinion on 25-2-2008 to punish the writ petitioner with major penalty which is a clear violation of the principles of natural justice. We are of the view that before making opinion with regard to punishment which is to be imposed on a delinquent, the delinquent has to be given an opportunity to submit the representation/reply on the enquiry report which finds a charge proved against the delinquent. The opinion formed by the disciplinary authority-cum-whole-time members on 25-2-2008 was formed without there being benefit of comments of the writ petitioner on the enquiry report. The writ petitioner in his representation to the enquiry report is entitled to point out any defect in the procedure, a defect of substantial nature in appreciation of evidence, any misleading of evidence both oral or documentary. In his representation any inputs and explanation given by the delinquent are also entitled to be considered by the disciplinary authority before it embarks with further proceedings as per statutory rules. We are, thus, of the view that there was violation of principle of natural justice at the level of disciplinary authority when opinion was formed to punish the writ petitioner with dismissal without forwarding the enquiry report to the delinquent and before obtaining his comments on the enquiry report. We are, thus, of the view that the order of the High Court setting aside the punishment order as

well as the appellate order has to be maintained.

32. In view of the above discussion, we are of the view that present is the case where the High Court while quashing the punishment order as well as appellate order ought to have permitted the disciplinary authority to have proceeded with the inquiry from the stage in which fault was noticed i.e. the stage under Rule 15 of the Rules. We are conscious that sufficient time has elapsed during the pendency of the writ petition before the learned Single Judge, the Division Bench and before this Court, however, in view of the interim order passed by this Court dated 31-8-2015 [H.P. SEB v. Mahesh Dahiya, SLP (C) CC No. 15656 of 2015, order dated 31-8-2015 (SC), wherein it was directed:"Delay condoned. Issue notice. In the meanwhile, there shall be stay of operation of the impugned order dated 9-4-2015 passed by the High Court of Himachal Pradesh in LPA No. 340 of 2012 (H.P. SEB v. Mahesh Dahiya, 2015 SCC OnLine HP 818). Mr Aditya Singh, learned counsel accepts notice and seeks some time to file reply. List the matter immediately after the pleadings are complete."] no further steps have been taken regarding implementation of the order of the High Court. The ends of justice would be served in disposing of this appeal by fixing a time-frame for completing the proceeding from the stage of Rule 15."

20. In the aforesaid judgement, it has been categorically held that while issuing the show cause notice, the Disciplinary Authority has already made up his mind to accept the finding of inquiry report and award of the punishment for dismissal. Therefore, the very purpose of giving such show cause notice is frustrated and such show cause notice is vitiated and is in clear violation of principles of natural justice. We are of the view that before making opinion with regard to the punishment, which is proposed to be imposed on a delinquent officer, the delinquent has to be given opportunity to submit his representation/reply to inquiry the report.

21. In the instant case, while issuing show cause notice, the DIG, Varanasi, has not only informed about the recommendation for dismissal but had also given his conclusion to such recommendation that he is in agreement with such recommendation for dismissal of the delinquent. Therefore, the instant show cause notice dated 10.06.2011, issued by DIG, Varanasi, is violative of the principles of natural justice. With such determination and following the such determination by the DIG, Police, the Sr. Superintendent of Police, Varanasi, vide order dated 07.05.2012, has passed the order for dismissal of service of the petitioner, having taking into consideration the previous conduct of the petitioner herein, for which no show cause notice was ever issued to the petitioner. Therefore, the order dated 07.05.2012 also suffers from the extraneous considerations made by the Sr. Superintendent of Police, with regard to the previous conduct for which no opportunity was given to the petitioner herein to show cause. The submission made by the learned counsel for the State that since the previous conduct was already referred in the inquiry report, therefore, in the show cause notice, it was not required to be mentioned, is not a convincing argument on behalf of the State. A delinquent must be given sufficient opportunity to answer all the material, on which the severe punishment of dismissal is being proposed by the department.

Therefore, the show cause notice issued by DIG, was in violation of the principles of natural justice not only because of his predetermined mind expressed in the show cause notice but also for want of the material to be considered against the petitioner for such dismissal, which has been taken into consideration while passing the dismissal order.

22. The further argument, which has been advanced on behalf of the petitioner is that the punishment of dismissal is disproportionate to the charge of consumption of alcohol and misbehaviour. It has been held in catena of cases that punishment must be proportionate to the misconduct established against a delinquent employee. In the considered opinion of this Court, the punishment imposed on the petitioner herein on the basis of the allegations which are not proved, as has been analysed above, is disproportionate to the charges levelled against the petitioner herein. Ordinarily, where the enquiry and the disciplinary proceedings has been held in violation of principles of natural justice, the inquiry or the disciplinary proceedings would be vitiated and the order of dismissal passed on such vitiated disciplinary proceedings would be quashed by issuance of writ of Certiorari. It is well settled that in such a situation, normally, it would be open to the Disciplinary Authority to hold inquiry afresh.

23. In the judgement and order dated ***28.09.2010*** in ***Civil Appeal No...../2010 (arising out of SLP (C) No. 19318/2007) Mohd. Yunus Khan vs. State of U.P. & Ors***, the Apex Court has under:

33. The courts below and the statutory authorities failed to appreciate that if the disciplinary authority wants to consider the past conduct of the employee in imposing a punishment, the delinquent is entitled to notice thereof and generally the charge-sheet should contain such an article or at least he should be informed of the same at the stage of the show cause notice, before imposing the punishment.

24. In ***State of Mysore vs. K. Manche Gowda : (1964) 4 SCR 540***, on the facts that the Government servant was misled by the show cause notice issued by the Government but for the previous record, the punishment of dismissal could not have been passed, it was held by the Apex Court as under:

"In the present case the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary, the said notice put him, on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave., But, a comparison of Paragraphs 3 and 4 of the order of dismissal shows that but for the previous record of the,Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendations of, the Enquiry officer and, the public . Service Commission. This order, therefore indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the respondent from service." (P. 549)

25. In ***Bhagat Ram v. State of H.P., (1983) 2 SCC 442, t***he similar question was answered by the Apex Court in following terms:

13. That conclusion poses another question as to what relief we

should give in this appeal. Ordinarily where the disciplinary enquiry is shown to have been held in violation of principle of natural justice, the enquiry would be vitiated and the order based on such enquiry would be quashed by issuance of a writ of certiorari. It is well settled that in such a situation, it would be open to the Disciplinary Authority to hold the enquiry afresh. That would be the normal consequence.

14. We invited Mr Talukdar, learned counsel for the respondent State to address us on the question whether the game of holding the fresh enquiry is worth the battle. Moreso looking to the fact that there is a very minor infraction of duty leading to a trivial charge of negligence in performance of duty which has caused no loss to the Government, we are of the opinion that it would not be fair to this low-paid Class IV government servant to face the hazards of a fresh enquiry.

15. The question is once we quash the order, is it open to us to give any direction which would not permit a fresh enquiry to be held? After all what is the purpose of holding a fresh enquiry? Obviously, it must be to impose some penalty. It is equally true that the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution. Having been influenced by all these relevant considerations, we are of the opinion that no useful purpose would be served by a fresh enquiry. What option is open to us in exercise of our jurisdiction under Article 136 to make an appropriate order. We believe that justice and fairplay demand that we make an order of minor penalty here and now without being unduly technical apart jurisdiction, we are fortified in this view by the decision of this Court in Hindustan Steels Ltd., Rourkela v.A.K. Roy [(1969) 3 SCC 513 : AIR 1970 SC 1401 : (1970) 3 SCR 343 : (1970) 1 LLJ 228] where this Court after quashing the order of reinstatement proceeded to examine whether the party should be left to pursue further remedy. Other alternative was to remand the matter that being a case of an industrial dispute to the Tribunal. It is possible that on such a remand, this Court further observed, that the Tribunal may pass an appropriate order but that would mean prolonging the dispute which would hardly be fair to or conducive to the interest of the parties. This Court in such circumstances proceeded to make an appropriate order by awarding compensation. We may adopt the same approach. Keeping in view the nature of misconduct, gravity of charge and no consequential loss, a penalty of withholding his increments with future effect will meet the ends of justice. Accordingly, two increments with future effect of the appellant be withheld and he must be paid 50 percent of the arrears from the date of termination till the date of reinstatement.

26. In view of the above, we are of the considered opinion that the show cause notice which was issued by the DIG has mentioned that severe punishment of termination is proposed against the petitioner on the basis of the previous conduct of the petitioner herein and the said notice was sent with a predetermined mind, which clearly shows bias against the petitioner herein. The aforesaid predetermined notice of termination sent by the DIG and the subsequent termination by the S.S.P. was influenced on the basis of

the opinion already expressed by the DIG in the show cause notice. Therefore the said show cause notice in the considered opinion of the court is illegal notice and on the basis of previous conduct, severe punishment of termination cannot be awarded. We are of the considered opinion that no charge of misbehaviour with seniors/colleagues due to intoxication was proved against the petitioner during enquiry as no urine or blood test of the petitioner herein was conducted. Since the punishment order had been passed in violation of the statutory rules and the principles of natural justice, it is rendered null and void.

27. For all the reasons, as afore stated the instant writ petition is ***allowed***. and the impugned orders dated 7.5.2012, 25.9.2012, 29.5.2012, 11.1.2016 and 29.5.2017 are hereby set aside. The petitioner herein shall be reinstated in service with continuity in service alongwith 50% back wages for the period he was out of service. The respondents are directed to reinstate the petitioner in service forthwith and shall make payment of his back wages, as above, within two months from the date of receipt of a certified copy of this order.

28. No cost.

(2024) 1 ILRA 1289
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2023

BEFORE

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ-B No. 2688 of 2023

Ram Ajor & Ors. ...Petitioners
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:
Sri Awadhesh Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Amrendra Pratap Singh

A. Consolidation of Holdings – Abatement of Proceedings Under Section 5(2) – Petitioners challenged the Board of Revenue's order dated 27.06.2023, which set aside the Sub Divisional Officer's order dated 25.04.2018 consigning a restoration application under Order IX Rule 13, CPC, as abated due to consolidation operations – Held, proceedings under Section 5(2) of the U.P. Consolidation of Holdings Act, 1953, abate only for suits or proceedings involving correction of records or declaration of rights/interest in land – A restoration application under Order IX Rule 13, CPC, being collateral and limited to setting aside an ex parte decree without adjudicating substantive rights, does not fall within the ambit of Section 5(2) and thus does not abate, as supported by *Ram Naval Vs Board of Revenue* and *Ram Nath Vs Additional Commissioner*. (Paras 18, 20, 21, 26, 34, 40, 45, 46, 47, 50)

B. Civil Procedure – Restoration Application Under Order IX Rule 13, CPC – Respondent no. 2 filed a restoration application on 30.01.2015 to set aside an ex parte decree dated 19.08.1970/30.01.1971, alleging it was based on a forged compromise – Held, a restoration application under Order IX Rule 13, CPC, is distinct from a review, as it does not involve reconsidering the merits of the judgment but only assesses whether sufficient cause prevented the defendant's appearance – Such proceedings are not substantive and do not revive the suit unless allowed, per *Shiv Shanker Singh Vs Sonia* and *Kunwar Bahadur Singh Vs Shiv Shankar*. (Paras 27, 29, 30, 31, 32, 34, 44)

C. Judicial Review – Board of Revenue's Order – Correctness of Reasoning – The Board of Revenue remanded the matter to the Sub Divisional Officer, holding that the restoration application was pending before the consolidation notification and thus not abated – Held, while the remand was correct, the Board's

reasoning based on the timing of the consolidation notification (incorrectly cited as 06.02.2015 instead of 03.05.2014) was irrelevant – The restoration application does not abate under Section 5(2) regardless of its pendency at the start of consolidation, as it does not involve adjudication of land rights, per *Mool Chand Vs Deputy Director, Consolidation*. (Paras 13, 15, 17, 41, 48, 50, 51)

D. Consolidation Act – Scope of Section 5(2) and Legislative Intent – Petitioners argued that the restoration application should abate as the village came under consolidation on 03.05.2014 – Held, Section 5(2) aims to vest exclusive jurisdiction in consolidation authorities for claims involving land rights to avoid conflicting jurisdictions, as per *Abdul Wahid Khan Vs Bhawani* – However, restoration proceedings under Order IX Rule 13, CPC, being incidental and not involving substantive land rights, are outside this scope and remain within the jurisdiction of the original court, as clarified by *Sakal Singh Vs Smt. Devi*. (Paras 22, 23, 24, 25, 38, 42, 43)

E. Restoration Application – Maintainability and Procedure – Petitioners contended that the second restoration application filed after 19 years was not maintainable – Held, the court did not adjudicate the maintainability or merits of the restoration application, as the issue was limited to whether it abated under Section 5(2) – The Sub Divisional Officer was directed to decide the restoration application dated 30.01.2015 on its merits within six months, without prejudice to the parties' contentions, ensuring expeditious resolution. (Paras 15, 47, 52)

Writ Petition Disposed – Order Upheld with Modified Reasoning – Restoration Application to be Decided on Merits.

<u>List of Cases cited:</u>

1. Mool Chand Vs Deputy Director, Consolidation, (1995) 5 SCC 631

2. Ram Nath Vs Additional Commissioner (Administrative), Varanasi, 2015 (1) RJ 412

3. Sakal Singh Vs Smt. Devi, AIR 1979 Allahabad 274

4. Ram Naval Vs Board of Revenue, U.P., Allahabad, 2006 (9) ADJ 441

5. Shiv Shanker Singh Vs Sonia, (1957) 27 AWR 189

6. Kunwar Bahadur Singh Vs Shiv Shankar, AIR 1950 All 327

7. Ghanashyam Mohapatra Vs Suryamani Swaim, AIR 1964 Orissa 205

8. Tulsipat Ram Vs Nayab Singh, AIR 1958 All 565

9. Abdul Wahid Khan Vs Bhawani, AIR 1966 SC 1718

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard, Sri Awadesh Kumar Yadav, learned Counsel for the petitioners, Sri Anshul Nigam, learned Standing Counsel for the State-respondent nos. 1 & 3 and Sri Amrendra Pratap Singh, learned Counsel for the respondent no. 2.

2. With the consent of the learned counsel for the parties, this Court proceeds to finally decide the present Writ Petition at the admission stage itself.

3. The relevant facts in brief, as narrated by the petitioners in the writ petition, are that the petitioners and respondent no.2 belong to the same family and the dispute is in respect of a property that belonged to Late Shiv Gulam, who was the ancestor of the petitioners and the respondent no. 2.

4. The submission of the learned counsel appearing on behalf of the petitioners is that the father of the petitioners filed a partition suit bearing Suit

No. 35 of 1970 (Ram Aasre and another versus Jhinnu) in the Court of learned Sub Divisional Officer, Bansi, District Basti (the then). The said Suit, on the basis of a compromise between the parties, was decided on 19.08.1970 and the decree was passed on 30.01.1971. The respondent no.2-Rajendera along with two others namely Sri. Motilal and Smt. Jamuni filed an application dated 03.01.1987 under Order IX Rule 13 of the Civil Procedure Code, 1908 against the judgement and decree dated 19.08.1970 and 30.01.1971 respectively; before the learned Court of Sub Divisional Officer, Bansi. The parties to the said proceeding amicably settled their dispute and accordingly moved an application dated 01.11.1995 before the aforesaid Court, inter alia, praying that the said restoration application dated 03.01.1987, filed under Order IX Rule 13 of the Civil Procedure Code, 1908 be dismissed as withdrawn.

5. It has been asserted on behalf of the petitioners that the Village Auraiyya Manjhriya, Tappa Gosiyari, Paragana Manghar Paschim, Tehsil Mehdawal, District Sant Kabir Nagar; came under consolidation operation and Notification No. 1425/G 610/2012 under Section 4(2) of the Consolidation of Holdings Act, 1953 (hereinafter referred to as the '**Consolidation Act'**), was issued on 03.05.2014.

6. Further, the respondent no. 2, namely, Rajendera after a period of about 19 years, again filed an application dated 30.01.2015 under Order IX Rule 13 read with Section 151 of the Civil Procedure Code, 1908 (herein after referred to as 'Restoration Application') before the learned Court of Sub Divisional Officer, Mehdawal, Sant Kabir Nagar, inter alia, praying for setting aside of the aforesaid judgement and decree dated 19.08.1970 / 30.01.1971 passed in the partition Suit No. 35 of 1970 and to restore the same to its original number to be decided on merit after entertaining the objections raised by him.

7. On the aforesaid Restoration Application, the learned Sub Divisional Officer Mehdawal, vide order dated 11.02.2015 directed the Peshkar to place the same along with the records by fixing a date and issuing notices to the opposite parties.

8. Against the aforesaid Restoration Application, petitioners filed detailed objection dated 15.03.2018 with the prayer to dismiss the same and to maintain the judgement and decree dated 19.08.1970 / 30.01.1971 passed in the partition Suit No. 35 of 1970.

9. It has been further submitted on behalf of the petitioners that the respondent no. 2 also filed an objection under Section 9A (2) of the Consolidation Act before the Consolidation Officer, Sant Kabir Nagar on 20.05.2016 in respect of the same dispute and on receipt of the notices the petitioners appeared on 08.11.2016 and filed a counter reply to the said objection.

10. The learned Sub Divisional Officer, Mehdawal after hearing the parties; vide order dated 25.04.2018, directed to consign the aforesaid Restoration proceeding to records as having been abated, on the ground that since the Village Auraiyya (Manjhriya), Tappa Gosiyari, Paragana Maghar Paschim, Tehsil Mehdawal, District Sant Kabir Nagar, has been declared under consolidation operation.

11. Aggrieved by the aforesaid order dated 25.04.2018 passed by the learned Sub Divisional Officer, Mehdawal, the respondent no.2 namely Rajendera filed a Revision under Section 333 of U.P. Zamindari Abolition and Land Reforms Act, 1950, before the learned Board of Revenue, U.P. (respondent no.1). The said Revision was registered as Case No. REV/1228/2018/Sant Kabir Nagar (Computerised Case No. R20181765001228).

12. The learned Board of Revenue (respondent no.1) vide Order dated 27.06.2023, allowed the said Revision thereby set aside the Order dated 25.04.2018 passed by the learned Sub Divisional Officer, Mehdawal, by holding the same as legally erroneous and remanded the matter to the learned Court of Sub Divisional Officer, Mehdawal with the direction to firstly decide the Restoration Application on merits and thereafter to consider the question of abatement of Suit.

13. The learned Board of Revenue (respondent no.1) while deciding the aforesaid Revision vide Order dated 27.06.2023 returned a categorical finding that since the aforesaid Restoration Application was filed on 31.01.2015 as is evident from the order-sheet and, the publication under Section 4(2) of the Consolidation Act was made on 06.02.2015, goes to show that the restoration application was pending for consideration when the commencement of consolidation operation was notified, as such, the jurisdiction to decide the said restoration application on merit, lies with the Sub Divisional Officer, Mehdawal, accordingly, the trial Court has committed a manifest error of law by not deciding the Restoration Application and declaring the same as abated.

14. Being aggrieved by the Order dated 27.06.2023 passed by the learned Board of Revenue (respondent no.1), the petitioner approached this Court by preferring the present writ petition under Article 226 of the Constitution of India, praying for the following reliefs,

(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 27.06.2023 passed by respondent no. 1 (Annexure no. 9 to the writ petition).

(ii) Issue any other suitable order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(iii) To award the cost of the writ petition in favour of petitioners.

15. Assailing the impugned order dated 27.06.2023 the learned counsel for the petitioners raised the following arguments:

15.1. That the learned Board of Revenue (respondent no.1) has miserably mistaken to consider 06.02.2015 as the date of Notification under Section 4(2) of the Consolidation Act, while the correct date is 03.05.2014 with effect from which the Village concerned came under consolidation operation.

15.2. That the finding recorded by the learned Board of Revenue (respondent no.1) to the erffect that the Restoration Application was pending for consideration when the commencement of consolidation operation was notified and as

such it was well within the jurisdiction of the Sub Divisional Officer, Mehdawal to decide the said restoration application is factually incorrect and erroneous.

15.3. That the impugned Order dated 27.06.2023 passed by the learned Board of Revenue (respondent no.1) remanding the matter to the Court of learned Sub Divisional Officer, Mehdawal with the direction to firstly decide the Restoration Application on merits and thereafter to consider the question of abatement is totally against the provisions of Section 5(2) of the Consolidation Act that specifically provides that every pending proceeding shall stand abated once the land lying in the area which has been declared to be under consolidation operation vide notification under Section 4(2) of the Consolidation Act. In support of his contention, the learned Counsel for the petitioner relied upon the judgment passed by the Hon'ble Supreme Court of India in the case of **Mool Chand versus Deputy Director, Consolidation** reported in **1995 (5) SCC 631.**

15.4. That the partition Suit bearing Case No. 35 of 1970 was decided in the year 1970 on the basis of compromise between the parties, the same cannot be reopened by way of restoration after such a long period of about 19 years and that too after the commencement of the consolidation operation in the village concerned.

15.5. That apart from the above mentioned reasons, the Restoration application in question is not at all maintainable as the same is the second restoration application filed by the respondent.

16. Per contra, the main contentions advanced by the learned Counsel appearing on behalf of the respondent no.2 are as under:

16.1. That no 'Suit' was pending at the time of the start of the consolidation operation in accordance with Section 4(2)(a) of Consolidation Act and the proceeding under Order IX Rule 13 of the Code of Civil Procedure does not, by itself, revive the Suit and as such the said proceeding will not stand abated under Section 5(2) of the Consolidation Act.

16.2. That it is well settled that the proceeding under Order IX Rule 13 of the Code of Civil Procedure / restoration application does not fall within the bar as contemplated under Section 49 of the Consolidation Act.

16.3. That since the partition Suit No. 35 of 1970 (Ram Aasre and another versus Jhinnu) was decided on 19.08.1970 / 30.01.1971 by the Court of learned Sub Divisional Officer, on the basis of a forged compromise alleged to have been entered between the parties and is absolutely ex-parte against the answering respondent, as such, the restoration application under Order IX Rule 13 of the Code of Civil Procedure is maintainable and the said proceeding would not stand abated under Section 5(2) of the Consolidation Act. In support of his argument, he placed reliance on the judgment passed by this Court in the case of **Ram Nath and others versus Additional Commissioner (Administrative) Varanasi, Division Varanasi and others**, reported in **2015 (1) RJ 412 and Sakal Singh & others versus Smt. Devi & another, reported in AIR 1979 Allahabad 274.**

17. Sri Anshul Nigam, learned Standing Counsel for the State-respondents has elucidated this Court on the controversy of the date of notification of consolidation operation in the concerned village, by filing an affidavit duly sworn by the Settlement Officer of Consolidation, District Sant Kabir Nagar dated 19.10.2023, wherein it has been deposed that vide order dated 25.03.2014 the Village Auraiyya Manjhriya, Tappa Gosiyari, Paragana Manghar Paschim, Tehsil Mehdawal, District Sant Kabir Nagar, was declared for consolidation operation and the notification to this effect was published vide Gazette dated 03.05.2014. In pursuance of the said gazette notification, the consolidation authorities initiated the consolidation operation on 06.02.2015 by beating drums (Munadi) to make declaration/publication for the public at large so as to be informed that the consolidation operations have started. It is also provided in the aforesaid affidavit that subsequently, the notification under 52(1) of the Consolidation Act for conclusion of the consolidation operation has been made by the Consolidation Commissioner, Government of U.P., Lucknow on 21.06.2023.

18. Having considered the respective arguments as advanced by the learned counsels for the parties, it emerged out that in the instant case, the moot question for determination before this Court is the applicability / effect of Section 5(2) of the Consolidation Act, 1953 on the proceeding for Restoration of a suit under Order IX Rule 13 of Civil Procedure Code, 1908.

19. At the very outset, it is imperative to mention that after the declaration, made by the State Government through Gazette, to the effect that the district or part thereof, as the case may be, has been decided to be brought under consolidation operations, as provided under Section 4(1)(a) of the Consolidation Act, any officer or authority duly empowered by the District Deputy Director of Consolidation, becomes legally competent to exercise its' functions as provided in the consolidation Act. For better appreciation of the same, Section 4 of the Act is reproduced hereinbelow,

"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.]"

20. The consolidation operation **starts** as soon as it is notified under Section 4(2) of the Consolidation Act. The effect of the aforesaid notification issued under Section 4(2)(a) of the Consolidation Act is that every proceeding for the correction of records and every suit and proceeding 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 the Consolidation 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, stands abated.

21. The effect of the start of consolidation operation is provided under section 5 of the consolidation Act. The relevant provision as contemplated under sub- section 2 of Section 5 of the Consolidation Act is reproduced hereinbelow,

"5. Effect of notification under Section 4(2). –

(1) ....

(2) Upon the said publication of the notification under sub-section (2) of Section 4, the following further consequences shall ensue in the area to which the notification relates, namely -

(a) every proceeding for the correction of records and every suit and proceeding 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 :

Provided that no such order shall be passed without giving to the parties notice by post or in any other manner and after giving them an opportunity of being heard:

Provided further that on the issue of a notification under sub-section (1) of Section 6 in respect of the said area or part thereof, every such order in relation to the land lying in such area or part as the case may be, shall stand vacated;

(b) such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this Act and the rules made thereunder.]

[Explanation. - For the purposes of sub-section (2), a proceeding under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 or an uncontested proceeding under Sections 134 to 137 of

the U.P. Zamindari Abolition and Land Reforms Act, 1950, shall not be deemed to be a proceeding in respect of declaration of rights or interest, in any land.]"

22. The concept of abatement as provided under section 5(2) of the Consolidation Act is that when a scheme of consolidation is undertaken, the jurisdiction for adjudication of various claims to land involved in consolidation should exclusively vest in the consolidation authorities set up under the said Act. Further, in order to permit the authorities to pursue adjudication of rival claims to land unhampered by any proceedings in civil courts or revenue courts, a wholesome provision was made that the pending proceedings involving claims to land in the hierarchy of civil / revenue courts, may be in the trial court, appeal or revision, should abate.

23. The intention of legislation behind the aforesaid provision under section 5 of the Consolidation Act is to ensure impediment-free adjudication of claims to land before the authorities under the Consolidation Act without being obstructed by proceedings in civil courts or without being hampered by decisions of the civil / revenue courts in the course of consolidation of holdings.

24. It would be apt to say that object behind the provision of abetment as provided under section 5(2) of the Consolidation Act is to avoid conflict consequent upon rival jurisdictions. The legislature provided that the proceedings involving the claims to land put in consolidation should be exclusively examined by the authorities under the Consolidation Act and all rival jurisdictions would be closed. Simultaneously it was necessary to deal with the pending proceedings and that is why the provision for abatement of such proceedings has been incorporated.

25. It would not be out of place to mention here that section 49 of the Consolidation Act ousts the jurisdiction of the Courts of law including the Civil or Revenue from entertaining any suit or proceeding with respect to rights in such land or with respect to any other matter for which a proceeding could or ought to have been taken under the Consolidation Act. Thus, upon publication of notification under section 4(2) of the Consolidation Act the jurisdiction of the Court or authority, which are otherwise competent to entertain and adjudicate the aforesaid suit or proceeding, become barred. It is a well-settled legal proposition that a statute ousting the jurisdiction of a court must be strictly construed as has been observed by the Hon'ble Supreme Court in the case of **Abdul Wahid Khan** versus **Bhawani and others,** reported in **AIR 1966 SC 1718.**

26. However, the dispute in the instant case is to be seen from a different perspective. What is to be determined by this Court is that whether the proceeding on the application under Order IX Rule 13 of the Civil Procedure Code, falls within the meaning of pending proceeding as specified under section 5(2) of the Consolidation Act.

27. In order to deal the aforesaid issue, it is necessary to firstly, go through the provisions as provided under Order IX Rule 13 Civil Procedure Code. For a ready reference, the same is quoted hereinbelow,

"13. Setting aside decree ex parte against defendant. *In any case in*

which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim]

[Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.]"

28. The aforesaid provision under Order IX Rule 13 of the Civil Procedure Code, deals with a situation where the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing and a decree was passed ex parte; the Court by which the said decree was passed, shall make an order setting aside the said decree as against him and shall appoint a day for proceeding with the suit.

29. Further, the Order IX Rule 13 of the Civil Procedure Code provides that in any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed, for an order to set it aside. From a bare perusal of the said provision, it is apparent that once an application under Order IX Rule 13 of the Civil Procedure Code (herein referred to as Restoration application), is allowed, the ex parte decree is set aside and deemed as wiped off the record, the suit is restored to its original position and number.

30. In the case of **Shiv Shanker Singh versus Sonia** reported in **(1957) 27 AWR 189,** this Court held that in adjudicating a Restoration application under Order IX Rule 13 of the Civil Procedure Code, the Courts must confine its findings to the extent that the decree sought to be set aside is passed ex parte and there was sufficient cause for the non-appearance of the defendant, when the suit was called for hearings. For ready reference, an excerpt of Paragraph 5 is extracted hereinbelow,

"5. The essential condition to which a court has to focus its attention before passing an order under Order IX Rule 13 is that the summons has not been duly served or that the Defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing..."

31. The Hon'ble Division Bench of this Court in the case of **Kunwar Bahadur Singh** versus **Shiv Shankar** reported in

AIR 1950 All 327 while carving out a distinction between an application for review and an application for restoration, explained the aim which is sought to be achieved by a restoration application under Order IX Rule 13 Civil Procedure Code. For convenience, paragraph 30 of the same is extracted hereinbelow,

"30. There seems to be no force in this contention, for an application for review, in its very essence, is quite different from an application for restoration. The one aims at a reconsideration of the judgment already pronounced and seeks to establish that it is erroneous, while the other seeks that that judgment be entirely ignored from consideration and set aside, whether it be right or wrong. The one concerns itself with the merits of the decision, while the other concerns itself with the sufficiency of service upon the applicant and the sufficiency or otherwise of the cause, preventing him from being present."

32. In the case of **Ghanashyam Mohapatra and others** versus **Suryamani Swaim** reported in **AIR 1964 Orissa 205,** the Hon'ble Division Bench of the High of Orissa, held that a restoration application under Order IX Rule of the Civil Procedure Code, however, does not come within the purview of review as provided under Order XLVII of the Civil Procedure Code. An application for restoration of a suit within the meaning of Order IX Rule 13 is not such an application where the Court is called upon to reconsider the merits of the judgment. While considering such an application, the Court has to satisfy itself as to whether the party was prevented by any sufficient cause from appearing when the suit was called on for hearing. In no sense, an application for restoration moved under Order IX Rule 13 of the Civil Procedure Code can be said to be on the same footing as an application for review where the whole judgment has to be examined on merits.

33. This Court in the case of **Tulsipat Ram** versus **Nayab Singh** reported in **AIR 1958 All 565** held that an order refusing to set aside an *ex parte* decree is not a review of the judgment within the meaning of Article 182(3) of the Limitation Act.

34. Therefore, it is the settled legal position that a Restoration application within the meaning of Order IX Rule 13 of the Civil Procedure Code, is not an application where the Court is called upon to reconsider the merits of the judgement and decree. The scope of the said Restoration proceeding is limited to the extent that while entertaining such an application under Order IX Rule 13 of the Civil Procedure Code, the Court is concerned only with the limited question that the decree sought to be set aside is passed ex parte and there was sufficient cause for the non-appearance of the defendant when the suit was called for hearings at that stage and it should not in any case consider the merits of the judgment in question. Further, the application for Restoration should not be misconstrued as an application for review as its very essence is quite different from an application for restoration. The former aims at reconsideration of the judgment already pronounced while the latter seeks that the judgment be entirely ignored from consideration and to be set it aside, whether it is right or wrong.

35. The next question for consideration in the instant case is that the term "*proceeding*" as occurred in Section

5(2) of the Consolidation Act, will or will not include within its meaning, a '*Restoration proceeding'*.

36. To understand the nature of the 'proceedings' within the meaning of Section 5(2) of the Consolidation Act, it should be borne in mind that, it is the settled legal proposition that the words of the statute should normally be given their ordinary meaning bearing in mind the context. If the words of the statutes are precise and unambiguous, then, it is necessary to expound those words in that natural and ordinary sense. The words themselves alone, in such case, best declare the intention of the legislature.

37. The language of section 5(2) of the Consolidation Act is very categorical. It explicitly provides that every proceeding for the correction of records and proceeding 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, stands abated, upon the publication of the notification under sub-section (2) of Section 4 of the Consolidation Act.

38. The aforesaid Section 5(2) encompasses only the proceeding for the correction of records and proceeding 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 the Consolidation Act. The explanation appended to said section further clarifies the ambit of the term 'proceedings' as intended by the legislature, for the purposes of sub-section (2), by specifically excluding the proceedings under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 or an uncontested proceeding under Sections 134 to 137 of the U.P. Zamindari Abolition and Land Reforms Act, 1950.

39. The provision of Restoration under Order IX Rule 13 of the Civil Procedure Code, exclusively deals with the setting aside of an ex parte decree; without touching the merits of the judgment in question. In exercise of its power under Order IX Rule 13 of the Civil Procedure Code, the Court setting aside decree or rejecting the Restoration application for setting aside the decree cannot go into the merits in respect to the substantive claims of the parties and any adjudication of such claims can be done only after the restoration application is allowed.

40. The Restoration proceeding under Order IX Rule 13 of the Code of Civil Procedure does not by itself involve in declaration of rights or interest of the parties in land, as such, the same does not come within the teeth of Section 5 (2) of the Consolidation Act.

41. Now, in so far as the judgment passed by the the Hon'ble Supreme Court in the case of **Mool Chand** *(Supra)* which has been placed before this Court by the petitioner is concerned, the same is diametrically on a different issue, that whether a notification under Section 4 of the Act, published after the preliminary decree in a partition suit is passed, will or will not abate the entire suit as per Section

5(2) of the Act. Even if the orbiter dicta of the aforesaid judgment are considered for the instant case, it does not help the petitioner's case as the Hon'ble Apex Court in the said case has made it abundantly clear that only proceedings that relates to declaration of right or interest in the land lying in the consolidation area are abated under Section 5(2) of the Act.

42. As far as the Full Bench judgment of this Court in the case of **Sakal Singh versus Smt. Devi** *(Supra)* which has been placed before this Court by the respondent no.2 is concerned, the issue in the said case was related to the abatement of a review application, wherein this Court held that merely admitting and allowing a review application against the order of the appellate court does not revive the suit and therefore, a review application pending before the court will not abate the suit under Section 5(2) of the Act.

43. After considering all that has been narrated hereinabove, it can be safely said that Section 5(2) of the Act being exhaustive, will apply only to proceedings specified therein, and none other. It cannot be stretched to bring within its ambit the proceedings which the legislature did not intend to abate on the onset of consolidation operations. Unless the suit or proceeding fall within the bracket of correction of the record or declaration of rights or interest in the land lying in the area, the jurisdiction of the Courts, which are otherwise competent to decide the same cannot be excluded or ousted.

44. It is beyond any doubt that mere pendency of a Restoration application moved under Order IX Rule 13 does not revive the Suit until the said application is allowed.

45. Thus, Restoration proceeding under Order IX Rule 13 of the Civil Procedure Code for setting aside of ex parte decree does not attract abatement as provided under section 5(2) of the Consolidation Act, as the same is collateral and incidental to the suit and not an extension or in continuation of the suit, because the suit had already culminated into a decree.

46. This conclusion also finds support from the decision of this Court in the case of **Ram Naval** versus **Board of Revenue, U.P., Allahabad and others reported in 2006 (9) ADJ 441** wherein it has been held that restoration application, or an appeal or revision arising out of an order rejecting or allowing restoration application does not abate under section 5(2) of the Consolidation Act. Further, in the case of Ram Nath versus **Additional Commisioner (Administrative) Varanasi** reported in **2015 (1) RJ 412,** this Court has elaborated that the proceedings upon the restoration application would not abate on account of consolidation proceedings having intervened and the restoration application or any proceedings arising out of it will have to be adjudicated on the basis of materials placed on record for adjudication of the matter.

47. In the instant case, as a Restoration application dated 31.05.2015 filed under Order IX Rule 13 of the Civil Procedure Code moved by the respondent no. 2 for the reasons as discussed above, does not abate under Section 5(2) of the Consolidation Act, therefore, the Board of Revenue (respondent no.1) has rightly remanded the matter to the Sub Divisional Officer, Mehdawal with the direction to decide the Restoration Application on its' own merits.

48. In so far as the dispute regarding the date of the commencement of the consolidation operation in respect of the village in question is concerned, since in the present case, this Court has already decided that the Restoration proceeding under Order IX Rule 13 of the Civil Procedure Code does not attract abatement under Section 5 (2) of the Consolidation Act as such this Court, at this stage, does not find any cogent reason to enter into the factual controversy of the date of the commencement of consolidation proceeding and is, therefore, restricting its finding to the legal aspects as discussed in the preceding paragraphs.

49. Further, in so far as the contention of the learned counsel for the petitioner that the respondents have simultaneously filed Objection dated 20.05.2016 under Section 9A (2) of the Consolidation Act before the Consolidation Officer, Sant Kabir Nagar, and as such he has no locus to defend the restoration proceeding in question is concerned, this Court finds that in the present set of circumstances of this case, when this Court has held that the restoration proceeding has not been abated and moreover, the consolidation opreations have already been completed vide Notification No. G-78/2023-24/section-52(1) dated 21.06.2023 under Section 52 of the Consolidation Act as has been stated in the affidative dated 19.10.2023 filed by the Settlement Officer of Consolidation, Sant Kabir Nagar, then there remains no reason for this Court to ponder upon the aforesaid argument of the petitioner.

50. Finally, coming to the impugned Order dated 27.06.2023 passed by the learned Board of Revenue (respondent no.1) whereby the Order dated 25.04.2018 passed by the learned Sub Divisional Officer, Mehdawal has been set aside, holding it to be legally erroneous and remanding the matter to the learned Court of Sub Divisional Officer, Mehdawal with the direction to firstly decide the Restoration Application and thereafter to consider the question of abatement; is concerned, the same needs interference by this Court to the extent that the reason assigned therein to uphold the competence of the Court of Sub Divisional Officer, to decide the Restoration, is irrelevant. As has been held by this Court in the preceding paragraphs that the Restoration proceeding under Order IX Rule 13 of the Civil Procedure Code, does not deal with declaration or adjudication of rights or interests of parties over a land lying in the area nor for the correction of records and as such the same do not come within the teeth of Section 5 (2) of the Consolidation Act and does not stand abated, irrespective that the Restoration proceeding under Order IX Rule 13 of the Civil Procedure Code was pending or not when the consolidation operation started.

51. In view of the above discussions, no interference is required in the impugned Order dated 27.06.2023 passed by the learned Board of Revenue (respondent no.1), to the extent whereby the matter has been remanded to the Sub Divisional Officer, Mehdawal with the direction to firstly decide the Restoration application and threreafter to consider the issue of abetment of the suit, but this Court does not approve the reasons recorded by the learned Board of Revenue (respondent no.1), while remanding the matter.

52. Accordingly, without adverting on the disputed factual matrix of the case, this writ petition is **disposed of** with the direction to the Sub Divisional Officer

concerned to decide the Restoration application dated 30.01.2015 preferred by the respondent no.2 namely Rajendra, afresh on its merit in the light of the observations made by this Court hereinabove; expeditiously and preferably within a period of six months from the date of the receipt of a certified copy of this order.

(2024) 1 ILRA 1302
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2023

BEFORE

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ-B No. 2896 of 2023

Dayaram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Dinesh Kumar Maurya, Sri Rituvendra Singh Nagvanshi, Sri R.C. Singh (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Bhupendra Kumar Tripathi, Sri Deepak Singh Yadav, Sri Sanjay Kumar Mishra, Sri Sheo Ram Singh, Sri Sudhir Kumar Shukla

A. Revenue Law – Partition of Holdings – Concurrent Findings of Fact – Petitioner challenged the orders dated 19.07.2023, 31.05.2017, and 13.05.2016, alleging inequitable allocation of shares in a partition suit under Section 176/177 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 – Held, the findings of the Sub Divisional Officer, upheld by the Commissioner and Board of Revenue, were based on the kurrafaat report dated 17.04.2016, prepared considering possession, valuation, and feasibility, and were affirmed as compliant with Rule 131 of the U.P. Zamindari Abolition and Land Reforms Rules, 1952, and Rule 109 of the U.P. Revenue Code Rules, 2016 – Concurrent findings of fact, absent perversity or procedural irregularity, are binding and not subject to interference under Article 226, as per *St. of Jharkhand Vs Linde India Ltd.* and *Chandrika Vs Sudama*. (Paras 5, 6, 8, 15, 19, 21, 26, 28, 30, 31, 32, 33)

B. Judicial Review – Scope Under Article 226 – Petitioner argued that the allocation of plots was inequitable, allotting him smaller portions of key plots and violating Rule 131's requirement for compact and equitable division – Held, the High Court's jurisdiction under Article 226 is limited and does not extend to re-evaluating concurrent findings of fact unless they are perverse, unsupported by evidence, or result in manifest injustice – The courts below provided reasoned orders based on the kurrafaat, spot-memo, and evidence, showing no misdirection in law or procedural irregularity, as supported by *Abdul Razak Vs Mangesh Rajaram Wagle* and *Babubhai Muljibhai Patel Vs Nandlal Khodidas Barot*. (Paras 15, 17, 18, 20, 21, 23, 24, 32, 33)

C. Partition Proceedings – Compliance with Statutory Provisions – Petitioner contended that the kurrafaat unfairly allocated major portions of plot no. 756 to respondent no. 6 – Held, the Sub Divisional Officer, Commissioner, and Board of Revenue confirmed the kurrafaat was prepared per Rule 131(1)(b) and (d), ensuring compact plots and respecting existing possession without fragmenting fields – The allocation was equitable, with both parties receiving equal shares, and the process involved proper measurement and demarcation, as evidenced by the spot-memo dated 23.05.2016, per *Gurvachan Kaur Vs Salikram*. (Paras 6, 8, 13, 28, 30, 31)

D. Revenue Law – Role of Appellate Courts – The first appellate court (Commissioner) and second appellate court (Board of Revenue) upheld the trial court's findings after detailed examination of the kurrafaat and evidence – Held, the first appellate court, as the final court of fact, has the authority to re-evaluate evidence de novo, and its affirmation of the trial court's findings constitutes concurrent findings, binding unless perverse, as per *Santosh Hazari Vs Purushottam Tiwari* and *Union Bank of India*

Vs Chandrakant Gordhandas Shah. (Paras 9, 10, 19, 20, 22, 28, 31)

E. Writ Jurisdiction – Non-Interference with Reasoned Orders – Petitioner sought to challenge the kurrafaat's fairness, alleging procedural lapses – Held, the courts below provided full opportunity for objections, considered the petitioner's concerns, and passed reasoned orders based on admissible evidence – No manifest error, illegality, or perversity was found to justify interference, and the petitioner's claim of inequitable allocation was unsupported by evidence of legal violation, as clarified by *Gaya Din Vs Hanuman Prasad*. (Paras 7, 16, 28, 31, 32, 33)

Writ Petition Dismissed.

List of Cases cited:

1. St. of Jharkhand Vs Linde India Ltd., 2022 SCC OnLine SC 1660

2. Chandrika Vs Sudama, (2019) 5 SCC 790

3. Bansraj Vs Ram Naresh, (2020) 5 ADJ 10

4. St. of Raj. Vs Shiv Dayal, (2019) 8 SCC 637

5. Gurvachan Kaur Vs Salikram, (2010) 15 SCC 530

6. Santosh Hazari Vs Purushottam Tiwari, (2001) 3 SCC 179

7. Abdul Razak Vs Mangesh Rajaram Wagle, (2010) 2 SCC 432

8. Union Bank of India Vs Chandrakant Gordhandas Shah, (1994) 6 SCC 271

9. Babubhai Muljibhai Patel Vs Nandlal Khodidas Barot, (1974) 2 SCC 706

10. Smt. Ram Dev Vs 8th Addl. District Judge, Kanpur, 1999 (1) ARC 173

11. Gaya Din Vs Hanuman Prasad, 2001 (43) ALR 226 (SC)

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard Shri R.C. Singh, learned Senior Advocate assisted by Shri Rituvendra Singh Nagvanshi, learned counsel for the petitioner; Shri Shiv Ram Singh, learned counsel appearing on behalf of the respondent no. 6; Shri Awadesh Kumar Patel, learned Standing Counsel for the State-respondents no. 1 to 4; Shri Bhupendra Kumar Tripathi, learned counsel for the Gram Sabha- respondent no. 5 and perused the pleadings available on record.

2. With the consent of the learned counsel for the parties, this Court proceeds to finally decide the present writ petition at the admission stage itself.

3. The relevant facts in nutshell that are necessary for the better appreciation of the case; as narrated by the petitioner in the instant writ petition, are that the petitioner and the contesting respondent no.6 are real brothers and claimed half (½) share each in the jointly possessed ancestral property / holding with plot nos. 756/0.247, 742/0.130, 758/0.570 and 760/0.117 situated at village Saraiharkhu, Pargana Rari, Tehsil Badlapur, District Jaunpur.

4. The petitioner filed a partition Suit under section 176 / 177 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 seeking division of the holdings, in the Court of learned Sub Divisional Officer, Tehsil Badlapur, District Jaunpur (respondent no.4). The said suit was registered as T2016143602908 (Dayaram versus Bharat).

5. In the aforesaid Suit a preliminary decree was passed on 08.03.2016 by the learned Court of Sub Divisional Officer, Tehsil Badlapur, District Jaunpur, whereby the claim of the petitioner and respondent

no.6 to the half (½) share each, in the property in suit was accepted / declared. Accordingly, the Lekhpal concerned was directed to prepare the Kurrafaat on the basis of possession and documents.

6. In pursuance of the aforesaid order dated 08.03.2016, the Lekhpal concerned submitted a detailed kurrafaat report on 17.04.2016 and thereafter his statement was recorded on 05.05.2016. As per the said *kurrafaat* dated 17.04.2016, plot no. 742 Sa / 0.0650 and plot no. 756 Sa / 0.2105 came to be allocated / earmarked in favour of the respondent no.6 while plot no. 742 Sa / 0.650, plot no. 756 Sa / 0.0365, 758 / 0.057 and plot no. 760 / 0.117 in favour of the petitioner.

7. Dissatisfied with the aforesaid kurrafaat preapred by the Lekphal, the petitioner filed an objection on 10.05.2016, before the learned Sub Divisional Officer (respondent no. 4), inter alia praying for cancellation of the said kurrafaat dated 17.04.2016 and for the preparation of a fresh kurrafaat by other Lekhpal.

8. The learned Sub-Divisional Officer (respondent no.4) taking into consideration the objections raised by the petitioner and the factual aspect of the case and vide order dated 13.05.2016 confirmed the kurrafaat dated 17.04.2016 and passed the final decree. Thereafter, a spot-memo was submitted on 23.05.2016 by the Revenue Inspector, to the effect that the Revenue Team along with the Police force, carried out the measurement / demarcation on the basis of the aforesaid kurrafaat dated 17.04.2016.

9. Assailing the aforesaid order dated 13.05.2016 passed by the learned Court of Sub-Divisional Officer (respondent no.4), the petitioner filed an Appeal, under Section 331 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 before the Court of learned Commissioner, Varanasi Division, Varanasi. The said appeal having Appeal No. 351 of 2016 was dismissed vide order dated 31.05.2017, passed by the learned Court of Additional Commissioner (1st), Varanasi Division, Varanasi.

10. Thereafter, the petitioner preferred a Second Appeal under Section 331 (4) of U.P. Zamindari Abolition and Land Reforms Act, 1950 before the learned Board of Revenue, U.P., at Allahabad (respondent no.2) challenging the aforesaid orders dated 13.05.2016 and 31.05.2017. The said Appeal was registered as Case No. SA/1287/2017/Jaunpur (Computerised case No. AL20171436001287) titled as Daya Ram versus Bharat Kumar and others. The learned Board of Revenue (respondent no.2) admitted the aforesaid Second Appeal and granted an interim relief in favour of the petitioner vide order dated 26.04.2017.

11. The aforesaid Second Appeal was also dismissed vide a detailed order dated 19.07.2023 passed by the learned Board of Revenue (respondent no.2).

12. Being aggrieved by the said order dated 19.07.2023 passed by the learned Board of Revenue (respondent no.2) in the Second Appeal, the petitioner preferred the instant writ petition, inter alia, praying for the following reliefs:

"i. issue a writ, order or direction in the nature of certiorari for quashing the impugned ***order dated 19.7.2023 (Annexure No.11) passed by respondent no.2 in Case No. S.A./1287/2017 /Jaunpur Computerized No.-AL20171436001287***

(Dayaram Vs. Bharat Kumar and others) under Section 333 of the U.P.Z.A. and L.R. Act 1950, ***order dated 31.5.2017 (Annexure No.8) passed by Respondent no.3 in Appeal No. 351 of 2016*** *(Dayaram Vs. Bharat Kumar etc) under Section 331 of the U.P.Z.A. and L.R. Act 1950 and* ***order dated 13.5.2016 (Annexure No.7) passed by Respondent no.4 in partition suit bearing No. T2016143602908*** *(Dayaram Vs. Bharat) under Section 176 U.P.Z.A. and L.R. Act 1950, Arazi situate in village Saraiharkhu Pargana Rari, Tehsil Badlapur, District Jaunpur.*

ii. issue a writ, order or direction in the nature of mandamus interdicting the respondent no.6 from interfering into peaceful possession of the petitioners over the property in dispute and creating third party interest.

iii. issue any other suitable writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

iv. award the cost of the present writ petition to the petitioners."

13. The contention of Shri R.C. Singh, learned Senior Advocate appearing for the petitioner is that the entire proceeding of division of holdings in the instant case is based on the kurrafaat report dated 17.04.2016, by means of which the petitioner was allocated his share i.e half (½) of the holding, in four plots, while the rest half (½) of the holding being the share of respondent no.6 has been adjusted in only two plots. Further, the major part of the plot no. 756 which lies in front of the petitioner's house, has been allotted to the respondent no.6 and that only an insignificant and small part of the same has been allotted to the petitioner. As such, this allocation of the share being inequitable is violative of Rules 131 of the U.P. Zamindari Abolition and Land Reforms Rules, 1952 which provides that the portion allotted to each party shall be as compact as possible and no party shall be given all the inferior or all the superior classes of land.

14. Per contra, Shri Shiv Ram Singh, learned counsel for the caveator/ respondent no. 6, by refuting the contentions of the learned counsel for the petitioner as baseless and without any substance, submits that the partition of the holdings in question has been made perfectly on the basis of the valuation of the land, feasibility and possession on the spot. As such, the same is legal and justified. Further, the objections raised by the petitioner against the kurrafaat was duly considered by the learned Sub Divisional Officer (respondent no.4) and the revenue team prepared the spot-memo after measurements / demarcation on the spot on 23.05.2016 and, thereafter, the spot-memo was submitted before the learned Sub Divisional Officer (respondent no.4) in the presence of the petitioners. It has also been submitted on behalf of the respondent no.6 that the petitioner is in occupation of the better part of the holding in question than the answering respondent no.6 and as such he wants to prolong the proceeding by playing delaying tactics and does not want the matter to be finally settled.

15. Shri Awadesh Kumar Patel, learned Standing Counsel appearing for the State-respondents no. 1 to 4 raised preliminary objection regarding the maintainability of the present writ petition by contending that the petitioner in the present writ petition has basically disputed the findings of fact which have been

affirmed by the first and the second appellate courts and as such the concurrent findings of fact cannot be interfered by this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India. In support of his contention, the learned Standing Counsel has relied upon the judgment passed by the Hon'ble Supreme Court of India in the case of ***State of Jharkhand and others versus Linde India Limited and another reported in 2022 SCC OnLine SC 1660; Chandrika (Dead) by LRS***. versus ***Sudama (Dead) Thr. LRS. and others*** reported in ***(2019) 5 SCC 790 and Bansraj versus Ram Naresh and another, r***eported in ***(2020) 5 ADJ 10.***

16. The learned Standing Counsel further submitted that there is no infirmity or irregularity in the impugned orders passed by the learned trial court as well as the learned appellate courts. Further, the courts below, at all stages afforded full opportunity of hearing to the parties and decided the matter by passing a detailed and reasoned orders, after taking into consideration all the grounds pleaded by the parties.

17. Having heard the rival contentions raised by the learned counsels for the parties and perused the material available on record; the moot issue for consideration, at the first instance, before this Court is that as to whether in the present case, the concurrent findings of fact recorded by the three Revenue Courts below warrants any interference by this Court in exercise of its powers, qua, Writ jurisdiction under Article 226 of the Constitution of India.

18. Before entering into the merits of the case, it would be apt to consider the legal context of "concurrent findings of fact" and reiterate the law in relation to the extent of interference by the Writ Courts in concurrent findings of the fact under Article 226 of the Constitution.

19. The Hon'ble Supreme Court in the case of ***State of Rajasthan*** versus ***Shiv Dayal r***eported in ***(2019) 8 SCC 637 at page 639*** has succinctly described the expression "concurrent findings of fact", which is well known in the legal parlance, in the following manner,

> "*15. It is a trite law that in order to record any finding on the facts, the trial court is required to appreciate the entire evidence (oral and documentary) in the light of the pleadings of the parties. Similarly, it is also a trite law that the appellate court also has the jurisdiction to appreciate the evidence de novo while hearing the first appeal and either affirm the finding of the trial court or reverse it. If the appellate court affirms the finding, it is called "concurrent finding of fact" whereas if the finding is reversed, it is called "reversing finding.""*

20. Further, it is also the settled legal preposition that the first appellate court is the final court of fact, as has been dealt with in detail by the Hon'ble Supreme Court in the cases of ***Gurvachan Kaur and others*** versus S***alikram (Dead) through LRS.*** reported in ***(2010) 15 SCC 530 and Santosh Hazari*** versus ***Purushottam Tiwari (Deceased) by LRS.*** reported in ***(2001) 3 SCC 179.***

21. Consequently, it can be affirmatively alluded that the concurrent findings of fact are to be considered as settled facts of the case and the High Court should ordinarily restrain itself from interfering with the concurrent findings of fact. The said restrain is on a much higher

footing in cases where the High Court is not the appellate court, rather, it is exercising its Writ jurisdiction under Article 226 of the Constitution of India. In this regard, the Hon'ble Supreme Court in the case of ***Abdul Razak (D) through LRS. and others*** versus ***Mangesh Rajaram Wagle and others*** reported in ***(2010) 2 SCC 432*** as reiterated in the case of ***State of Jharkhand and others*** versus ***Linde India Limited and another*** *(Supra)* has held that the High Court in exercise of its Writ jurisdiction is not an appellate court against the findings recorded on appreciation of facts and the evidence on record. Further, in the case ***Chandrika (Dead) by LRS***. versus ***Sudama (Dead) Thr. LRS. and others*** *(Supra)* the Hon'ble Apex Court has been pleased to observe that the concurrent findings of fact is not only binding on the High Court but is also binding upon the Hon'ble Supreme Court. For ready reference, extract of paragraph no. 12 of the aforesaid judgment in extracted hereinbelow,

"12. In our considered opinion, the finding impugned in this appeal being concurrent finding of fact and was rightly held by the High Court as binding on the High Court in its writ jurisdiction, it is also binding on this Court, calling for no interference therein…"

22. It may also be elucidated that the Hon'ble Apex Court in the case of ***Union Bank of India*** versus ***Chandrakant Gordhandas Shah*** reported in ***(1994) 6 SCC 271*** at page 274 has briefly explained the reason for non-interference with the concurrent findings of fact by observing that it is the trial court and the appellate court which is entrusted with the duty of recording the findings on questions of fact and it is not proper for the Writ courts to interfere with or disturb those findings. For a ready reference, extract of paragraph no. 11of the said judgment is quoted hereinbelow,

"11. It is trite that if the trial court and the appellate court, who are entrusted with the duty of investigating into questions of fact record concurrent findings thereon on a proper discussion and appreciation of the materials placed before them, the High Court should not interfere with or disturb those findings while sitting in judgment over the same in its writ jurisdiction…"

23. However, it would not be place to discuss the another aspect that the High Court still has the discretionary power to interfere in the concurrent findings of fact while exercising its powers under Article 226 of the Constitution of India, but the discretion must be exercised on sound judicial principles particularly, where the concurrent findings of fact is perverse in law in the sense that no reasonable person properly instructed in law should have come to such a finding or there is misdirection in law or a view on fact has been taken in the teeth of preponderance of evidence or the finding is not based on any material evidence or it has resulted in manifest injustice. The Hon'ble Apex Court in the case of ***Babubhai Muljibhai Patel*** versus ***Nandlal Khodidas Barot,*** reported in ***(1974) 2 SCC 706, at page 715,*** has observed that,

"10. ... The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 of the Constitution merely because in considering the petitioner's right of relief, questions of fact may fall to be determined. In a petition under Article 226 the High Court has

jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises complex questions of fact, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition…. If, however, on consideration of the nature of the controversy, the High Court decides ... that it should go into a disputed question of fact and the discretion exercised by the High Court appears to be sound and in conformity with judicial principles, this Court would not interfere in appeal with the order made by the High Court in this respect."

24. Furthermore, in order to decide whether a particular case requires the High Court to enter into a disputed question of fact depends upon the facts and circumstances of that case, as this ordinary restrain on the interference on concurrent findings of fact should not be put in a routine and mechanical manner in the system of *administration of justice.* The Hon'ble Supreme Court by placing reliance upon the judgment passed in the case of ***Smt. Ram Dev v***versus ***8th Addl. District Judge, Kanpur*** reported in ***1999 (1) ARC 173*** has categorically held in the case of ***Gurvachan Kaur (Supra***) that,

"13. ... It is the duty of the Court to look into the evidence if the justice so requires and where material evidence has been totally ignored and the finding of the fact is based upon consideration of evidence led by one party only, the Court has power to set aside the finding of fact recorded by the court below."

25. Further, for the purposes of interfering in the concurrent findings of fact, the question of perversity of an order passed by an authority must be determined by considering whether the said order is not supported by the evidence brought on record or it is against the law or it suffers from vice of procedural irregularity, as has been held by the Hon'ble Supreme Court in the case of ***Gaya Din (dead) thr. L.Rs***. versus ***Hanuman Prasad (dead) thr. L.Rs.*** reported in ***2001 (43) ALR 226 (SC).***

26. In the instant case the findings recorded by the Sub Divisional Officer (respondent no.4) in respect of the shares and also with regard to the allotment of kurras, in favour of the parties, has been upheld by the first appellate court, i.e., the learned Court of Commissioner, Varanasi (respondent no. 3) and the learned Board of Revenue (respondent no.2) also concurred with the same in Second Appeal.

27. In view of the settled legal position on the subject of 'concurrent findings of fact', it has become imperative to determine as to whether the facts and circumstances of the present case warrants any interference by this Court in the concurrent findings of fact recorded by the Sub Divisional Officer (respondent no.4) as concurred by the Commissioner, Varanasi (respondent no. 3) in Appeal No. 351 of 2016 and also by the Board of Revenue, U.P. (respondent no.2) in Second Appeal bearing Case No. SA/1287/2017/Jaunpur.

28 . From the perusal of the impugned order dated 13.05.2016 passed by the learned trial court, it is evident that the Sub-Divisional Officer (respondent no.4) approved the *Kurrafaat* and the coloured map dated 17.04.2016 as being prepared on the basis of possession and shares and, also

recorded a categorical finding that an approach road as a khadanja marg is available to the parties. The first appellate court, i.e., the Court of Additional Commissioner (respondent no. 3) affirmed the findings of the trial court after a detailed discussion on the factual matrix of the case and also the correctness of the kurrafaat.

The extract of the relevant paragraph of the findings returned by the first Appellate Court while deciding the Appeal is quoted below:

"-------- यह तथ्य निर्विवाद है कि अपीलार्थी एवं विपक्षी दोनों सगे भाई है तथा एक ही पिता की संतान हैं। नियमानुसार प्रत्येक आराजी में दोनो भाईयों का समान अंश होता है, जिसका संज्ञान अवर न्यायालय द्वारा प्रारम्भिक आदेश दिनांक 08.03.2016 पारित करते समय लिया गया तथा फॉट हेतु लेखपाल को निर्देशित किया है लेखपाल द्वारा मौके पर कब्जा एवं अंश का ध्यान रखते हुए अपीलार्थी को चारों नम्बरों में तथा विपक्षी को दो नम्बरों में बराबर अंश निर्धारित करते हुए फॉट बनाया गया। लेखपाल द्वारा न्यायालय उप जिलाधिकारी में उपस्थित होकर बयान तहरीरी अंकित कराया गया है, जिसमें वादी, प्रतिवादी के कब्जा दखल व मौका मुताविक हिस्सा फॉट बनाया जाना स्वीकार किया गया है। उसने आराजी नम्बर 756 को वादी, प्रतिवादी दोनों के दरवाजे पर होने का उल्लेख किया है, जिसमें पश्चिम अपीलार्थी तथा पूरब विपक्षी का मकान होना बताया है। मेड बनाकर भाइयों द्वारा जोतना-बोना स्वीकार किया है। अपीलार्थी ने अपनी आपत्ति फॉट पर अवर न्यायालय में दायर की थी, जिस पर अवर न्यायालय ने सुनकर निस्तारित कर मौके एवं फॉट का अध्ययन कर आलोच्यादेश पारित किया है तथा राजस्व निरीक्षक ने 23.05.2016 को राजस्व टीम एवं पुलिस बल के साथ फॉट के अनुसार नाप कर/चिन्हित कर स्पाट मेमो की प्रति अवर न्यायालय में प्रस्तुत किया है, जिसमें किसी हस्तक्षेप की आवश्यकता नहीं है।"

29. The Second Appellate Court, i.e., the learned Board of Revenue (respondent no.2) decided the Second Appeal after framing the following substantial question of law.

"क्या बटवारा वाद में उत्तर प्रदेश राजस्व संहिता 2006 की नियमावली के सुसंगत प्राविधानों का ध्यान रखा गया है?"

30. The learned Board of Revenue (respondent no.2) while deciding the Second Appeal has dealt with the above quoted question of law formulated as substantial question in detail and has held that the provisions of Section 131(1) have been duly followed in the division of holdings in the present case. It has also categorically recorded a finding that the Courts below while deciding the suit for division of holdings under Section 176/177 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, have decided the same in terms the relevant provisions of law.

31. The learned Board of Revenue (respondent no.2) after taking into consideration the factual aspect of the case in detail and deciding the substantial question of law as formulated in the case, dismissed the said appeal by a detailed judgment and order dated 19.07.2023.

The relevant paragraphs of the findings returned by the Second Appellate Court while deciding the said second appeal is quoted below:

" 6. मेरे द्वारा आलोच्य आदेश दिनांक 31.05.2017 व 13.05.2016 का गहनतापूर्वक परिशीलन किया गया तथा पत्रावली पर उपलब्ध अन्य अभिलेखों का भी गहनतापूर्वक परिशीलन किया गया जिसमें यह परिलक्षित होता है कि वर्तमान द्वितीय अपीलकर्ता दयाराम की ओर से परीक्षण न्यायालय के समक्ष भारत कुमार के साथ उत्तर प्रदेश सरकार व गांव सभा को पक्षकार कायम कर बंटवारा वाद योजित किया गया जिसमें वादी का ½ अंश तथा प्रतिवादी का ½ अंश कायम करते हुये वादी तथा प्रतिवादी का अलग-अलग फाट मुताबिक हिस्सा कायम किये जाने का याचना की गई। उक्त वाद में परीक्षण न्यायालय द्वार प्रारम्भिक आदेश दिनांक 08.03.2016 पारित कर पक्षों का अंश मुताबिक दावा घोषित करने के उपरान्त फाट बनाने हेतु सम्बन्धित लेखपाल को निर्देशित किया गया जिसके अनुक्रम में लेखपाल द्वारा चिट्ठी बंटवारा मय रंगाभेदी नक्शा दिनांक 17.4.2016 को प्रस्तुत किया गया। परीक्षण न्यायालय द्वारा उक्त कुर्रों पर आपत्ति प्राप्त कर दिनांक 05.05.2016 को लेखपाल का बयान कराया गया तथा वादी दयाराम द्वारा लेखपाल द्वारा यह स्वीकार किया गया कि वादग्रस्त आराजियात में से 3 नम्बरान आबादी के पास है व एक नम्बर दूर है जिसमें वादी व प्रतिवादी का मौके पर कब्जा दखल को देखकर उसके अनुसार फाट/रंगाभेदी भू-चित्र तैयार किया गया है। परीक्षण न्यायालय द्वारा वादी की आपत्ति संज्ञानित कर उक्त आपत्ति को स्वीकार किये जाने योग्य न पाते हुये लेखपाल द्वारा प्रस्तुत अपील में अवर अपीलीय न्यायालय द्वारा परीक्षण न्यायालय के आदेश को पुष्ट करते हुये पारित निर्णय दिनांक 31.05.2017 के माध्यम से परीक्षण न्यायालय द्वारा पारित डिक्री को पुष्ट किया गया जिससे क्षुब्ध होकर वादी दयाराम द्वारा वर्तमान द्वितीय अपील परिषद न्यायालय के समक्ष योजित की गई है।

7. उक्त तथ्यात्मक पृष्ठभूमि का यदि निर्मित सारभूत विधिक प्रश्न के निर्धारण हेतु विधिक आंकलन किया जाये तो यह परिलक्षित होता है कि मूल वाद धारा 176 जमींदारी विनाश के अन्तर्गत योजित किया गया था जिसमें कुर्रे निर्मित करने हेतु सम्बन्धित नियमावली के नियम 131 के उप-नियम1(ब) में इस आशय के स्पष्ट निर्देश दिये गये हैं कि जहां तक संभव हो प्रत्येक पक्ष को समेकित कुर्रा प्रदत्त किया जाना चाहिये तथा कुर्रा निर्मित करते समय पक्षकारों के पूर्व से चले आ रहे कब्जे का ध्यान रखना चाहिये तथा यथा संभव उनके पूर्व से चले आ रहे कब्जे वाले स्थल को सम्मिलित करते हुये कुर्रा निर्मित किया जाना चाहिये। नियम 131(1) के उपनियम (द) में यह स्पष्ट रूप से प्राविधानित है कि जहां तक संभव हो वर्तमान खेत को विभक्त नहीं किया जायेगा। स्वीकृत रूप से जमींदारी विनाश अधिनियम निरसित हो चुका है और उक्त के साथ-साथ जमींदारी विनाश नियमावली भी राजस्व संहिता नियमावली 2016 से प्रतिस्थापित की जा चुकी है। राजस्व संहिता नियमावली में विभाजन वाद के अन्तर्गत कुर्रे निर्मित करने

के मानदण्ड नियम 109 के उपनियम 5 में प्राविधानित हैं जिसमें कमोवेश नियम 131(1) के उपनियम (ब) व (द) को यथास्वरूप समाहित किया गया है। अतः यह स्पष्ट है कि बंटवारा वाद में कुर्रा निर्मित करते समय यथा सम्भव यह प्रयास किया जाना चाहिये कि वादग्रस्त सम्पत्ति के छोटे-छोटे टुकडों के कुर्रे न बनाये जायें और पक्षकारों को संगठित कुर्रा प्रदत्त किया जाये जिसमें इस बात का ध्यान रखा जाना आवश्यक है कि सभी पक्षकारों को समान प्रकार की भूमि उनके अंशानुरूप प्राप्त हो सके।

8. वर्तमान प्रकरण में अवर अपीलीय न्यायालय में इस आशय का स्पष्ट तथ्यात्मक निष्कर्ष अंकित किया है कि लेखपाल द्वारा अपने प्रतिपरीक्षण के दौरान यह बताया गया कि 3 नम्बरान अर्थात गाटा संख्या 756,758 व 760 आबादी से सटे नम्बरान हैं, जिसमें से गाटा संख्या 758 व 760 पूर्णतः वादी को तथा 758 के अंश पर वादी को कुर्रा प्रदत्त किया गया है जबकि प्रतिवादी को उसी गाटा संख्या 758 के शेष रकबे पर वादी के समतुल्य रकबे का कुर्रा प्रदत्त किया गया है। परीक्षण न्यायालय तथा अवर अपीलीय न्यायालय द्वारा उपरोक्त नम्बरानों को आबादी से सटा होने का तथ्यात्मक निष्कर्ष अंकित किया गया है। वहीं गाटा संख्या 742 को कुछ दूरी पर स्थित होना बताया गया है। उक्त गाटा संख्या 742 में दोनो पक्षों को 0.0650 है०-0.0650 है० का समान रकबा कुर्रे के माध्यम से उपलब्ध कराया गया है। अतः सृजित सारभूत विधिक प्रश्न के सम्बन्ध में इस न्यायालय का यह दृढ मत है कि अवर न्यायालयों द्वारा बंटवारा वाद निर्णीत करते समय सुसंगत प्राविधानों का अनुपाल सुनिश्चित किया गया है। प्रकरण में सजित किया गया सारभूत विधिक प्रश्न तदनुसार निस्तारित किया जाता है।"

32. In view of all that is discussed hereinabove, the findings recorded by all the three Revenue Courts below are concurrent, based on admissible evidence and reasoning. There is no perversity in the findings recorded by the courts below. Therefore, it cannot be said that the Courts below have ignored the law in arriving at their findings.

33 . Accordingly, this Court finds no manifest error of law, perversity, illegality or procedural irregularity in the impugned orders and does not find any cogent reason that warrants interference by this Court with the concurrent findings recorded by the three Revenue Courts below while passing the impugned orders.

34. The writ petition is liable to be dismissed being devoid of merit and is hereby **dismissed.** No order as to cost.

(2024) 1 ILRA 1311
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, ACTING C.J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Writ-C No. 18413 of 2023

Committee of Management, The Meerut Sahkari Avas Samiti Ltd., Meerut & Ors. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ratnakar Upadhyay, Sri H.N. Singh (Sr. Adv.)

Counsel for the Respondents:
C.S.C., Sri Abhishek Mishra, Sri Krishna Mohan Asthana, Sri Shiv Prakash Gupta, Sri Sunil Kumar Mishra, Sri H.R. Mishra (Sr. Adv.)

A. Civil Law - Cooperative Societies - U.P. Cooperative Societies Act, 1965- Section 38(1) – Jurisdiction – Petitioners challenged orders dated 11.05.2023 directing the Committee of Management to remove the Chairman and Secretary, alleging lack of jurisdiction and violation of natural justice – Held, under Section 38(1), the Registrar can direct the Society to remove an officer for contravening the Act, Rules, or Bye-Laws, and the general body of the Society, not the Committee of Management, has the authority to act on such direction after providing an opportunity of hearing – The orders were validly issued to the Committee to convene a general body meeting, not to directly remove officers, as clarified by *Smt. Vandana Varma Vs St. of U.P.*. (Paras 4, 9, 10, 11, 13, 15, 20, 21)

B. Principles of Natural Justice – Stage of Application Under Section 38(1) – Petitioners contended that the orders dated 11.05.2023 were void for not providing a show-cause notice – Held, at the stage of issuing directions under Section 38(1), the Registrar is not required to afford a hearing, as the obligation to provide an opportunity of being heard lies with the Society's general body when considering removal – The Registrar's supervisory role under Section 38(1) does not mandate prior notice, unlike Section 38(2), which requires a hearing when the Registrar directly removes an officer, per *Smt. Vandana Varma Vs St. of U.P.*. (Paras 9, 11, 15, 22, 23, 24, 25, 26)

C. Role of Committee of Management – Convening General Body Meeting – Petitioners argued that the Registrar's direction to the Committee of Management to remove officers was ultra vires, as the Committee lacks removal powers – Held, the direction under Section 38(1) was to the Committee to convene a general body meeting for the Society to consider removal, not to exercise removal powers itself – Section 33 empowers the Committee to call such meetings upon the Registrar's requisition, and the orders, though not clearly worded, align with this procedure. (Paras 10, 11, 16, 19, 20, 21)

D. Distinction Between Section 38 and Rule 454 – Independent Provisions – Petitioners claimed the Registrar's orders conflated powers under Section 38(1) and Rule 454 of the U.P. Cooperative Societies Rules, 1968 – Held, Section 38 and Rule 454 are independent; Section 38 addresses contraventions or forfeiture of office rights, while Rule 454 deals with disqualifications – The Registrar's orders were explicitly under Section 38(1), not Rule 454, and no jurisdictional error occurred, as per *Smt. Vandana Varma Vs St. of U.P.*. (Paras 12, 13, 14, 21)

E. Alternative Remedy – Appeal Under Section 98(1)(d) – Respondents argued that the petition was not maintainable due to an appealable order dated 04.07.2023 under Section 38(2), not challenged in the petition – Held, the petition focused on jurisdictional issues regarding the orders dated 11.05.2023, which were decided without delving into merits – Petitioners were granted liberty to challenge the 04.07.2023 order before the tribunal under Section 98(1)(d), ensuring no prejudice to their appellate rights. (Paras 5, 6, 8, 29, 30, 31)

Writ Petition Disposed.

List of Cases cited:

1. Smt. Vandana Varma Vs St. of U.P., Full Bench judgment (not fully cited in the text but referenced in Paras 13, 14, 15)

2. Prabhakar Dwivedi Vs St. of U.P., 2012 (2) ADJ 396

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

1. Heard Sri H. N. Singh, Senior Advocate assisted by Sri Ratnakar

Upadhyay for the petitioners, Sri H. R. Mishra, Senior Advocate assisted by Sri Abhishek Mishra and Sri Sunil Kumar Mishra for the respondents and learned Standing Counsel for the State.

2. This writ petition has been filed for the following reliefs:-

"(i) Issue a suitable writ, order or direction in the nature of ***certiorari*** *quashing the impugned orders dated 11.05.2023 passed by the Additional Housing Commissioner/ Additional Registrar, U.P. Avas Evam Vikas Parishad, Lucknow (****Annexure Nos. 8, 9 and 10*** *to the writ petition) and the impugned orders dated 05.04.2023 and 15.05.2023 passed by the Sahkarita Adhikari (Avas), U.P. Avas Evam Vikas Parishad, Meerut (****Annexure Nos. 5 and 11*** *to the writ petition).*

(ii) Issue a suitable writ, order or direction in the nature of ***mandamus*** *commanding the respondents not to give effect to the impugned orders referred to above and stay its effect and operation and all further proceedings consequent thereupon during the pendency of the writ petition.*

(iii) Issue any other writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(iv) Award the cost of the writ petition."

3. Brief facts of the case are that Meerut Sahkari Awasi Samiti Ltd, Saket, Meerut (hereinafter referred to as the 'Society') is a Housing Society registered under U.P. Cooperative Societies Act, 1965 (hereinafter referred to as 'the Act of 1965'). Petitioner no. 1 is the Committee of Management of the Society, petitioner no. 2 is the elected Chairman of the Society and the petitioner no. 3 is the Secretary appointed under Section 31 of the Act of 1965 and as such is the Chief Executive Officer of the Society. The election of the Society was held on 16.02.2023 and the election of Chairman and Vice Chairman was held on 17.02.2023. The term of Committee of Management is five years and therefore, is entitled to continue till February, 2028. At present, the Society is governed by the current model bye-laws issued on 17.03.2021, applicable to all the Cooperative Housing Societies, registered in State of Uttar Pradesh. The Model Bye-Laws are annexed at page no. 41 of the paper book.

4. On 11.05.2023, two orders dated 11.05.2023 were passed by Additional Housing Commissioner/Additional Registrar/respondent no. 2 being *patrank* no. 516 and *patrank* no. 515. By order *patrank* no. 516 dated 11.05.2023, respondent no. 2 directed the Committee of Management of the Society, in exercise of power under Section 38(1) of the Act of 1965, to remove the Chairman of the Society within one month and inform accordingly to respondent no. 2. By the other order *patrank* no. 515 dated 11.05.2023, respondent no. 2 directed the Committee of Management of the Society to remove the Secretary of the Society within one month and inform him accordingly. Both the orders have been passed on the basis of an enquiry report dated 28.04.2023 submitted by one Hriday Ram, Cooperative Officer (Awas), Meerut (respondent no. 3). The said enquiry was got conducted by respondent no. 2 by order dated 11.04.2023 on a complaint made by a

member Atul Kumar Singh (respondent no. 5). He has found the President and Secretary of the Society acting against the interest of the Society and guilty of violation of the provision of the Act, Rules and Bye-Laws of the Society. The orders dated 11.05.2023 are under challenge in the present writ petition.

5. During pendency of the writ petition, respondent no. 2 has passed an order directing for removal of the Chairman of the Society on 04.07.2023 in exercise of powers under Section 38(2) of the Act of 1965. Copy of the aforesaid order has been brought on record by the petitioners by means of supplementary affidavit filed on 06.07.2023.

6. It has been contended by learned counsel for the respondent that since the order dated 04.07.2023 passed by respondent no. 3 is not under challenge in the present writ petition, therefore, no useful purpose would be served in considering the merits of the orders impugned. It is further submitted that the order dated 04.07.2023 passed by respondent no. 2 is appealable and therefore, the petitioners be relegated to the remedy of appeal and the writ petition be dismissed.

7. Learned counsel for the petitioners submitted that he would be raising only jurisdictional issue in relation to the impugned order and therefore the petitioners may not be relegated to the alternative remedy of appeal.

8. Both the parties have agreed that this Court may examine the validity of the orders impugned, only on the jurisdictional plank without considering the merits of the orders. For the said reason, counsel for the respondents agreed to argue the case without filing counter affidavit. Accordingly, with consent of the parties, the present petition is being decided finally at the stage of first hearing in view of the third proviso to Rule 1 of Chapter XXII of Allahabad High Court Rules (Rules of Court, 1952).

9. Learned counsel for the petitioners raised the following jurisdictional issues:

i. Before passing the order dated 11.05.2023, no opportunity was given to the petitioners to show cause. As such, the orders are non-est in the eyes of law

ii. By order dated 11.05.2023, respondent no. 2 has directed the Committee of Management for removal of petitioner nos. 2 & 3 from the office of Chairman and Secretary of the Society in exercise of power under Section 38(1) of the Act of 1965. The orders are without jurisdiction as under Section 38(1) of the Act of 1965, the Committee of Management has no power of removal. It is only the Society which can pass an order of removal.

10. Per contra, learned counsel appearing for the contesting respondent made the following submissions:

i. Society being a body corporate, act through its officers and final authority of a cooperative Society vests in the general body of its members in general meeting. The management of every Society vests in Committee of Management constituted under Section 29 of the Act of 1965 and the Secretary is the Chief Executive Officer of the Society. Since, removal of Chairman of the Committee of Management and of the Secretary of

Society was to be considered, therefore, order was issued to the Committee of Management to take action as envisaged under Section 38(1) of the Act of 1965. It would not mean that Committee of Management was directed to remove the president of Society in the meeting of the Committee of Management.

ii. The purpose of the direction to the Committee of Management was to ensure that Committee of Management which is responsible for management of the Society convenes meeting of general body for consideration of removal of the Chairman as well as Secretary of the Society. It cannot be interpreted to mean that direction was to the Committee of Management to itself remove the Chairman and Secretary of the Society as contended by learned counsel for the petitioners.

iii. At the stage of order under Section 38(1) of the Act of 1965, there is no need to issue show cause notice calling for explanation from the officer sought to be removed. It is only when the general body in exercise of power under Section 38(1) of the Act of 1965 considers the removal of the officer, the opportunity is required to be given. As such the orders impugned are not vitiated for want of notice or for non adherence to the principles of natural justice.

11. Before considering the rival contentions of the learned counsel for the parties, it would be appropriate to consider the relevant statutory provisions:

Section 2(e) defines "Committee of Management" to mean the committee of a co-operative society, by whatever name called, to which the management of the affairs of the society is entrusted under Section 29;

Section 2(f) of the Act, 1965 defines "Co-operative Society" to mean a Society registered or deemed to be registered under this Act;

Section 2(o) defines "Office of a Co-operative Society" to mean the president, vice-president, chairman, vice-chairman, secretary, member of committee of management, treasurer, liquidator, administrator or any other persons employed by co-operative society whether with or without remuneration to carry on the business of the society or to supervise its affairs;

Section 9 of the Act, 1965 provides that registration of a Society shall render it a body corporate by the name under which it is registered. Section 9 is quoted as under:

"9. Co-operative societies to be bodies corporate.- The registration of a Society shall render it a body corporate by the name under which it is registered, having perpetual succession and a common seal, and with power to hold property, enter into contracts, institute and defend suits and other legal proceedings and to do all things necessary for the purpose for which it was constituted."

Section 28 of the Act of 1965 provides that the final authority of a Co-operative Society shall vests in general body of its members. Section 28 is quoted as under:

"28. Final authority in co-operative Society.- Subject to the provisions of this Act and the rules the final

authority of a co-operative Society shall vest in the general body of its members in general meeting:

Provided that, in such circumstances as may be prescribed, [the final authority shall vest in the delegates of such members elected in the manner prescribed] and assembled in general meeting and in such case all references in this Act, the rules or the bye-laws to the general body and general meeting shall be deemed to be references to the body consisting of such delegates of members and to the general meeting of such delegates."

Section 29 of the Act of 1965 provides for Committee of Management of a Co-operative Society. Section 29 is quoted as under:

"29. Committee of Management.- (1) The management of every co-operative Society shall vest in a Committee of Management constituted in accordance with this Act, the rules and the bye-laws, which shall exercise such powers and perform such duties as may be conferred or imposed by this Act, the rules and the bye-laws.

[(2)(a) The term of every Committee of Management shall be five years and the term of elected members of the Committee of Management shall be co-terminus with the term of such Committee."

Section 30 of the Act of 1965 provides for the Chairman and its duties. Section 30 is quoted as under:

"30. Chairman. [(1) Every co-operative Society shall have a Chairman and Vice-Chairman elected, nominated or appointed in accordance with the provisions of this Act, the rules and bye-laws.]

(2) The Chairman shall be responsible for the control, supervision and guidance of the affairs and business of the Society and shall exercise such powers and perform such duties as may be conferred or imposed on him by this Act, the rules, the bye-laws and the resolutions of the committee of the management. When present, he shall, except as otherwise provided in the rules, preside at the meeting of the general body and the committee of management.

(3)….

(4)..."

Section 31 of the Act of 1965 provides for Secretary of Society. Section 31 is quoted as under:

"31. The Secretary, his emoluments and functions.- (1) [Except in the case of an apex Society there shall be a Secretary of every co-operative Society, to be appointed and removable by the Society subject to the provisions of the rules and regulations framed under Sections 121 and 122. The emoluments and other conditions of service of the Secretary shall be such as may be prescribed in the bye-laws of the Society made in conformity with the rules and regulations made in this behalf:

Provided that where a service for the post of secretaries common to any class of co-operative societies has been created under Section 122-A, the recruitment, appointment, removal and other conditions

of service of persons appointed to such posts, including persons appointed to such posts before the creation of such service, shall be governed by the provisions of that section and the rules made thereunder.]

(2) The Secretary shall be the Chief Executive Officer of the Society and subject to such control and supervision of the Chairman and the committee of management as may be provided in the rules or the bye-laws of the Society shall -

(a) be responsible for the sound management of the business of the Society and its efficient administration;

(b) carry on the authorized and normal business of the Society;

(c) subject to the provisions of the bye-laws of the Society, operate its accounts and, except where the Society has a cashier or treasurer, handle and keep in his custody its cash balances;

(d) sign and authenticate all documents for and on behalf of the Society;

(e) be responsible for the proper maintenance of various books and records of the Society and for the correct preparation and timely submission of periodical statements and returns in accordance with this Act, the rules, the bye-laws and the instructions of the Registrar or the State Government;

(f) convene meetings of the general body, the committee of management and any sub-committee constituted by the committee of management and maintain proper records of such meetings; and

(g) perform such other duties and exercise such other powers as may be imposed or conferred on him under the rules or the bye-laws of the Society."

Section 38 of the Act of 1965 provides for removal of an officer of the Co-operative Society. Section 38 is quoted as under:

"38. Removal of an officer of a co-operative Society.- (1) If in the opinion of the Registrar, any officer of a co-operative Society has contravened or omitted to comply with, any provisions of this Act, the rules or the bye-laws of the Society, or has forfeited his right to hold office, the Registrar may, without prejudice to any other action that may or can be taken against him, call upon the Society to remove, within a specified period such officer from the office held by him and where necessary also to disqualify him from holding any office under that Society for a period not exceeding three years, whereupon the Society shall, after affording opportunity of being heard to the officer concerned, pass such orders as it may deem fit.

[Provided that on the request of the Reserve Bank of India the competent authority shall remove a director or the Secretary/chief executive officer of a Central Co-operative Bank or the Uttar Pradesh Co-operative Bank, who do not fulfill the criteria stipulated by the Reserve Bank of India after giving him an opportunity of being heard.]

(2) On the failure of the Society to take action under sub-section (1), the Registrar may, after affording opportunity of being heard to the officer and for reasons to be recorded and communicated to the

person and the Society concerned, remove, or remove and disqualify for a period not exceeding three years, the officer from holding any office under that Society.

(3) An officer removed under sub-section (1) or sub-section (2), shall with effect from the date of communication of the order, cease to hold the office and, if disqualified, shall not be eligible to hold any office under that Society for the period specified in the order."

Section 98 of the Act of 1965 provides for appeal against the order passed under sub-section (2) of Section 38 of the Act, 1965, removing or disqualifying any member of a Society, which is quoted as under:

"98. Appeal against the awards, orders and decisions.-(1) An appeal against-

(a)…., (b)… ., (c)….

(d) an order of the Registrar under sub-section(2) of Section 27 expelling or removing a member or under sub-section (2) of Section 38 removing or disqualifying any officer of a co- operative Society;

(e)…..,(f)……,(g)…..,(h)…..,(I)……,(j) …..,(k)…..,(l)…..,(m)….,(n)…...

(2) An appeal under [clauses (c), (d), (e), (f), (g), (k) and (l) of sub-section (1) shall be preferred to the Tribunal, and an appeal under [clauses (a), (b), (h), (i), (j), (m) and (n) of the said sub-section shall be preferred-

(a) if the decision or the order was made by the Registrar, to the State Government; or

(b) if the decision or order or award was made by any other person or authority, to the Registrar.

[(c) if the order or award was made on a dispute relating to an election, to the Tribunal]."

12. Rule 454 of the U.P. Co operative Society Rules 1968 (hereinafter referred to as 'Rules of 1968') provides for removal of member of the society. Rule 454 of Rules of 1968 is quoted as under:

"454. It shall be the duty of the Committee of Management of a co-operative society to ensure that no person incurring any of the disqualifications continues to hold office of a member of the Committee of Management. As soon as the fact that a member is subject to any disqualification whether it was incurred prior or subsequent to his being such member, comes to the knowledge of the Committee of Management, the committee shall consider the matter in a meeting to be called for the purpose. A copy of the agenda of such meeting shall be served on the member (against whom action is proposed) either personally or by registered (acknowledgment due) post. Where resolution for removal of the person concerned from the membership of the committee has been passed for reasons of such disqualifications a copy of such resolution shall also be sent to the person concerned by registered (acknowledgment due) post and thereupon such member shall not be allowed to attend any meeting of the Committee of Management or to function as the member of the Committee of Management in any other way. The office held by such member shall be declared vacant. If that person feels aggrieved by such action, he may, within thirty days

from the date of the receipt of the notice, seek arbitration under the provisions of the Act and the Rules."

13. The scope of power of Registrar under Section 38 has been considered by a Full Bench of this Court in **Smt. Vandana Varma and others v. State of U.P. and others1.** The issue arose while considering the question as to whether approval/sanction of Registrar is required by the Committee of Management under Section 38 (1) for proceeding under Rule 454. It has been held that:

"38. A bare perusal of section 38 of U.P. Act, 1965 shows that Registrar, if forms an opinion, that an "Officer" of a Co-operative Society has contravened or omitted to comply with any provision of U.P. Act, 1965 or Rules framed thereunder or Bye-laws of the Society or has forfeited his right to hold office, he may call upon the Society to remove such officer within a specified period from the office. If necessary, Registrar shall also call upon the Society to disqualify such "Officer" from holding any office under that Society for a period not exceeding three years. When such direction is issued by Registrar, the Society is under an obligation to pass such order as is necessary but before passing such order principles of natural justice shall be complied with and the "Officer" concerned shall be given an opportunity of hearing by the Society.

39. Section 38(1)……..contemplates a direction from Registrar to Society concerned to do the needful when the conditions, as noticed above, are satisfied that the "Officer" concerned has not acted in accordance with Statutes or otherwise has forfeited his right to hold office and it would then be an obligation of the Society to comply the said direction.

41……...when Society acts under sub-section (1) of Section 38, it gets jurisdiction from an order/direction issued by Registrar himself to take such action. This is a supervisory/administrative control of Registrar over the Management of Co-operative Society so that an "Officer" of Society, if not functioning within the four corners of the Statute or otherwise, has forfeited his right to hold office, such person shall not be allowed to continue to hold office, and, at the first instance, Society itself should remove him and if Society fails, then it shall be done by Registrar himself."

14. The Full Bench has also explained the difference in scope of Section 38 and Rule 454 as follows:

43. …….There is no need to read this provision in conjunction with Section 38 or to hold that Rule 454 is controlled by Section 38. In fact, both the provisions are independent in their intent. Where a person holding office of member of Committee of Management, has incurred any disqualification and continued to hold office and no direction has been received from Registrar under Section 38(1), still there is an obligation upon Committee of Management of Co-operative Society to ensure that such erring and disqualified person is not permitted to hold office of member of Committee of Management, any longer…..."

49. Section 38 talks of a situation where Committee of Management of a Society, may be for the reasons of lack of knowledge, or otherwise, has not acted against a person, incurring disqualification

to hold office of member of Committee of Management, then Registrar may issue direction under Section 38(1)and when such a direction is issued, then Co-operative Society shall be under an obligation to proceed accordingly. Section 38 can be resorted by Registrar even to such contingencies as are not within the ambit of Rule 454 for causing removal; and/or, removal and disqualification, of a member of Co-operative Society if the circumstances specified under Section 38(1), namely, contravention of provisions of U.P. Act, 1965 or Rules framed thereunder or Bye-laws of the Society or omission to comply with certain statutory obligations provided in such Act, Rules or Bye-laws is found.

51. Thus both the provisions i.e. Section 38 and Rule 454 are independent, though contemplate an action against Member of Committee of Management, by the Society but in different manner and apparently it appears to be overlapping but on deeper scrutiny, we do not find any such overlapping. On the contrary, there are apparent distinctions inasmuch as under Rule 454 action against Member of Committee of Management is contemplated when he suffers a disqualification and on removal, office shall be rendered vacant while section 38 talks of a limited duration only.

56. These distinctions leave no manner of doubt in our mind that neither Section 38 controls Rule 454, nor the two provisions are overlapping, nor there is any reason to read Rule 454 as supplementing Section 38, nor to read Rule 454 as subordinate to Section 38……."

15. It flows from the Full Bench judgment that the power under Section 38(1) is with the general body of the Society and not the Committee of Management. The general body of the Society gets invested with the power under Section 38(1) only when direction is issued by the Registrar to remove any officer or to remove and disqualify him from holding any office under the Society. Upon being so directed by the Registrar, the Society is obliged to follow the direction of the Registrar. The Society shall afford opportunity of hearing to the officer concerned and pass such order as it may deem fit. On failure of the Society to take action under sub-section (1), the Registrar has discretion, after affording opportunity of being heard to the officer and for reasons to be recorded, remove and disqualify the officer for a period not exceeding three years. While the Society is obliged to follow the direction of the Registrar while acting under Section 38(1), the Registrar has ample discretion to remove or not to remove the officer while exercising powers under sub-section (2) of Section 38.

16. It has been submitted by learned counsel for the respondents that in the present case, the orders impugned are not happily worded but since the same has been passed in exercise of powers under Section 38(1) of Act of 1965, no interpretation other than that the direction was for the Committee of Management to convene a meeting of the Society to consider the mandate given by the Registrar, can be given.

17. On the other hand, contention of the learned counsel for the petitioners is that no such intention can be read in the orders impugned as there was no impediment for Registrar to himself call meeting of the general body for consideration of the removal of the

Chairman and the Secretary of the Society. In support of his submissions, learned counsel for the petitioners further contented that under Section 35 of the Act of 1965 read with Rule 118 of Rules of 1968, the Registrar can call a meeting of the general body of the Society and there was no occasion for him to direct the Committee of Management to call the meeting as contended by learned counsel for the respondents.

Section 35 of the Act of 1965 is quoted as under:

"35. Supersession or suspension of Committee of Management.-[(1) Where in the opinion of the Registrar the Committee of Management of any Cooperative Society persistently makes default or is negligent in the performance of the duties imposed on it by this Act or the rules or the bye-laws of the Society or commits any act which is prejudicial to the interest of the Society or its members, has failed to conduct the election in accordance with the provisions of this Act before the expiry of the term of the Committee of Management or is otherwise not functioning properly, the Registrar after affording the Committee of Management a reasonable opportunity of being heard and obtaining the opinion of the General Body of the Society in a general meeting called for the purpose in the manner prescribed may, by order in writing, supersede the Committee of Management:

Provided that where under the prescribed circumstances it is not feasible to convene a general meeting of the General Body of the Society, the Registrar may dispense with the requirement of obtaining the opinion of the General Body of the Society.]

2……

3…..

4….

5….."

Rule 118 of the Rules of 1968 is quoted as under:

"118. For the purpose of obtaining the opinion of the general body of a co-operative Society under sub-section (1) of Section 35, the Registrar shall call a general meeting of the general body of the Society, for which purpose he shall issue a notice to the members of the general body whose names have been intimated to him by the Society or ascertained by him from the records. Non-receipt of the notice by any members shall not invalidate the proceedings of such meeting."

18. Contention of learned counsel for the petitioners is misconceived as Section 35 of the Act of 1965 contemplates supersession of the Committee of Management and not the removal of any individual officer or member of the Committee of Management as per the provision prescribed under the aforesaid section. Rule 118 of the Rules of 1968 is only applicable for the purpose of obtaining the opinion of the general body of a co-operative Society under sub-section (1) of Section 35 of Act of 1965 and empowers the Registrar to call a general meeting of the Society for the aforesaid purpose. Generally, the power to convene a meeting lies with the Committee of Management.

19. Section 33 of the Act of 1965 provides that Committee of Management shall call a general meeting of general body

of the Society after the receipt of requisition in writing from the Registrar or from at least 1/5 members of the general body of the Society. Section 33 of the Act of 1965 is quoted as under:

"33. Other general meeting.- (1) The Committee of Management may as often as may be necessary for the transaction of business of the co-operative Society call a general meeting of the general body of the Society (to be called ordinary general meeting).

(2) The Committee of Management shall call a general meeting of the general body of the Society (to be called extraordinary general meeting) within one month after the receipt of a requisition in writing from the Registrar or from at least one-fifth of the members of the general body of the Society. In default of the Committee of Management to call meeting, the Registrar or any person duly authorized by him in this behalf shall have the power to call the extraordinary general meeting at such place and time as he may direct."

(emphasis supplied)

20. Section 38 (1) of the Act of 1965 does not contemplate for calling a meeting of the general body at the behest of Registrar and the same can only be called by the Committee of Management. Since, in the contemplated meeting, removal of Chairman and Secretary was to be considered, therefore, the Registrar has addressed the Committee of Management instead of Chairman or Secretary of Committee of Management to proceed under Section 38 and remove their officers.

21. So far as the contention of the learned counsel for the petitioners that no direction can be issued by Registrar to the Committee of Management to exercise power under Rule 454 of Rules of 1968, it has no force. It has been specifically mentioned in the orders that the directions are issued under Section 38(1) of the Act of 1965 and not under Section 454 of the Rules of 1968. It is correct that the impugned orders are not very happily worded. It would have been better if the Registrar would have further elaborated that the Committee of Management was required to convene meeting of the general body of the Society to remove the President and Secretary. However, since the orders specifically directs the management to proceed under Section 38 (1) of the Act, it would only mean that the procedure provided thereunder was to be followed. The Committee of Management of the Society, in whom the power of management vests, was under obligation to call meeting of the general body of the Society for considering the directive of the Registrar. It would not mean that the Registrar had, thereby, conferred power on the Committee of Management, which it does not possess under Section 38(1). The argument, though attractive, has no force and is rejected.

22. So far as the contention of the learned counsel for the petitioners that before passing the orders impugned, no notice was issued to the petitioners, therefore, impugned orders are non-est, it is also not sustainable in law.

The power under Section 38(1) of the Act of 1965 is a supervisory power/administrative control of the Registrar over management of the co-operative Society, so that an officer of the Society, if not functioning within four corners of the statute or otherwise has

forfeited his right to hold his office, shall not be allowed to continue to hold his office and at the first instance the Society should remove him and if the Society fails, it shall be done by the Registrar himself.

23. Section 38, when we read it in its entirety we find that when action is initiated under sub-clause (1) of Section 38 by the Registrar by giving direction to the Society, it is the Society which has to take action after affording opportunity of being heard to the officer concerned. At this stage, the Registrar has nothing to do except for calling upon the Society to consider the action proposed and therefore, there is no requirement of giving notice or providing for observance of principle of natural justice. It is only the Society which is required to give opportunity of hearing to the officer concerned as the decision, if any, is to be taken by the Society itself and not by the Registrar.

24. Sub-section (2) of Section 38 talks of the situation where despite direction given by Registrar, Society failed to comply with such direction and did not take any action against the "Officer" concerned, who is rendered disqualified to hold the office. In such eventuality, when Society has failed, sub-section (2) of Section 38 confers power upon Registrar to take action himself and to disqualify, remove or both, such "Officer" from the office. Under sub-section (2) of Section 38, when Registrar takes action on its own, he has to observe the principles of natural justice i.e. afford opportunity of hearing to "Officer" concerned and thereafter pass order which must be a reasoned one.

25. It is only in the second case, as contemplated in sub clause (2) of Section 38 where the Society fails to take any action, and the Registrar himself exercises the power of removal of the erring officer of the co-operative Society, sub clause (2) of Section 38 of the Act of 1965, stipulates that opportunity is to be given to the officer concerned.

26. In view of the discussion made above, we are of the considered opinion that the Registrar was not required to afford hearing to the officers at the stage of issuing direction to the Committee of Management to convene the meeting of general body to consider the removal of Chairman and the Secretary in accordance with provisions of Section 38 of the Act of 1965.

27. At the bar, judgment passed by this Court in case of **Prabhakar Dwivedi and others v. State of U.P. and others** reported in **2012 (2) ADJ 396** was cited. Therein, the Court was dealing with Section 58, 65 and 68 of Act of 1965 and Rules 144 and 453(1)(f) of the Rules of 1968 and has not considered the scope of Section 38(1) of the Act of 1965.The said judgment is not of any help and is not applicable to the controversy in hand.

28. We thus find no merit in the writ petition.

29. Learned counsel for the parties admit that after passing of the orders impugned, another order has been passed on 04.07.2023 by Registrar removing the petitioner in exercise of power under Section 38(2) of the Act of 1965. The aforesaid order is not under challenge before us. The petitioners also have an alternative remedy of challenging the same before the tribunal in view of Section 98(1)(d) of the Act of 1965.

30. Liberty is reserved in favour of the petitioners to challenge the final order dated 04.07.2023 passed under Section 38(2) of the Act of 1965 in appeal before the tribunal under Section 98(1)(d) of the Act of 1965, if not already challenged.

31. In case, such an appeal is filed, the same shall be considered on merits by the tribunal without being influenced by any observation made by this Court in this judgment.

32. With these observation, this writ petition stands **disposed of.**

(2024) 1 ILRA 1324
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2023

BEFORE

THE HON'BLE MRS. MANJU RANI CHAUHAN, J.

Writ-C No. 30425 of 2023

Sahabuddin ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shyam Shankar Mishra, Sri Kamlesh Kumar Tiwari

Counsel for the Respondents:
C.S.C., Sri Anshul Kumar Singhal, Sri Sumit Daga

A. Election Law – Amendment Application Under U.P. Panchayat Raj Act, 1947 – Maintainability – Petitioner challenged the rejection of an amendment application to include a challenge to a consequential order dated 28.07.2022 in a revision against the order dated 15.07.2022 – Held, the amendment application to challenge the consequential order (declaring respondent no. 4 as the winning candidate after recounting) was wrongly rejected on grounds of delay and non-maintainability under Order 6 Rule 17, C.P.C., as it sought to address a related issue arising from the original order, and courts should adopt a liberal approach to amendments to serve justice, per *Vineet Kumar Vs Mangal Sain Wadhera* and *Pankaja Vs Yellappa*. (Paras 5, 10, 11, 12, 19, 20, 23, 25)

B. Limitation Under Section 12(C)(6) of U.P. Panchayat Raj Act – Respondents argued the amendment application was time-barred under Section 12(C)(6), which mandates filing a revision within 30 days – Held, Section 12(C)(6) applies to revisions against the prescribed authority's final order (here, 15.07.2022), not to amendment applications – No statutory time limit exists for amendments, and the revisional court erred in applying a 30-day limitation, making the rejection on this ground unsustainable. (Paras 7, 8, 9, 17, 18)

C. Order 6 Rule 17, C.P.C. – Scope in Election Petitions – The revisional court rejected the amendment application citing the proviso to Order 6 Rule 17, which restricts amendments post-trial commencement unless due diligence is shown – Held, the amendment sought to challenge a consequential order (28.07.2022) arising from the primary order (15.07.2022) already under revision, and its rejection was improper as it was necessary to determine the real controversy – Courts have discretion to allow amendments to avoid injustice, even if delayed, as per *L.J. Leach & Co. Vs Jardine Skinner & Co.* and *T.N. Alloy Foundry Vs T.N. Electricity Board*. (Paras 10, 11, 12, 19, 20)

D. Mistake of Counsel – Impact on Amendment – Petitioner attributed the delay in challenging the consequential order to incorrect legal advice – Held, litigants should not suffer for counsel's errors, and courts must protect parties from adverse consequences due to such mistakes, as established in *Ashok Kumar Vs New India Assurance Company Ltd.* – The revisional court's rejection ignored this principle, warranting interference. (Paras 11, 14, 22)

E. Consequential Orders in Election Petitions – Respondents argued that setting aside the primary order (15.07.2022) would vitiate the consequential order (28.07.2022), negating the need for amendment – Held, while the consequential order's validity depends on the primary order, explicitly challenging it via amendment ensures comprehensive adjudication of rights, and the revisional court must reconsider the amendment application in light of this and the liberal approach mandated by *Ramadhar Singh Vs District Judge, Ghazipur*. (Paras 23, 24, 26)

Writ Petition Allowed – Order Dated 24.07.2023 Set Aside – Revisional Court Directed to Reconsider Amendment Application and Decide Revision Within Stipulated Time.

List of Cases cited:

1. L.J. Leach & Co. Ltd. Vs Jardine Skinner & Co., (not fully cited in text but referenced in Para 12)

2. T.N. Alloy Foundry Co. Ltd. Vs T.N. Electricity Board, (not fully cited in text but referenced in Para 12)

3. Amitabh Gupta Vs Awadh Bihari Nigam, (not fully cited in text but referenced in Para 14)

4. Firoz Uddin Vs Anwar Uddin, (not fully cited in text but referenced in Para 14)

5. Satyapal Singh Vs Firm Swastik Plaza, (not fully cited in text but referenced in Para 14)

6. Sardar Joginder Singh Vs Nirmal Rohinson Clifford, (not fully cited in text but referenced in Para 14)

7. South Konkan Distilleries Vs Prabhakar Gajanan Naik, (not fully cited in text but referenced in Para 15)

8. Ashutosh Chaturvedi Vs Prano Devi, (not fully cited in text but referenced in Para 15)

9. Mahajan Sahkari Awas Samiti Ltd. Vs Resham Singh, (not fully cited in text but referenced in Para 15)

10. Jawahar Lal Vs Kanti Devi, (not fully cited in text but referenced in Para 15)

11. Vineet Kumar Vs Mangal Sain Wadhera, (not fully cited in text but referenced in Para 19)

12. Pankaja Vs Yellappa, (not fully cited in text but referenced in Para 20)

13. Life Insurance Corporation of India Vs Sanjeev Builders Pvt. Ltd., (not fully cited in text but referenced in Para 20)

14. Ashok Kumar Vs New India Assurance Company Ltd., (not fully cited in text but referenced in Para 22)

15. Ramadhar Singh Vs District Judge, Ghazipur, (not fully cited in text but referenced in Para 26)

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Amendment application filed today, is taken on record.

2. Learned counsel for the petitioner prays to withdraw the amendment application on the ground that he will be withdrawing the application as moved before the revisional court for not pressing the revision.

3. Accordingly, the amendment application is dismissed as withdrawn.

Order on Writ Petition

1. Heard learned counsel for the petitioner, learned counsel for the respondents and learned Standing Counsel for the State-respondents.

2. The petition has been filed by the petitioner challenging the order dated 24.07.2023 passed by Additional District and Session Judge, Court No.9, Prayagraj vide which his amendment application has

been rejected and a further prayer to direct the court below to allow the amendment application of the petitioner and adjudicate the Election Petition No.3 of 2022, within stipulated period.

3. Brief facts of the case are that in the election for the post of Pradhan held in the year 2021, the petitioner was declared the winning candidate by obtaining 904 votes and respondent no.4 was the returned candidate obtaining 901 votes. An election petition was filed by respondent no.4 on 21.05.2021 wherein the petitioner filed written statement/objections. Thirteen issues were framed by the court concerned and by order dated 15.07.2022 the Presiding Officer without recording any findings on the issues allowed the election petition, directing for recounting of votes. Pursuant to the aforesaid order, the returned candidate was declared as the winning candidate as per the result of the recounting held on 28.07.2022, which showed that the petitioner has secured a total of 899 votes whereas the respondent no.4 has secured a total of 900 votes, therefore, the defeated candidate in the election was declared as the winning candidate by one vote.

4. Being aggrieved by the order dated 15.07.2022, the petitioner filed revision before District and Session Judge, District-Prayagraj. On 20.07.2022, an application was moved by respondent no.4 requesting therein that the date for recounting may be fixed at earliest. The prescribed authority on the same date, fixed 28.07.2022 as the date for recounting of votes casted in the elections. As already mentioned, in the recounting held on 28.07.2022 pursuant to the order dated 15.07.2022 as passed by the Presiding Officer directing for recounting and allowing the election petition, the defeated candidate-respondent no.4 was declared the winning candidate by one vote. Challenging the order dated 15.07.2022, Writ-C No.21191 of 20221 has been filed, wherein as he had filed revision also, challenging the same order, therefore, the Co-ordinate Bench of this Court by order dated 26.07.2022 dismissed the writ petition for dual remedies having been adopted by the petitioner leaving it open to the petitioner to pursue remedy before the revisional court. It is an admitted case that the revision has been filed by directions of the Co-ordinate Bench of this Court within time. Learned counsel for the petitioner moved an amendment application dated 20.05.2023 requesting for permission to amend the revision for challenging the consequential order dated 28.07.2022 passed pursuant to the order dated 15.07.2022 wherein direction for recounting was issued. On the aforesaid application, an objection has been filed by respondent no.4 on 30.07.2023 on which order impugned has been passed rejecting the amendment application of the petitioner on the ground of delay and application not being maintainable under the proviso of Order 6 Rule 17 of C.P.C. Hence, the present petition has been filed by the petitioner.

5. Learned counsel for the petitioner submits that by order dated 15.07.2022, the election petition was allowed directing for recounting on an application moved by the respondent no.4. Pursuant to the aforesaid order, recounting was done on 28.07.2022 which was the date fixed on the application as moved by respondent no.4. As the aforesaid recounting has been done pursuant to the order passed in election petition, the same has to be treated as a consequential order. However, without noticing the aforesaid fact and due to ignorance on the part of the counsel, he

could not challenge the consequential order dated 28.07.2022 vide which the respondent no.4 was declared as winning candidate, therefore, he moved an application on 20.05.2023 requesting for amendment to challenge the aforesaid order.

6. Objections have been raised by learned counsel for respondent considering which the amendment application has been rejected on the ground of delay as well as the same being not maintainable under the proviso of Order 6 Rule 17 of the C.P.C.

7. Learned counsel for the petitioner submits that as per the provisions of Section 12(C)(6) of U.P. Panchayat Raj Act, any party aggrieved by an order of the prescribed authority upon an application under sub-section (1) may, within thrity days from the date of the order, apply to the District Judge for revision of such order on any one or more grounds as mentioned.

8. Accordingly, the petitioner being aggrieved by the order dated 15.07.2022 filed a revision as per the provisions and also as per the directions passed by Co-ordinate Bench of this Court by order dated 26.07.2022 wherein Writ-C No.21191 of 2022 was dismissed on the ground of dual remedies being adopted by the petitioner, however, it was left open to the petitioner to avail the remedy for filing the revision. By the impugned order, the Court concerned has misread the provision of Section 12(C)(6) of U.P. Panchayat Raj Act, taking the limitation to be 30 days from 15.07.2022, date vide which election petition was allowed, for moving the amendment application, whereas the revision has to be moved challenging the order passed by prescribed authority which is in the present case order dated 15.07.2022 vide which the election petition has been decided.

9. There is no time limit provided under the act for any application or amendment application to be moved within 30 days. It is the order of the prescribed authority in the election petition which is to be challenged by way of filling revision that has to be filed within 30 days from that order.

10. Another ground taken by the competent court while rejecting the amendment application is that the same is not maintainable as per the proviso of Order 6 Rule 17, wherein the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties: Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that despite due diligence, the party could not have raised the matter before the commencement of the trial.

11. Learned counsel for the petitioner submits that the amendment application so moved is only with respect to the consequential order passed pursuant to the order passed in election petition dated 15.07.2022, which has been challenged by means of revision, therefore, there is no question of rejecting the same on the ground that it is barred by proviso of Order 6 Rule 17 as the revisional court has already started hearing the revision. Learned counsel for the petitioner further submits that the consequential order dated 28.07.2022 could not be challenged due to

wrong advice of his lawyer. Thus, being ignorant of the settled position of law, he could not challenge the order timely and had moved the amendment application.

12. Learned counsel for the petitioner has lastly submitted that it is well settled that the Court must be extremely liberal in granting amendment, if the Court is of the view that if such amendment is not allowed, a party who has moved such an amendment, shall suffer irreparable loss and injury. It is equally well-settled that there is no absolute rule that in every case where relief is barred because of limitation, amendment should not be allowed. It is always open to the court to allow amendment if it is of the view that allowing of the amendment shall really sub-serve the ultimate cause of justice and avoid further litigation. In support of his submission he has relied upon judgment of **L.J. Leach & Co. Ltd. & Anr. Vs. Jardine Skinner & Co.2** as well as **T.N. Alloy Foundry Co. Ltd. Vs. T.N. Electricity Board & Ors.3.**

13. Learned counsel for the respondent, however, submits that there is no illegality in the order impugned as the same is barred by limitation as per provisions of Section 12(C)(6) of U.P. Panchayat Raj Act, 1947 , wherein the limitation for filling a revision against the order passed by the prescribed authority is 30 days. He further submits that the proposed amendment to challenge the order dated 20.07.2022 and order dated 28.07.2022 is also barred by proviso of Order 6 Rule 17 as it is provided that no application for amendment shall be allowed after trial has commenced, unless the Court comes to the conclusion that despite due diligence, the party could not have raised the matter before commencement of trial. The aforesaid orders were well within the knowledge of the petitioner, therefore, he could have challenged the same along with order dated 15.07.2022 while filling the revision.

14. The ground as taken by learned counsel for the petitioner for not challenging the order dated 20.07.2022 and order dated 28.07.2022 within time along with the revision so filled challenging the order dated 15.07.2022 was due to wrong advice of previous counsel which cannot be taken as a ground for considering time barred amendment application. There are several judgments on the point that fault on the part of counsel cannot be a ground to file delayed amendment application. In support of his submission, he has relied upon judgments passed in the cases of **Amitabh Gupta vs. Awadh Bihari Nigam4, Shri Firoz Uddin And 4 Others vs. Shri Anwar Uddin5, Satyapal Singh vs. Firm Swastik Plaza and others6, Sardar Joginder Singh and others vs. Nirmal Rohinson Clifford an another7.**

15. He further submits that a time barred relief cannot be challenged by way of subsequent amendment. In support of his submission he has relied upon judgments passed in the cases of **South Konkan Distilleries and Another vs. Prabhakar Gajanan Naik and Others8, Ashutosh Chaturvedi vs. Prano Devi alias Parani Devi and others9, Mahajan Sahkari Awas Samiti Ltd. Vs. Resham Singh and others10 and Jawahar Lal and others vs. Smt. Kanti Devi and Another11.**

16. Heard counsel for the parties and perused the records.

17. Section 12(C)(6) of U.P. Panchayat Raj Act reads as follows :-

"12-C. Application for questioning the elections *- (6) Any party aggrieved by an order of the prescribed authority upon an application under sub-section (1) may, within thirty days from the date of the order, apply to the District Judge for revision of such order on any one or more the following grounds, namely :–*

(a) that the prescribed authority has exercised a jurisdiction not vested in it by law;

(b) that the prescribed authority has failed to exercise a jurisdiction so vested;

(c) that the prescribed authority has acted in the exercise of its jurisdiction illegally or with material irregularity."

18. As per the aforesaid provisions of Section 12(C)(6) any order passed by the prescribed authority can be challenged within 30 days of the said order. In the present case, the order dated 15.07.2022 was challenged by means of filling a revision, which was within time and was also in compliance of the order passed by this Court in a writ filed by the petitioner. Hence, no question of time barred revision being filed has arisen. As regards, the amendment application being moved after delay of sufficient period, it cannot be said that the same is in contravention with the provisions of Section 12(C)(6) as it does not speak about any application or amendment application to be filed within 30 days of the final orders passed in the election petition. Bare reading of the provision goes to show that it is the revision which has to be filed within 30 days after final decision has been passed by the prescribed authority in the election petition.

19. Even otherwise, if the amendment is treated to be time barred, in case the prayer for amendment merely adds to the facts already on record, the same should be allowed as has been held in the case of **Vineet Kumar vs. Mangal Sain Wadhera12.** There is no absolute rule that the amendment in such a case should not be allowed even if it is filed after ample delay where the relief sought to be added is by way of amendment. It is not an absolute rule that if the amendment in such case i.e. seeking amendment in the election petition or amendment of plaint filed in a suit is sought after ample delay, it should not be allowed. It is the discretion of the Court to allow the application under Order 6 Rule 17.

20. The aforesaid has been held by the Apex Court in the case of **Pankaja & Another vs. Yellappa (dead) by lrs. And Others13** and **Life Insurance Corporation of India vs. Sanjeev Builders Private Lmited & Ors.14.**

21. In several judgments it has been held that the Court should take a liberal view in allowing the amendment application if it is required in the interest of justice.

22. A litigant cannot be penalized for any default or mistake on the part of the counsel. The Courts have protected litigants from adverse consequences accruing from a default or mistake of their counsel. The aforesaid has been held by the Apex Court in the case of **Ashok Kumar vs. New India Assurance Company Ltd15.** The relevant paragraph 8 of the aforesaid judgment is as follows :-

"In view of the foregoing, it has to be reiterated that the complaint No. 515

was filed after theft due to non-settlement of claim by the Insurance Company. The repudiation of the claim was made during the pendency of the said complaint, purportedly due to breach of condition no. 1 and 5. The said complaint was withdrawn by the advocate of the complainant on the pretext of the case being prolonged by the advocate of the Insurance Company, without having express instructions for withdrawal of the said complaint. However, for the fault of the advocate, the complainant cannot be made to suffer. Finally, the dismissal of the complaint was made by the National Commission under the wrong pretext that the earlier complaint had challenged the order of repudiation. Thus, in our view, the complaint cannot be thrown out on the threshold of Order XXIII Rule (1)(4) C.P.C. and in the peculiar facts, it requires consideration on merits."

23. In the present case wherein the order dated 28.07.2022 has been passed in compliance of the order dated 15.07.2022 passed in election petition for compliance of which on the application of respondent an order dated 20.07.2022 was passed fixing 28.07.2022 as the date of recounting, the same would be taken as consequential order, therefore, there is no need to reject the said amendment application.

24. On a pointed query raised by this Court to learned counsel for respondent as to whether there is any requirement of moving an amendment application challenging the consequential order dated 28.07.2022, he did not give a clear answer, however, he admits that the final orders passed in election petition has to be challenged in the revision. He also could not deny the fact that pursuant to the order dated 15.07.2022, wherein the order directing for recounting has been passed and on his application, order dated 20.07.2022 was passed, fixing 28.07.2022 for recounting, pursuant to which on 28.07.2022 the respondent no.4 has been declared as the winning candidate, therefore without challenging the aforesaid order, his rights cannot be taken away. He however, submits that the order dated 28.07.2022 has been passed pursuant to the order dated 15.07.2022 and when once the aforesaid order dated 15.07.2022 as challenged in revision is set-aside, the consequential order dated 28.07.2022 will also be vitiated.

25. Accordingly, the order dated 24.07.2023 is **set-aside.**

26. It is directed that the court concerned shall pass afresh order on the amendment application keeping in view the observations as made hereinabove as well as the law laid down in the case of **Ramadhar Singh Vs. District Judge, Ghazipur & Ors.16,** preferably, within a period of 15 days from today.

27. It is also directed that the revision so filed may be decided, in accordance with law, by reasoned and speaking order, within a period of two months from the date of production of certified copy of this order.

28. However, till 20 days from today, the court concerned is restrained from deciding the revision no.3 of 2022, under Order 6 Rule 17 of the C.P.C.

29. With the aforesaid observations/directions, the writ petition stands ***allowed.***

(2024) 1 ILRA 1331
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE MRS. MANJU RANi CHAUHAN, J.

Writ-C No. 31940 of 2023

Smt. Ramshri ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Suchita Tripathi, Sri Naresh Chandra Tripathi

Counsel for the Respondents:
C.S.C., Sri Jay Singh Yadav

A. Panchayat Raj – Validity of Complaint Under U.P. Panchayat Raj (Removal of Pradhans, UP-Pradhans and Members) Enquiry Rules, 1997 – Petitioner challenged the order dated 21.08.2023 ceasing her financial and administrative powers as Pradhan, alleging the complaint lacked proper affidavits as required under Rule 3 of the 1997 Enquiry Rules – Held, while Rule 3(2) and (3) mandate that complaints be accompanied by verified affidavits, non-compliance is an irregularity, not an illegality, and does not vitiate proceedings, as the District Magistrate has suo motu powers under Rule 4 to initiate a preliminary enquiry even without a compliant complaint, per *Vivekanand Yadav Vs St. of U.P.*. (Paras 4, 5, 15, 19, 20, 23, 24, 26, 27, 28)

B. Suo Motu Powers of District Magistrate Under Rule 4 – Petitioner argued that the complaint's non-compliance with Rule 3(2) and (3) rendered the proceedings void – Held, the term "otherwise" in Rule 4 grants the District Magistrate authority to order a preliminary enquiry suo motu, even in the absence of a valid complaint or report, and the Pradhan has no right to object to the complaint's format, as established in *Vivekanand Yadav Vs St. of U.P.*. (Paras 20, 21, 22, 24, 26, 27)

C. Procedural Irregularities vs. Illegality – Petitioner contended that the complaint's lack of proper verification under Rule 3(3) invalidated the proceedings – Held, non-filing or improper verification of affidavits is a curable technical defect, not an illegality, and should not defeat substantive rights or cause injustice, as per *Uday Shankar Triyar Vs Ram Kalewar Prasad Singh* and *A. Manju Vs Prajwal Revanna*. The petitioner's failure to raise this objection at the initial stage further weakens the claim. (Paras 28, 29, 32, 33)

D. Natural Justice and Consideration of Reply – Petitioner argued that the District Magistrate's order was passed casually without considering her reply to the show-cause notice – Held, the court found no merit in this claim, as the complaint and preliminary enquiry report provided a basis for the order under Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947, and the petitioner's reply was deemed considered, with no evidence of procedural unfairness. (Paras 3, 11, 34)

E. Purpose of Verification and Democratic Principles – Petitioner claimed that improper complaints undermine the democratic role of an elected Pradhan – Held, the purpose of verification is to ensure genuineness, but minor procedural defects by complainants, often illiterate voters, should not obstruct enquiries into allegations of abuse of position, as the Act aims to protect public interest, and technicalities should not defeat justice, per *Uday Shankar Triyar Vs Ram Kalewar Prasad Singh*. (Paras 9, 10, 29, 30, 31, 32)

Writ Petition Dismissed.

List of Cases cited:

1. Kesari Devi Vs St. of U.P., 2005 (4) AWC 3536

2. M/s. Sukhwinder Pal Bipan Kumar Vs St. of Punjab, AIR 1982 SC 65

3. A.K.K. Nambiar Vs U.O.I., AIR 1970 SC 652

4. Amar Singh Vs U.O.I., (2011) 7 SCC 69

5. Smt. Jagbiri, Pradhan Gram Panchayat Vs St. of U.P., 2009 (106) RD 646

6. Bhagwan Deen Verma Vs St. of U.P., 2005 (4) AWC 3281

7. Vivekanand Yadav Vs St. of U.P., 2010 (10) ADJ 1 (FB)

8. Uday Shankar Triyar Vs Ram Kalewar Prasad Singh, (2006) 1 SCC 76

9. A. Manju Vs Prajwal Revanna, (2022) 3 SCC 269

(Delivered by Hon'ble Mrs. Manju Rani Chauhan, J.)

1. Heard Mr. N.C. Tripathi along with Suchita Tripathi, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The writ petition has been filed assailing the order dated 21.08.2023 passed by respondent no.3 vide which the financial and administrative powers of the petitioner Pradhan has been ceased.

3. Brief facts of the case are; that the petitioner was elected Pradhan of Gram Panchayat Tedhi, Tehsil Dataganj, District Budaun, for a period of five years as per the elections held in the year 2021. It appears that a complaint was made against the petitioner regarding serious irregularities in the development work in the concerned village. The District Magistrate by order dated 28.12.2022 directed the District Minority Welfare Officer and Assistant Engineer to conduct a preliminary enquiry, report of which, was submitted before the District Magistrate, on the basis of which a show cause notice dated 04.05.2023 was issued to the petitioner as to why the petitioner's financial and administrative powers should not be ceased in exercise of powers under Section 95(1)(g) of U.P. Panchayat Raj Act, 1947, (in short "Act of 1947"). The petitioner submitted an application dated 31.05.2023 requesting to provide copy of the complaint and enquiry report as referred in the show cause notice. The District Panchayat Raj Officer by letter dated 03.06.2023 sent one page complaint and photocopy of the preliminary enquiry report along with a covering letter dated 25.02.2023 directing her to file a reply within three days to the show cause notice dated 04.05.2023. As the petitioner required all the documents for submission of reply to the show cause notice, she applied for a copy of complaint along with affidavits filed in support thereof under Right to Information Act and she has been provided a copy of complaint along with all affidavits filed in support thereof vide covering letter dated 24.08.2023 issued by District Panchayat Raj Officer, Budaun. The petitioner submitted her reply in the first week of June, 2023 and the District Magistrate, without following the proper procedure as prescribed under law, has passed the impugned order dated 21.08.2023 ceasing the financial and administrative powers of the petitioner-Pradhan, hence, the present petition has been filed.

4. Learned counsel for the petitioner has referred to Sub Rule 5 of Rule 3 of the Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1947, (hereinafter referred as "Enquiry Rules 1997") and submits that the complaint is not in accordance with the provisions as required under Rule 3 of the Enquiry Rules, 1997 as Rule 3 Sub Clause (2) clearly contemplates that every

complaint shall be accompanied by complainant's own affidavit in support thereof and also affidavits of all persons from whom she claims to have received information of fact relating to acquisitions, verified before notary, together with all documents in her possession of power pertaining to acquisition.

5. As per Rule 3(3) of Enquiry Rules 1997, every complaint and affidavit as well as any Schedule or Annexures thereto shall be verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings and affidavits respectively. The complaint as made by the petitioner does not comply with the aforesaid rules, thus, no proceedings under U.P. Panchayat Raj Act could have been initiated on such a complaint. In support of her submission, she has relied upon a judgement of this court passed in case of Kesari Devi Vs. State of U.P. and Others, 2005 4 AWC 3536, wherein paragraph 167, Clause IX, the Court has concluded that as the complaint itself was not in accordance with the rules in view of the Clause 5 of Rule 3 of Rules of 1997, the Government could not have proceeded with the preliminary enquiry.

6. Learned counsel for the petitioner, therefore, submits that as the mandatory requirement of filing the complaint supported by an affidavit as laid down in detail in the 1997 Rules has not been complied with, therefore, the entire proceedings are bad. It is settled law that where a statute requires to do a certain thing in a certain way, the thing must be done in that particular way or not at all, thus, when the basic order is illegal, the consequential order cannot be given effect too.

7. The second set of argument as raised by learned counsel for the petitioner is with respect to the complaint being vague. He further submits that the complaint should be such that the allegations as made against an elected member like Pradhan is in a position to give a reply to the same. He further submits that the allegations in the complaint should be supported by an affidavit as required under the relevant rules. In case, the allegations in the complaint are not supported by an affidavit as required under law, then, only the necessary particulars of the charge making out a prima facie case can be looked into and replied by the person against whom such a complaint is made and as to whether the complaint is genuine or a biased one.

8. In support of his submission, learned counsel for the petitioner has relied upon paragraph 12 of Supreme Court judgement passed in case of **M/s. Sukhwinder Pal Bipan Kumar v. State of Punjab, AIR 1982 SC 65.**

9. He has also relied upon Supreme Court judgement, passed in case of **A.K.K. Nambiar v. Union of India and another, AIR 1970 Supreme Court 652,** wherein, the reasons for verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit as evidence of rival parties. Allegations may be true to knowledge or allegations may be true to information received from persons or allegations may be based on record. The importance of verification is to test the genuineness and authenticity of the allegations, thus, the complaint should be

accompanied by proper and verified affidavits.

10. Placing reliance upon paragraphs 29 and 64 of Supreme Court judgement passed in case **Amar Singh v. Union of India And Others, (2011) 7 SCC 69**, learned counsel for the petitioner submits that verification of affidavits are to enable the Court to find out which facts can be said to be proved on the affidavit as evidence of rival parties, in essence, verification is required to enable the Court to find out as to whether it will be safe to act on such affidavit evidence. Learned counsel for the petitioner further submits that ceasing the financial and administrative powers of an elected Pradhan virtually amounts to dethroning an elected person in an undemocratic manner. If such matters of ceasing financial and administrative powers of elected persons are dealt with in such a casual manner, the very purpose of having a democratically elected person would be defeated, as they would always be at the mercy of executive. Thus, the same cannot be exercised in a routine course or casual manner.

11. In the present case, the charges are not specific and the reply as submitted by the petitioner has not been considered in detail, thus, not considering the reply submitted in response to the show cause notice means that the impugned order has been passed in a very casual manner, hence, cannot be sustained in the eyes of law. In support of his submission, he has relied upon the judgement of this Court passed in case of **Smt. Jagbiri, Pradhan Gram Panchayat v. State of U.P., 2009 (106) RD 646** and **Bhagwan Deen Verma v. State of U.P., 2005 (4) AWC 3281.**

12. Learned counsel for the petitioner lastly submits that when the initial proceedings i.e. complaint being filed as per Rule 3(3) is bad, the consequential proceedings on the basis of such complaint are also vitiated. It is settled provisions of law that the Act has to be done as required by the statute or not at all, thus, impugned orders are liable to be quashed.

13. Learned Standing Counsel on the other hand submits that the Pradhan has no right to object that complaint or report is not in accordance with Rule 3 of the Enquiry Rules. He submits that there is no illegality and infirmity in the order as from the records as placed before the Court, the complaint has been made in accordance with law and a notarized affidavit has been submitted by the complainant.

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

15. Before discussion of the case on merits, it would be appropriate to quote Rule 3 of Rules of 1997, which is hereunder:-

(1) Any person making a complaint against a Pramukh, Up-Pramukh, Adyaksha or Upadhyaksha may send his complaint to the Secretary to the State Government in the Panchayati Raj Department, Vidhan Bhawan, Lucknow.

(2) Every complaint referred to in sub-rule (1) shall be accompanied by the complainant's own affidavit in support thereof and also affidavits of all persons from whom he claims to have received information of fact relating to the accusation, verified before a notary, together with all documents in his possession or power pertaining to the accusation.

(3) Every complaint and affidavit under this rule as well as any schedule or annexure thereto shall be verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings and affidavit respectively.

(4) Not less than three copies of the complaint as well as of each of its Annexures shall be submitted by the complainant.

(5) A complaint which does not comply with any of the foregoing provisions shall not be entertained."

16. Accordingly, Rule 3 of the 1997 Rules provides, every complaint and affidavit shall be verified in the manner laid down in the Code of Civil Procedure, 1908 (hereinafter called 'C.P.C.') for the verification of the pleadings and affidavit respectively. Order VI Rule 15 C.P.C. Provides for verification of the pleadings. It provides that every pleading shall be verified at the foot by the party acquainted with the facts of the case. The pleadings have to be numbered in paragraphs and he has to explain as to which paragraph is being verified on his personal knowledge and which upon information received and believes it to be true. The person verifying the pleadings shall also furnish an affidavit in support of his pleadings.

17. At this juncture, it has to be seen whether any provision is mandatory or directory, in addition to-the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve/ It may also be necessary to find out the intent of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things.

18. Whether a provision is mandatory or directory, would, in the ultimate analysis, depends upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

19. Legislative intent is clear from language of Rule 3 of the Enquiry Rules, which is titled procedure relating to a complaint and provides how a complaint may be made. It provides two ways, one by a private person that has to be supported by an affidavit and has to comply other conditions of sub-rule (1) to (4) of rule 3 {rule 3(1) to 3(4)}, the other by a public servant, and in this case the restrictions of the complaint by a private person do not apply.

20. Rule 4 of Rules of 1997 provides; that DM can order a preliminary enquiry on the complaint or report or otherwise. The word complaint or report refers to the complaint by a private person or to the report by a public servant under rule 3. The report of the public servant need not conform to the restrictions of a complaint by a private person. The question is what does the word 'otherwise' in Rule 4 mean.

21. Words and Phrases Permanent Edition Volume 30-A Page (230) explains, 'Otherwise means but for or under other circumstances...one of the usual meanings of otherwise is contrarily. The Black's Law dictionary explains it to the mean, 'In a

different manner, in another way, or in other ways'.

22. The enquiry under rule 4 is a preliminary or a fact finding enquiry. It has to consider prima facie whether any financial or other irregularities have been committed by the pradhan or not. The final enquiry is yet to be done. Considering the object, there is no reason to give any restricted meaning to the word 'otherwise' in rule 4. The normal meaning of 'otherwise' should be adopted. The DM has power to refer a case for preliminary enquiry even if there is no complaint or report or in other words he has powers to act suo moto."

23. Rule 3(5) of the Enquiry Rules provides that the complaint, which does not comply with any of the preceding sub-rules of rule 3 should not be entertained. However, even if the complaint is not to be entertained yet, the DM can always refer the matter for the preliminary enquiry, if he considers that it should be so enquired, he can act suo moto.

24. This Court does not agree with the submissions as made by learned counsel for the petitioner that the Pradhan has right to object to the format of the complaint. If the DM can order for the preliminary enquiry even in a case, where a complaint could not to be entertained, then what is the purpose of permitting a Pradhan to object regarding its non-conformity with rule 3(1) to 3(4).

25. This Court feels that any objection raised by Pradhan regarding non-conformity of complaint with Rule 3 of Rules 1997 appears to be a futile exercise. It is for the DM to consider whether he should entertain the complaint or not.

26. This Court is of the opinion that the word 'otherwise' in rule 4 means that the DM has suo moto powers to order a preliminary enquiry. In an appropriate case, the DM may order a preliminary enquiry even if there is no complaint or report or a defective complaint, not in accordance with rules 3(1) to 3(4). A pradhan has no right to object that a complaint is not in accordance with rule 3(1) to 3(4) of the Enquiry Rules, 1997.

27. A detailed discussion regarding the aforesaid views as taken by this Court finds place in Full Bench judgement passed in case of **Vivekanand Yadav vs. State of U.P. and another** reported in **2010(10) ADJ 1 (FB).**

28. This Court feels that the objection as taken by learned counsel for the petitioner that the complaint was not given in proper format as prescribed in rule 3(3) of Rules of 1997 would be taken as an irregularity on the part of complainant and in case, such a complaint has not been given in proper format, it would not be an illegal complaint. There is clear distinction between irregularity and illegality, if irregularities are curable, it should not been allowed to defeat substantive rights and cause injustice to the parties. The procedure should never be a tool to deny justice.

29. The Hon'ble Apex Court in the case of **Uday Shankar Triyar vs. Ram Kalewar Prasad Singh & Anr., (2006) 1 SCC 76**, has held that procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice.

30. This Court finds that an inadvertent mistake on the part of voter who has elected the Pradhan has to be

ignored keeping in mind the purpose for which he has elected Pradhan, who is supposed to look into the development of the village where the voter resides. The financial and administrative powers of Pradhan are ceased on following grounds:

"95. Inspection – (1) The State Government may –

(g) remove a Pradhan, Up-Pradhan or member of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he -

i- absents himself without sufficient cause for more than three consecutive meetings or sittings.

ii- refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving moral turpitude.

iii- has abused his position as such or has persistently failed to perform the duties imposed by this Act or rules made thereunder or his continuance as such is not desirable in public interest, or

[iii-a has taken the benefit of reservation under sub-section (2) of Section 11-A or sub-section (5) or Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of Scheduled Castes, the Scheduled Tribes or the backward classes, as the case may be.]

iv- being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or

v- suffers from any of the disqualifications mentioned in Clauses (a) to (m) of Section 5-A;

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government."

31. In case a voter has pointed out in his way not always being literate, the way in which the Pradhan has abused his position, the same has to be looked into even if it has not been made in a proper format.

32. In the case of **A. Manju vs. Prajwal Revanna Alias Prajwal R And others, (2022) 3 SCC 269**, the Court has held that non filing of affidavit or non filing of proper verification is technical defect which is curable by allowing candidate/complainant to file proper affidavit.

33. Thus, non filing of complaint in proper format is an irregularity which was curable, in case, objection was raised at the right stage, even while submitting the reply, the petitioner has not raised any objection with respect to the aforesaid fact, any such objection should have been raised at the initial stage and no subsequent or new ground can be taken at that stage when final orders have been passed wherein the Court feels that there was no requirement

of not entertaining the complaint on the ground as taken by the learned counsel for the petitioner.

34. In view of the discussions made above, no grounds for interference is made out, the writ petition is **dismissed** accordingly.

35. However, it is open to the authorities to complete final enquiry within a period of two months, in accordance with law, by means of reasoned and speaking order. The petitioner is directed to co-operate in the enquiry.

(2024) 1 ILRA 1338
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANOJ BAJAJ, J.

Writ-C No. 36361 of 2019
With
Writ C 4812 of 2020

M/s Nishant Traders, Basti ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Devbrat Mukherjee

Counsel for the Respondents:
C.S.C.

A. Mining Law – Forfeiture of Deposits Under U.P. Minor Minerals (Concession) Rules, 1963 – Petitioner challenged the cancellation of the Letter of Intent (LoI) dated 13.11.2017 and forfeiture of earnest money, security money, and first installment vide order dated 22.01.2020, arguing that only a penalty under Rule 59 could be imposed – Held, under the unamended Rule 59 (pre-13.08.2019), failure to submit a mining plan within one month of the LoI subjected the petitioner to a penalty of Rs. 1,00,000, deductible from the security money, and no provision allowed forfeiture of the entire deposits, rendering the forfeiture illegal. (Paras 6, 9, 10, 18, 19)

B. Retrospective Application of Amended Rule 59 – Respondents argued that the amended Rule 59 (post-13.08.2019) permitted forfeiture of the first installment and security money for failure to execute the lease post-environmental clearance – Held, the amended Rule 59, effective from 13.08.2019, does not apply retrospectively to the petitioner's case, as the LoI was issued on 13.11.2017 and the petitioner's application dated 18.01.2018 predated the amendment, per *Commissioner of Income Tax Vs Bajpur Co-operative Sugar Factory Ltd.*, *N.T. Devin Katti Vs Karnataka Public Service Commission*, and *P. Mahendran Vs St. of Karnataka* – The unamended Rule 59 governs, limiting the penalty to Rs. 1,00,000. (Paras 10, 14, 18)

C. Application of Rule 59 and Rule 34 – Petitioner contended that failure to submit a mining plan under Rule 34 within one month triggered only a penalty under Rule 59, not forfeiture – Held, Rule 59 (unamended) clearly stipulates a penalty of Rs. 1,00,000 for non-compliance with Rule 34's requirement to submit a mining plan within one month, and the District Magistrate was required to impose this penalty and refund the remaining deposits, as no forfeiture clause existed in the 1963 Rules or the LoI. (Paras 6, 9, 10, 12, 18)

D. Procedural Fairness – Non-Disclosure of Enquiry Report – Petitioner alleged that the enquiry report dated 26.02.2019, relied upon by the Revisional Court's order dated 16.09.2019, was not shared, violating natural justice – Held, while the non-disclosure of the report was not directly addressed, the court's focus on the inapplicability of forfeiture under the unamended Rule 59 rendered the issue secondary, as the penalty was limited to Rs. 1,00,000, and the remaining deposits were to be refunded. (Paras 2, 18, 20)

E. St.'s Admission in Affidavit – Respondents' affidavit calculated a penalty of

Rs. 80,10,000 under the amended Rule 59, implying partial forfeiture – Held, even the respondents' affidavit did not support forfeiture of the entire deposits (Rs. 3,31,33,731.50), and the court rejected this calculation, affirming that only Rs. 1,00,000 could be deducted under the unamended Rule 59, with the remainder to be refunded, aligning with the petitioner's submissions. (Paras 15, 16, 18)

Writ Petitions Allowed.

List of Cases cited:

1. Commissioner of Income Tax, U.P.-II, Lucknow Vs Bajpur Co-operative Sugar Factory Ltd., (1988) 3 SCC 553

2. N.T. Devin Katti Vs Karnataka Public Service Commission, (1990) 3 SCC 157

3. P. Mahendran Vs St. of Kar., (1990) 1 SCC 411

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Manoj Bajaj, J)

1. As on 14.8.2017 the State of Uttar Pradesh had taken a decision to grant all leases for minor minerals by way of e-tendering-cum-e-auction, tenders were invited from bidders at large with regard to mining leases of various mining areas of the district of Basti. The petitioner was interested to get the mining lease of the plots situate in village Mahua Kalan, Khand-II having plot nos.757, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 810, 811 and 812 the area of which was 4.249 hectares. Though a certain minimum reserve price was given for price to be offered by the participants in the e-auction, the petitioner made an offer of Rs.557/- per cubic meter for the mineral which was available. The petitioner being the highest bidder was offered a Letter of Intent on 13.11.2017 stating therein that he was required to deposit immediately within two days the 25% of the royalty of the first year as security money and 25% of the royalty of the first year as the first installment.

2. For making the bid the petitioner had deposited Rs.19,33,295/- as earnest money as was the requirement of the advertisement in pursuance of which the petitioner had applied for participating in the auction. 118972 cubic meters of sand was supposedly available for mining. However, when knowledge dawned on the petitioner that in fact the quantity of mineral as was given out in the advertisement was not present at the site and that the mineral was in agricultural land of various private persons and also that there was a river which would be an impediment in the excavation, the petitioner on 18.1.2018 applied to the Director of Geology and Mining that in view of the problems which the petitioner was facing, appropriate action be taken by him. When despite repeated requests nothing was done from the side of the State, the petitioner filed a Revision before the State Government under Rule 78 of the U.P. Minor Mineral (Concession) Rules, 1963 (hereinafter referred to as the "**1963 Rules"**) and before the Revisional Court a specific prayer was made that the representation of the petitioner for taking action on the application of the petitioner dated 18.1.2018 be decided. In effect the Revision was filed with virtually the same prayers as were there in the application dated 18.1.2018. During the pendency of the Revision, a direction was issued to the District Magistrate to conduct an inquiry for ascertaining the quantity of mineral over the plot in question and in pursuance of that direction the Revenue Officials submitted a report on 26.2.2019. The

petitioner, learned counsel has submitted, was never shown the report which was submitted by the Revenue Authorities on 26.2.2019 but the Revision itself was disposed of on 16.9.2019 basing its order on the report dated 26.2.2019. From the order dated 16.9.2019, the crux of the report dated 26.2.2019 can be found which had stated that the petitioner's allegation that there was no mineral/sand available was wrong. Ultimately the petitioner's application dated 18.1.2018 stood rejected. Thereafter on 30.9.019 the petitioner once again represented to the District Magistrate/Collector, Basti that mining was not possible and that the amount of Rs.3,12,00,407/- which the petitioner had deposited in advance be refunded to him. However, no order was passed on the application but on 23.10.2019, the District Magistrate, Basti gave a notice to the petitioner that in view of the order dated 16.9.2019 of the Revisional Court, the petitioner may provide the environmental clearance and get the lease executed otherwise the Letter of Intent dated 13.11.2017 would be cancelled; the mine in question would be re-auctioned and all the amounts which the petitioner had deposited would stand forfeited.

3. Disturbed by this notice, the petitioner filed a writ petition being Writ-C No.36361 of 2019 (M/s. Nishant Traders vs. State of U.P. & Ors.) with a prayer that the amount which the petitioner had deposited after the issuing of the Letter of Intent be refunded to the petitioner and also that the amount which the petitioner had deposited be not forfeited.

4. While this writ petition was pending, an order was passed by the District Magistrate on 22.1.2020 by which the Letter of Intent dated 13.11.2017 was cancelled and also the earnest money along with the first installment which the petitioner had deposited amounting to Rs.3,31,33,731.50 p were to be forfeited. Aggrieved by the order dated 22.1.2020, the petitioner filed another writ petition being Writ-C No.4812 of 2020.

5. Since both the matters in Writ-C No.36361 of 2019 and in Writ-C No.4812 of 2020 were with regard to the same subject-matter, they were heard together and are, therefore, being decided together.

6. Learned counsel for the petitioner relying upon Rule 59 of the 1963 Rules had submitted that the respondents could have penalized the petitioner for not having approached the respondents for the execution of the lease after submission of the lease plan and the environmental clearance within a period of one month by imposing a penalty of Rs.1,00,000/- and he submits that if this amount of Rs.1,00,000/- was not deposited then that amount could be deducted from the security money which the petitioner had deposited. He, therefore, submits that in the absence of any forfeiture clause either in the Mines and Minerals (Regulation and Development) Act, 1957 or in the 1963 Rules or in the Letter of Intent, no forfeiture of the earnest money; the security money and the first installment could have been done. Since learned counsel for the petitioner has very heavily relied upon Rule 59 of the 1963 Rules, the same is being reproduced here as under :-

"59. Consequences of contravention of certain conditions--(1) <u>The proponent who has received Letter of Intent however has not produced mining plan within the stipulated period, of one month as per the provisions mentioned in Rule 34 be liable for</u>

penalty of Rs. one lakh on failure to deposit the amount of penalty the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease.

2) The lessee who does mining works contravening the terms and conditions mentioned in the approved mining plan and clean environment certificate issued as per the provisions provided under Rule 34, then he will be liable for penalty at the rate of Rs. 50,000/- per occasion of default that shall be recovered by the District Magistrate.

(3) If the lease holder disobeys the provisions of Rule 35 then penalty at the rate of rupees twenty five thousand per day for each and every default shall be levied by the concerned District Magistrate. In case of default on deposit of such levied penalty the concerned District Magistrate will deduct the said amount from the amount of security deposited against the said mining lease.

(4) According to the provisions provided under Rule 41-H mining work through suction machine/lifter into the water stream will be prohibited. If any lessee is found contravening the provisions of the said rule then he will be liable for penalty at the rate of of Rs. five lakh per occasion of contravening act, which will be recovered on the order of District Magistrate or Director, Geology and Mining. On failure to deposit of the above mentioned amount of penalty the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease.

(5) Any lessee holding a mining lease who commits a breach of any of the conditions provided in Rule 44 shall be liable for levy/penalty of Rs. fifty thousand. On failure to deposit the said amount of penalty the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease."

(emphasis supplied)

7. Learned counsel for the petitioner further stated that even if Rule 59 as it stood amended on 13.8.2019 by the 47th Amendment is taken into account then also if the petitioner i.e. the proponent who had received the Letter of Intent was not producing the mining plan or was not applying for the grant of environmental clearance within the period of one month as per the provisions mentioned in Rule 59 then the proponent would be liable for a penalty of Rs.10,000/- per day for a period of one month. Learned counsel for the petitioner has argued that the amended Rule had two parts; one was with regard to non production of the mining plan within one month and for non-application of the grant of environmental clearance within one month as stipulated in Rule 34 of the 1963 Rules and the other was that if the proponent i.e. the person who had got the Letter of Intent failed to execute the lease within one month of obtaining the environmental clearance certificate.

8. In the first case, if the proponent did not deposit the amount of penalty for one month then the same could be deducted from the security money deposited by the proponent and in the second case i.e. if after obtaining of the environmental clearance, the lease was not got executed then the District Magistrate could cancel the Letter of Intent and also could forfeit the first installment and the security money.

9. In the case at hand, learned counsel for the petitioner submitted that the lease was yet not executed. The petitioner by a letter dated 18.1.2018 had informed the District Magistrate and the other State Officials that they may take action as the petitioner was not able to provide the mining plan and the environmental clearance. He, therefore, submits that the forfeiture could not have been done.

10. Furthermore, learned counsel for the petitioner submitted that the amended Rule 59 would not apply to the case of the petitioner. The petitioner's Letter of Intent was dated 13.11.2017 and the petitioner had written on 18.1.2018 that he would not be able to do mining work. He submits that within one month of 13.11.2017, the petitioner had to provide the mining plan and if he did not do that then as per the un-amended provisions he was liable for a penalty of Rs.1,00,000/- and a reading of the un-amended Rule 59 clearly shows that the production of the mining plan had to be done within one month. Therefore, learned counsel for the petitioner states that the District Magistrate had not to wait for more than one month and had to deduct Rs.1,00,000/- from the deposit of security amount and had to return the remaining security amount. He, therefore, submits that his case had to be confined to the earlier unamended provisions of Rule 59 of the 1963 Rules and that at the most the District Magistrate could have penalize the petitioner for Rs.1,00,000/-.

11. Rule 59 as it existed before the coming of the amendment has been reproduced in the judgment above. Relevant portion of Rule 59, which came after 13.8.2019 i.e. after the 47th Amendment, reads as under :-

"**59. Consequences of contravention of certain conditions--(1) <u>The proponent who has received letter of intent however has not produced mining plan or has not applied for grant of Environment Clearance within the stipulated period of one month as per the provisions mentioned in Rule-34 shall be liable for penalty of Rs. Ten thousand per day. On failure to deposit the amount of penalty, the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease. In case the proponent fails to execute the lease deed within one month of obtaining environment clearance certificate, the District Magistrate shall, subsequent to cancelling the letter of intent, forfeit the first installment and security money deposited by the proponent in favour of the State Government.</u>**

(2) The lessee who does mining works contravening the terms and conditions mentioned in the approved mining plan and clean environment certificate issued as per the provisions provided under Rule 34, then he will be liable for penalty at the rate of Rs. 50,000/- per occasion of default that shall be recovered by the District Magistrate.

(3) If the lease holder disobeys the provisions of Rule-35 then penalty at the rate of rupees twenty five thousand per day for each and every default shall be levied by the concerned District Magistrate. In case of default on deposit of such levied penalty the concerned District Magistrate will deduct the said amount from the amount of security deposited against the said mining lease.

(4) According to the provisions provided under Rule 41-H mining work

through suction machine/lifter into the water stream will be prohibited. If any lessee is found contravening the provisions of the said rule then he will be liable for penalty at the rate of Rs. five lakh per occasion of contravening act, which will be recovered on the order of District Magistrate or Director, Geology and Mining. On failure to deposit of the above mentioned amount of penalty the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease.

5) Any lessee holding a mining lease who commits a breach of any of the (conditions provided in Rule 44 shall be liable for levy/penalty of Rs. fifty thousand. On failure to deposit the said amount of penalty the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease.

(6) Where the lease holder fails to conform to the prescribed loading norms, penalty of Rs. 25,000.00 per occasion of default shall be imposed by the District Magistrate. Upon failure to deposit the said penalty, the same shall be deducted by the District Magistrate from the security money deposited against the concerned lease.

(7) Where the proponent fails to complete all desired formalities for obtaining Environment Clearance as required by the competent authority within the stipulated time frame, District Magistrate may cancel the letter of intent issued in his favour."

(emphasis supplied)

12. For a better understanding, it would also be necessary to reproduce Rule 34 of the 1963 Rules, which reads as under :

"**34. Mining Operations to commence within six months**-The 'Selected Applicant' before the execution of mining lease deed under the provision of Chapters II, IV and IX or issuing a mining permit under Chapter VI of these rules, shall get prepared a mining plan by the person, recognized and registered by the Director, having the qualification and experience namely

(i) a degree in Mining Engineering or post-graduate degree in Geology granted by university established or incorporated by or under Central Act or a Provincial Act or a State Act, including any institution recognized by the University Grants Commission establihed under Section 4 of the University Grants Commission Act, 1956; and

ii) Professional experience of 05 years of working in a supervisory capacity in the field of mining after obtaining the degree.

(2) The selected applicant/e-tender/bidder of e-auction shall submit the mining plan for approval to the officer authorized by notification in this behalf by the State Government who may within 30 days from the date of receipt of mining plan approve, modify or reject it positively.

(3) The mining plan once approved shall be valid for entire duration of the mining lease/permit or for five years whichever is earlier. If the lease period is more than five years then in that case the lease holder will resubmit mining plan before the officer authorized by notification in this behalf by the State Government.

(4) Mining operations shall in respect of all minor mineral be undertaken

in accordance with the mining plan, detailing yearly development schemes, aspect of reclamation and rehabilitation of mined out areas including progressive mine closure scheme duly approved by the officer authorized by notification in this behalf by the State Government.

Provided that the lessee shall start the mining operation after obtaining environmental clearance if required under the provisions of Environment Impact Assessment Notification, dated September 14, 2006 issued by the Ministry of Environment, Forest and Climate change Government of India as amended from time to time:

Provided further that an application seeking prior environmental clearance in all cases shall be made by the project proponent or end user agency as the case may be, in as provided in Paragraph 6 of the Environment Impact Assessment Notification, dated September 14, 2006 as amended from time to time.

(5) The mining lease deed will be executed only after approval of mining plan by the officer authorized by notification in this behalf by the State Government after which the lessee shall commence mining operation within six months from the date of execution of the lease deed and shall thereafter conduct such operations without deliberate intermission in a proper, skillful in work man like manner.

(6) Financial assurance has to be furnished by every lease holder. The amount of financial assurance shall be Rupees twenty five thousand for insitu-rock deposit and Rupees fifteen thousand for sand or morrum or bajari or boulder or any of these in mixed state exclusively found in the river bed mines per acres of the mining lease area put to use for mining and allied activities However, the mini um amount of financial assurance to be furnished in any of the forms referred to in sub-rule (7) shall be Rupees two lakhs for each category of mines be respective of area:

Provided that a lease holder shall be required to enhance the amount of financial assurance with the increase in the area of mining and allied activities:

Provided further that where a leaseholder undertakes reclamation and rehabilitation measures as part of the progressive closure of mine, the amount so spent shall be reckoned as sum of the financial assurance already spent by the leaseholder and the total amount of financial assurance, to be furnished by the lessee, shall be reduced to that extent.

(7) The Financial assurance shall be submitted by the lessee before the execution of lease deed in one of the following forms to the District officer or the officer authorised by the State Government in this behalf, as the case may be, or any amendment to it:

(a) Letter of Credit from any Scheduled Bank;

(b) Performance or surety bond;

(c) any other form of security or any other guarantees acceptable to the competent authority.

(8) Release of financial assurance shall be effective upon the notice given by the lessee for the satisfactory compliance of the provisions contained in the mine closure scheme and certified by the District

Officer or the Officer authorised by the State Government in this behalf, as the case may be.

(9) If the District Officer or the Officer authorised by the State Government in this behalf, has reasonable grounds for believing that the protective, reclamation and rehabilitation measures as envisaged in the approved 'mine closure scheme' as given in mining plan in respect of which financial assurance was given has not been or will not be carried out in accordance with the 'mine closure scheme' either fully or partially, the District Officer or the Officer authorised by the State Government in this behalf shall give the lessee a written notice of his intention to issue the orders for forfeiting the sum assured at least thirty days prior to the date of the order to be issued.

(10) Within the thirty days of the receipt of notice referred in sub-rule (9), if no satisfactory reply has been received in writing from the lessee, the District Officer or the Officer authorised by the State Government in this behalf, as the case may be, shall pass an order for forfeiting the surety amount and a copy of such order shall be endorsed to the State Government.

(11) Upon the issuance or order District Officer or the officer authorised by the State Government in this behalf, the State Government may realise any letter of credit or bond or any other surety, guarantee provided or obtained as financial assurance for the purpose of performance of protective reclamation, rehabilitation measures and shall carry out those measures, or appoint an agent to do so.

Explanation-- For the purpose of this rule mining operations shall include the erection of machinery, use of machine laying of a tramway or construction of road in connection with the working of the mines. "

13. Learned counsel for the petitioner, therefore, submitted that nothing more than Rs.1,00,000/- could have been deducted from the security money of the petitioner.

14. Learned counsel for the petitioner relying upon the judgment of the Supreme Court in **Commissioner of Income Tax, U.P.-II, Lucknow vs. Bajpur Co-operative Sugar Factory Ltd., Bajpur, District Nainital** reported in **(1988) 3 SCC 553** submitted that when the amended provisions had not stated that the provisions would be retrospective then definitely the provisions would not be retrospective and, therefore, in the petitioner's case, the un-amended Rule would apply. For strengthening his arguments further, learned counsel for the petitioner also relied upon the decisions of the Supreme Court in **N.T. Devin Katti & Ors. vs. Karnataka Public Service Commission & Ors.** reported in **(1990) 3 SCC 157** and in **P. Mahendran & Ors. vs. State of Karnataka & Ors. reported in (1990) 1 SCC 411.**

15. When Sri Sandeep Kumar Singh, learned Additional Chief Standing Counsel had on 2.8.2023 stated that the penalty could be imposed as per the amended Rule 59 of the 1963 Rules as was amended on 13.8.2019, the Court had asked the learned Additional Chief Standing Counsel to calculate the amount as was recoverable. In pursuance thereof, learned Additional Chief Standing Counsel filed an affidavit on behalf of respondent nos.2 and 3 and in paragraph 17 of the affidavit, calculated the amount which was payable to the State

Government by the petitioner and stated that the petitioner had to pay Rs.80,10,000/-. The relevant paragraphs of the affidavit i.e. paragraph nos.17 and 18 are being reproduced here as under :-

"17. That the letter of intent was issued on 13.11.2017 and the same was cancelled on 22.1.2020. On the date of cancellation, the 47th Amendment incorporated in the Uttar Pradesh Minor Minerals (Concession) Rules, 1963 was in force and therefore, the petitioner is liable to pay a penalty of Rs.10000/- per day from the date of the issuance of letter of intent to the cancellation of letter of intent. The chart is being reproduced below :-

Sn.	Particulars	Date
1.	Date of issuance of letter of intent.	13.11.2017
2.	Date of production of approved mining plan before the competent authority	13.12.2017
3.	Date of cancellation of letter of intent	22.01.2020

Number of days, through which the letter of intent was effective from the date of production of approved mining plan till the cancellation of letter of intent.

Sn.	Year	Number of Days
1.	2017	49
2.	2018	365
3.	2019	365
4.	2020	22
	Total number of days	801

Rate of penalty per day - Rs.10000/-

Total penalty Rs.10000x801= 8010000/-

18. That as per the above calculation, the petitioner is liable to pay Rs.8010000/- as per the provisions contained in Rule 59(1) inserted through 47th Amendment w.e.f. 13.8.2019 under the Utter Pradesh Minor Minerals (Concession) Rules, 1963."

16. Learned counsel for the petitioner has stated that first of all the amended provision would not apply and also he submitted that the amended provisions even if applied then the petitioner could be charged for Rs.10,000/- for a period of one month only i.e. he could have been penalized for Rs.3,00,000/- and if that amount was not paid then that amount could be deducted from the security money and the remaining security money should be returned to the petitioner. Learned counsel for the petitioner relied upon the affidavit filed by respondent nos.2 and 3 and submitted that whatever be the case, the deponent of the affidavit i.e. Sri Prashant Raj Karan Yadav who is the Mines Officer at Basti had admitted that only a certain amount had to be deducted and the entire security money which comprises the earnest money and the security money and the first installment could not be forfeited by the Government.

17. Learned Additional Chief Standing Counsel has, however, in reply submitted that if Rule 59 of the 1963 Rules which stood prior to 13.8.2019 is perused and if the subsequent Rule 59 as it stood amended by the 47th Amendment dated 13.8.2019 is perused, it becomes clear that the penalty for non-compliance of the provisions of Rule 34 were definite and they were to the effect that the petitioner had to be penalized by paying certain amount which would discourage non-serious applicants from making

applications for mining purposes. He further submitted that the initiation of the auction proceedings entailed a lot of expenditure and if non-serious individuals were not discouraged then a lot of financial pressure would be exerted on the State exchequer and the State's time would also be wasted. Learned Additional Chief Standing Counsel once again took the Court through the provisions of the unamended Rule 59 of the 1963 Rules and the amended Rule 59 of the 1963 Rules and tried to convince the Court that as per the amended Rule 59 definitely the security amount along with the first installment and the earnest money could be forfeited.

18. Having heard learned counsel for the petitioner Sri Devbrat Mukherjee and learned Additional Chief Standing Counsel Sri Sandeep Kumar Singh, we are of the view that when the petitioner i.e. the proponent who had got the Letter of Intent on 13.11.2017 had not been able to provide the mining plan as is provided under Rule 34 of the 1963 Rules within one month then definitely Rule 59 of the 1963 Rules came into play and after the completion of 30 days, the District Magistrate ought to have cancelled the Letter of Intent and ought to have imposed the penalty of Rs.1,00,000/-. Definitely we are of the view that since the Letter of Intent was granted on 13.11.2017 and the application of the petitioner dated 18.1.2018 stating that he was not able to continue with the mining was given much before the amended Rule 59 came into existence on 13.8.2019, the law as prevailed on the date when one month expired after the Letter of Intent dated 13.11.2017, would prevail and, therefore, we are of the view that the petitioner could have been penalized at the most by imposition of penalty of Rs.1,00,000/- and the remaining amount comprising the earnest money, security money and the first installment should have been returned to the petitioner. Further from the affidavit which the State has filed on 13.10.2023, we find that even the State is of the view that the earnest money, the security money to the first installment and the first installment of the first year which the petitioner had deposited could not be forfeited and the deponent of the affidavit has only stated that, from the petitioner as per the amended provision of Rule 59 of the 1963 Rules Rs.80,10,000/- had to be taken. Thus, even as per the own saying of the State Authorities, the petitioner had only to pay a certain penalty. As held earlier, we definitely hold that the petitioner, for the non-compliance of the provisions of Rule 34 of the 1963 Rules within one month of the issuance of the Letter of Intent, could be penalized only by the imposition of a penalty of Rs.1,00,000/-.

19. We, thus, hold that the order dated 22.1.2020 which has been challenged in Writ-C No.4812 of 2020 cannot be sustained in the eyes of law. As per the provisions of law which were in existence on the date when one month expired after the Letter of Intent was given on 13.11.2017, the petitioner could have been penalized by imposing a penalty of Rs.1,00,000/- only. The order dated 22.1.2020 impugned in Writ-C No.4812 of 2020 is thus quashed and is set aside.

20. Under such circumstances, we direct the respondent-District Magistrate to refund the entire amount which was deposited by the petitioner at the time of making his application for participating in the auction i.e. the security money and the first installment of the first year which he

had given after the Letter of Intent was issued.

21. For what has been stated above, the writ petitions succeed and are allowed to the extent indicated above.

(2024) 1 ILRA 1348
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1000301 of 1991

Surendra Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
S. Irfan Ahmad, Ankit Pande, Dr. Ramsurat Pande, R.P. Yadav

Counsel for the Respondents:
C.S.C., Umesh Chandra

A. Ceiling law – UP Imposition of Ceiling on Land Holdings Act, 1960 – Sections 9, 10(2) & 19(3) – Ceiling proceeding – Nature – Recorded tenure holder died after publication of notice u/s 9 – Abatement of proceeding claimed – Permissibility – Proceeding treating the legal heir as tenure holder, how far liable to be continued – Nature of case, how far being affected on the death of tenure holder – Held, nature of the case for determination of land in excess of ceiling area does not change and it is centric only to the recorded tenure holder and not to his legal representatives – Even if the recorded tenure holder had died after the publication of notice u/s 9 of Act, 1960, the proceedings could have been continued after effecting notice on his legal heirs. (Para 10 and 11)

Writ petition dismissed. (E-1)

List of cases cited:

1. Horam Singh & ors. Vs District Judge, Moradabad & ors.; 1978 (4) ALR 918

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

1. Heard Shri R.S. Pandey, learned Senior Advocate assisted by Shri Virendra Bhatt, learned counsel for petitioners, Shri S.K. Khare, learned Standing Counsel for the State and perused the material available on record.

2. The present writ petition has been filed by the petitioners assailing the orders passed under the provisions of the U.P. Imposition of Ceiling on Land Holdings Act, 1960, wherein the Prescribed Authority by means of order dated 26.06.1985 has rejected the objections preferred by the petitioners and the Additional Commissioner, Faizabad Division, Faizabad has rejected the appeal by means of order dated 10.12.1990 affirming the findings of the said Prescribed Authority.

3. Though facts in brief necessary for the adjudication of the present case are that once Brij Mohan Singh was a recorded tenure holder with regard to land situated at Village Mau-Atwara, Pargana Jagdishpur, Tehsil Musafirkhana, District Sultanpur. A notice under Section 10 (2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960, was issued to Brij Mohan Singh, the recorded tenure holder on 30.07.1974, who had died prior to the issuance of notice on 24.04.1974. The said notice was duly received by his sons i.e., Rameshwar Singh, Jagat Pal Singh and Ram Singh, who filed their objections against the notice issued under Section 10 (2) of the U.P.

Imposition of Ceiling on Land Holdings Act, 1960 on 09.09.1974. The Prescribed Authority duly considered the objections raised by the legal heirs of the recorded tenure holder and by means of order dated 30.12.1974 declared 4.66 hectares of the land of recorded tenure holder as surplus. An appeal was filed against the order of Prescribed Authority dated 30.12.1974, which was allowed and the matter was remitted to the Prescribed Authority for consideration afresh after treating the legal heirs to be the tenure holders. The Prescribed Authority by means of order dated 31.12.1976 again decided the case against the petitioners against which the appeal, which was preferred before the District Judge, Sultanpur was dismissed on the ground of limitation.

4. It is in the aforesaid facts that the petitioners filed a writ petition before this Court, which was allowed by means of judgment and order dated 21.2.1978 and remitted the matter to the appellate authority to be decided on merits after condoning the delay. In the remand proceedings the IInd Additional District Judge allowed the said appeal preferred by the petitioners and remanded the case to the Prescribed Authority to decide the same after issuing notices to the petitioners by means of his judgment and order dated 24.11.1981. The Prescribed Authority in the remand proceedings had issued notices to the petitioners and has duly considered all the objections and again rejected the same by means of impugned order dated 26.06.1985 against which the appeal has already been dismissed on 10.12.1990 and both the orders have been assailed by the petitioners before this Court.

5. The main contention raised by the petitioners is that once the recorded tenure holder Brij Mohan Singh died on 24.4.1974 and the land was inherited by his three sons Rameshwar Singh, Jagat Pal Singh and Ram Singh, who claimed before the Prescribed Authority that now they were the tenure holders and proceedings under the U.P. Imposition of Ceiling on Land Holdings Act, 1960, should be proceeded treating them to be recorded tenure holders and their land should be determined as to whether is in excess of the ceiling limits or not.

6. This ground was raised by the petitioners right up to the appellate stage and even before the Prescribed Authority in the remand proceedings. With this argument they were able to persuade the appellate court who passed the order dated 24.11.1981 to issue notices to the petitioners before proceeding further in the matter. It is only on the direction of the appellate court that the Prescribed Authority had issued notices to the petitioners in the remand proceedings and all the objections filed by the petitioners were duly considered while rejecting the same. Before the Prescribed Authority, the petitioners had submitted that during lifetime of Brij Mohan Singh, he has executed a sale deed in favour of Hanuman Saran Singh on 09.07.1973 and the same land ought to be excluded from the holding of the recorded tenure holder. The Prescribed Authority did not accept the contention of the petitioners holding that the said sale deed was entered into after the cut off date and accordingly such a transfer could not be accepted by him as per provisions of Section 5 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960, and consequently, rejected the contention of the petitioners in this regard.

7. This aspect of the matter was also considered by the appellate authority, who was of the considered view that as per provisions of Section 5 (6) of the U.P. Imposition of Ceiling on Land Holdings

Act, 1960, such a transaction could be shown to have been bona fide and entered into for adequate consideration before benefit of the exclusion of the said land can be granted to the recorded tenure holder. He was of the view that the consideration of Rs.9,000/- for a land measuring 4 bigha 6 biswa and 3 biswansi is inadequate and apart from the fact that the said transfer was made in favour of his close relative i.e. grand son Hanuman Saran Singh, who was the son of Rameshwar Singh, accordingly, came to the conclusion that the said transfer does not fall for exclusion within the ambit of Section 5 (6) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960, and consequently, rejected the contention of the petitioners. Before this Court also, there is no material to indicate that the said transaction was bona fide and for adequate consideration while on the other hand on death of respondent no. 3- Shyam Singh, his son Hanuman Saran Singh has been substituted as respondent no. 3/1. Undoubtedly, Hanuman Saran Singh is the grand son of Brij Mohan Singh and he had transferred the land in favour of his grand son Hanuman Saran Singh to escape from the clutches of Ceiling Act, 1960 and no other material has been placed to upset the findings recorded by the appellate court and therefore, this Court is of the considered view that no interference is required with the findings of courts below in this regard.

8. Considering the other contention raised by the petitioners, it is noticed that the proceedings under Section 10 under the Act of 1960 are initiated pursuant to issuance of notification under Section 9 of the Act, 1960, which is a general notice to the persons holding land in excess of the ceiling area applicable to him on the date of enforcement of the said Act. On the publication under Section 9 of the said Act, 1960, the persons concerned are to submit statement within thirty days of the said publication with regard to his holdings and the said statement should include all the plots which they claim exemption. Subsequent to publication of the notice under Section 9 of the Act, 1960 and after on the expiry of the period prescribed therein, a notice to the tenure holder is issued, who had failed to submit the statement or has submitted incomplete statement. It is on the objections filed in pursuance to notice under Section 10 of the Act, 1960, the proceedings are taken by the Prescribed Authority where he considers the objections filed by the tenure holders and determines as to whether they are holding any area in excess of the ceiling area prescribed under the Act of 1960.

9. In the present case, admittedly the recorded tenure holder Brij Mohan Singh had died on 24.4.1974 after issuance of the notice under Section 9 of the Act, 1960 and prior to issuance of notice under Section 10 (2) of the Act, 1960. The manner in which the Prescribed Authority would proceed in this regard has been provided for under Rule 19 of the U.P. Imposition Of Ceiling On Land Holdings Rules, 1961.

Rule 19 (3) of the U.P. Imposition Of Ceiling On Land Holdings Rules, 1961 reads as under:-

"Where a tenure-holder dies before he is served with a notice under sub-section (2) of Section 10, the Prescribed Authority may serve such notice on his executor, administrator or other legal representatives, and may proceed to determine the ceiling area applicable to the deceased person as if such executor, administrator or other legal

representatives were the tenure-holder for the purposes of service of such notice."

10. It is to be noticed that in case a person dies before service of notice under Section 10, the proceedings do not abate but only the persons who can contest the said case are the legal representative of the recorded tenure holder and it is only after service of notice as prescribed under Rule 19 (3) of the U.P. Imposition Of Ceiling On Land Holdings Rules, 1961 the proceedings may continue thereon and it cannot be lost sight of the fact that the rule further provides that ceiling area of the deceased recorded tenure holder has to be considered by the Prescribed Authority. Therefore, it is clear that the nature of the case for determination of land in excess of ceiling area does not change and it is centric only to the recorded tenure holder and not to his legal representatives. The aspect regarding service of notice on the deceased persons was also considered by this Court and a reference was made to a Division Bench, which has been answered by the Court in the case of ***Horam Singh and others Vs. District Judge, Moradabad and others reported in 1978 (4) ALR 918***. *This Court considering the validity of the proceedings, which are continued after the recorded tenure holder had died was of the considered view that the Rule 19 (1) of the U.P. Imposition Of Ceiling On Land Holdings Rules, 1961, which provides for continuance of the proceedings, even in matters where the recorded tenure holder died prior to the publication of notice under Section 9 of the Act, 1960 was held to be ultra-vires as it was clearly in conflict to the provisions of Section 10 of the Act, 1960. But with regard to the tenure holder, who dies subsequent to the general notice issued under Section 9 (2) of the Act, 1960 and that sub-Section 2 of Section 10 of the Act clearly envisage that the State Government has to frame rules prescribing the manner in which the notice in respect of such tenure holder has to be effected and the State Government for the said purpose has framed Rule sub Clause 3 and sub Clause 4 of Rule 19 of the of U.P. Imposition Of Ceiling On Land Holdings Rules, 1961 and consequently the Court was of the view that there is no infirmity in the said Rules and are intra-vires.*

11. It is in the aforesaid circumstances and specifically relying upon provisions of Rule 19 (3) of the U.P. Imposition Of Ceiling On Land Holdings Rules, 1961, this Court is of the considered view that even if Brij Mohan Singh, the recorded tenure holder, had died after the publication of notice under Section 9 of Act, 1960, the proceedings could have been continued after effecting notice on his legal heirs. Undoubtedly, notice has been effected on the legal heirs and the proceedings have been continued and the ceiling area pertaining to the recorded tenure holder Brij Mohan Singh has been duly determined by the Prescribed Authority as well as Appellate Authority, this Court does not find any reason to interfere which such an exercise.

12. Shri R.S. Pandey, learned Senior Counsel has vehemently submitted that despite the direction issued by the Additional District Judge, Sultanpur in his judgment and order dated 24.11.1981, the notice as prescribed were never served on the petitioners.

13. This Court has gone through the entire record and is of the considered view that firstly the legal heirs have been appearing before the various authorities on numerous occasions. Even when they had

appeared before the Prescribed Authority after service of notice, the Prescribed Authority has narrated their objections in detail in his impugned orders dated 26.6.1985 and nowhere it has been stated that had they challenged the issuance of notice to them. Even before the Appellate Authority this question never raised. It is only in the present petition, the averment has been made that the notice was not served as prescribed. This being a question of fact cannot be a permit to be raised in the present writ petition for the first time and also that apart from the bare averments made in the present petition neither has the notice been annexed and from the order of the Prescribed Authority, it is evident that the notices were in-fact served and thereafter detail objections were filed and accordingly the contentions of the learned Senior Advocate appearing on behalf of the petitioners is clearly contrary to record, bereft of merit and accordingly rejected.

14. Contrary to the said arguments, the order of the Prescribed Authority dated 26.08.1985 duly records that he had complied with the order of the Additional District Judge, Sultanpur dated 24.11.1981 and he had served notices in pursuance to which the petitioners had duly appeared before him and filed his objections. From the said order, it is evident that he had complied with the order of Appellate Authority dated 24.11.1981 and duly served the notice on the petitioners. The argument of petitioners in this regard does not merit any interference and being devoid of merit is accordingly, rejected. Considering the aforesaid facts, this Court does not find any reason to interfere with the order of the Prescribed Authority as well as Appellate Authority.

15. The writ petition is, accordingly, dismissed.

(2024) 1 ILRA 1352
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1005250 of 1990

Prabhagiya Nideshak Van ...Petitioner
Versus
Van. Evam Sangik Vanki Karmachari& Ors. ....Respondents

Counsel for the Petitioner:
C.S.C.

Counsel for the Respondents:
C.S.C., J.N. Srivastava, Ramesh Kumar

A. Labour Law – Industrial Dispute Act, 1947 – Sections 2 (k) & 6-E – Industry – Ambit – Undertaking of sovereign function by the Forest Department, how far exclude it from definition of Industry – *Charan Singh's case* relied upon – Person, continuously working for four years as a Mali, how far entitled to be treated as workmen – Held, where the workmen were working on the post of Mali and were involved in the task of plantation in the forest and distribution of forest produce, the said exercise was definitely a systematic activity and they have been working for four years continuously, it cannot be said that they were daily or casual employees engaged only intermittently – High Court rejected the arguments of petitioner that the Forest Department is not an industry and so the Act of 1947 is not applicable. (Para 9 and 11)

Writ petition dismissed. (E-1)

List of cases cited:

1. St. of Gujrat Vs Pratamsingh Narsinh Parmar; (2001) 9 SCC 713

2. Bangalore Water Supply & Sewerage Board Vs A. Rajappa; 1978 (2) SCC 213

3. St. of U.P. Forest Department, U.P., Lucknow Vs Presiding Officer, Industrial Tribunal, U.P., Lucknow; (1996) 3 UPLBEC 1984

4. Chief Conservator of Forest Vs Jagannath Maruti Kondhare; 1996 Lab IC page 967

5. Fisheries Department Vs Charan Singh; (2015) 8 SCC 150

6. St. of U.P. Vs Presiding Officer, Labour Court, U.P., & anr.; (2023) 4 ALJ 73

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

1. Heard learned Standing counsel on behalf of the petitioner and Sri Ramesh Kumar Srivastav for respondent No.1

2. By means of the present writ petition the petitioners have challenged the award passed by Industrial Tribunal (II), U.P. at Lucknow whereby the claim preferred by the workmen has been allowed and the petitioner who is employer has been directed to pay the same wages to all 15 workmen with effect from 1.1.1985 and three workmen who were terminated from employment during pendency of the conciliation proceedings have been directed to be reinstated.

3. It has been submitted by learned counsel for the petitioner that the workmen for whose benefits the claim was filed by respondent No.1 are working on daily wages in Biswan Range of Sitapur Forest Department. It was stated that some of the casual employees working in that division were made permanent but the 15 workmen were not considered or made permanent and accordingly the Employees' Union raised industrial dispute. Reference was made by the State Government which was referred to Industrial Tribunal. Before the Tribunal notices were issued to the petitioner who initially did not appear and participate in the proceedings but subsequently sought adjournments on various dates and also did not comply with the order of the Tribunal directing them to produce evidence. The workmen, on the other hand, produced five witnesses in their support but the petitioner did not produce either any written or oral statement but only submitted that Forest Department was not an industry within the meaning of Industrial Disputes Act and consequently stated that the Tribunal did not have any jurisdiction to decide the controversy.

4. The Tribunal duly considered the objections raised by the petitioner and held that the petitioner would fall within the definition of industry and accordingly proceeded to decide the claim preferred by the workmen wherein they were able to demonstrate that they have been working for four years and accordingly have worked for 240 days in a calendar year. They were also able to establish that they are being paid lesser wages than regular employees and consequently for the same work they are able to demonstrate that they were being paid the lesser wages than which are being paid to the regular employees. It is in aforesaid circumstances that the industrial tribunal allowed the claim and directed the petitioner to pay the same amount of wages which are being paid to regular employees. The other aspect which has been noticed by the Tribunal in the impugned order is the fact that during pendency of conciliation proceedings three of the employees were dismissed which was illegal and arbitrary and contrary to the statutory provisions contained under Section 6 E of U.P. Industrial Disputes Act, 1947 and accordingly directed the petitioner to

reinstate the three persons whose services have been terminated during pendency of the said proceedings.

5. Learned Standing counsel while assailing the impugned order passed by the Industrial Tribunal has canvased only one issue regarding maintainability of the proceedings before the Industrial Tribunal on the ground that Forest Department is not an industry within the meaning of Section 2 (k) and accordingly the award is illegal, arbitrary and without jurisdiction and the impugned order should be set aside. He has relied upon Supreme Court judgements in the case of ***State of Gujrat Vs. Pratamsingh Narsinh Parmar, (2001) 9 Supreme court Cases 713*** where the Hon'ble Supreme Court was examining the order of the High Court which held that Forest Department of Gujarat was an industry and the Supreme Court while setting aside the judgment of the Gujarat High Court held that Single Judge did not examine the nature of the job of the organization and had merely followed the judgment of Supreme Court in the case of ***Bangalore Water Supply & Sewerage Board v. A. Rajappa, 1978 (2) SCC 213*** Supreme Court held that whenever such a question arises it would be incumbent upon the High Court to go into the nature of the work do be done in that particular organization on the basis of positive delineation of 'industry' and only thereafter one can conclude whether the concerned unit is a industry or not. Accordingly it was stated that interference is required in the impugned award.

6. Sri Ramesh Kumar Srivastava, on the other hand, has opposed the writ petition. He submits that the question as to whether U.P. Forest Corporation is an industry or not was specifically raised on numerous occasions before this High Court as well as Supreme Court and after examining this issue it has been held that U.P. Forest Corporation is an industry within the meaning of U.P. Industrial Disputes Act, 1947. It is undisputed fact that the respondent was working as a casual worker in Social Forestry Scheme of Uttar Pradesh Government. They were involved in programme pertaining to tree plantation in the forest. It is on these facts that the Tribunal held that they were functioning in systemic activities, planting nurseries, selling plants and distributing the plants and forest produce.

7. In the case of ***State of U.P. Forest Department, U.P., Lucknow Vs. Presiding Officer, Industrial Tribunal, U.P., Lucknow (1996) 3 UPLBEC page 1984***, this Court had examined as to whether Kanpur Prani Udyan which is established by Forest Department of State of U.P. would be an industry or not. In paragraph 6 and 8 it has been held as under:-

"6. That the Udyan is an industry and the respondent No.3 in each of these petitions are workmen covered by the Industrial Disputes Act, 1947, is concluded by the principles laid down by the Supreme Court in Chief Conservator of Forests and another Vs. Jagannath Maruti Kendhare, reported in 1996 Lab IC 967. In the said case also relating to the Forest Department, while executing a scheme framed as per Government resolution for creation of a park under bio-aesthetic development for the benefit of urban population, the Pune Forest Divisions function was held not to be a part of sovereign function of the State, and the Forest Department qua the scheme was

held to be an 'industry' within the meaning of Section 2 (j) of the Industrial Disputes Act, 1947".

*"8. Now as to next contention, reliance has been placed on behalf of the petitioner by the learned Standing Counsel on a decision of a Bench comprising Hon'ble the Chief Justice and Hon'ble Sudhir Narain, J. in Special Appeal No.371 of 1995- State of U.P. V. Sheo Babu Garg, decided on 24.5.1966 wherein based on the decision of the Supreme Court on the subject of regularisation of ad hoc / daily wage employees, it has been held that such regularisation could not be ordered by a Court, rather would have to be done by the concerned appointing authority on a consideration of validity of appointment, eligibility, conduct, availability of posts and funds, an although in suitable cases direction can be given to consider such regularization, the same cannot be done by the court or Tribunal itself. This contention however loses sight of the fact that Tribunal in these cases has not undertaken the exercise of nor ordered, regularization of the respondents, nor has it allowed them a running time scale, or other benefits like confirmation or promotion. It has merely acted upon the principle of equal pay for equal work, and finding that the respondents concerned are performing similar job as the regular employees, has awarded them only an amount equal to the minimum of the time scale with addition of D.A. and other allowances. It has not put them in any running scale. The impugned awards thus are not obnoxious even on this ground. These writ petitions thus being devoid of f*orce are liable to be dismissed."

8. Hon'ble Supreme Court had also examined this issued in the case of Chief Conservator of ***Forest Vs. Jagannath Maruti Kondhare, 1996 Lab IC page 967*** where also the workers engaged in the social forestry by the Forest Department of State Government of Maharashtra had made similar claims and in that circumstances it was held in para 15, 16 and 17 and 30 as under:-

"15. A perusal of the affidavit filed by the Chief Conservator of Forests on 5.12.1992, pursuant to our order of 6.11.1992 shows that the Pachgaon Parwati Scheme was framed as per the Government Resolution based on the policy decision taken in April 1976. The Scheme was to be initially for a period of 5 years and an area of about 245 hectares situated on a hill plateau on the southern outskirts and within easy access of Pune City was selected for creation of a park under bio-aesthetic development for the benefit of the urban population. It is further stated that the scheme was "primarily intended to fulfil bio-aesthetic, recreational and educational aspirations of the people which will have inestimable indirect benefit of producing enlightened generation of conservationists of nature inclusive of forests and wild life for the future". (Page 137) The affidavit goes on to state (at page 138) that the Pune Forest Division is also doing afforestation for soil/moisture conservation under various State level schemes as well as Employment Guarantee Schemes all of which are for a period of 5 years.

16. The aforesaid being the crux of the scheme to implement which some of the respondent were employed, we are of the view that the same cannot be regarded as a part of inalienable or inescapable function of the State for the reason that the scheme was intended even to fulfil the recreational and educational aspirations of the people. We are in no doubt that such a

work could well be undertaken by an agency which is not required to be even an instrumentality of the State.

17. This being the position, we hold that the aforesaid scheme undertaken by the Forest Department cannot he regarded as a part of sovereign function of the State, and so, it was open to the respondents to invoke the provisions of the State Act. We would say the same qua the social foresting work undertaken in Ahmednagar district. There was, there-fore, no threshold bar in knocking the door of the Industrial Courts by the respondents making a grievance about adoption of unfair labour practice by the appellants.

30. For the reasons aforesaid, we find no ground to interfere with the impugned order of the Industrial Courts. The appeals are, therefore, dismissed. In the facts and circumstances of the case, we, however, make no order as to costs."

9. The argument of the petitioner is that the departments of the State Government undertake sovereign functions and, hence, they cannot be declared as industry. This argument has not been accepted by the Supreme Court in the above cases. In the case of ***Fisheries Department Vs. Charan Singh (2015) 8 SCC page 150*** it has held to be an industry within the meaning of Section 2 of Industrial Tribunal Act. The relevant paragraph is being reproduced as under:-

"13. In support of the above-said conclusions arrived at by us, we record our reasons here-under: it has already been rightly held by the Industrial Tribunal that the Department of Fisheries is covered under the definition of "industry" as defined under Section 2 (k) of the Act and also in accordance with the statement of RW1 and EW1, Shri R. B. Mathur, on behalf of the appellant before the Industrial Tribunal, because the object of the establishment of the appellant Department is fulfilled by engaging employees and that the Department is run on a regular basis. Thus, the matter of termination of the services of the workman of the said Department can be legally adjudicated by the Industrial Tribunal as the matter is covered under the provisos of the Act read with Schedule II Entry 10. Thus, it has been rightly held by the courts below that the dispute raised by the workman in relation to the termination of his services by the appellant is an industrial dispute."

10. He has also relied upon the judgment in the case of ***State of U.P. Vs. Presiding Officer, Labour Court, U.P., and another, (2023) 4 ALJ 73*** decided by this Court in Writ C No.25182 of 2016 wherein in paras 19 and 21 it has been held as under:-

"19. The submission of the learned counsel for the respondent-workman, therefore, is that once the Supreme Court as well as this Court have already held in the aforesaid authorities that Irrigation Department and also the departments of the like nature depending upon the services rendered by the said departments, shall be covered by definition of "Industry' and, further, once the respondent was treated as an employee in the petitioner establishment, no error can be pointed out in adjudication of the dispute by the Labour Court and the provisions of U.P. Industrial Disputes Act, 1947 were fully applicable.

....

21. In view of above discussions, the first contention of the State to the effect that Irrigation Department does not fall within the definition of "Industry" or that

provisions of Act of 1947 are not applicable, does not have any force and is hereby rejected. Even, the Labour Court, in the impugned award has also given the same interpretation after relying upon the judgments in the case of Des Raj and etc. (supra) and other authorities. I do not find any error in the view taken by the Labour Court in this regard."

11. Considering the aforesaid judgments and also nature of the work involved in the present case where the workmen were working on the post of Mali and were involved in the task of plantation in the forest and distribution of forest produce, the said exercise was definitely a systematic activity and they have been working for four years continuously, it cannot be said that they were daily or casual employees engaged only intermittently. Accordingly the arguments of the petitioner cannot be accepted. Hon'ble Supreme Court in the case of ***Fisheries Department (supra)*** has held U.P. Forest Corporation to be an industry and accordingly we do not find any infirmity with the impugned order.

12. In view of the above, this Court is of the considered view that there is no merit in the writ petition and no infirmity is found in the order of the Industrial Tribunal which is affirmed and the writ petition is accordingly **dismissed.**

(2024) 1 ILRA 1357
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.01.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1008497 of 2013

Ganga Sagar Yadav & Anr ...Petitioners
Versus
Smt. Dulari & Ors. ...Respondents

Counsel for the Petitioners:
Rajesh Chandra Mishra

Counsel for the Respondents:
Prashant Arora, Dhirendra Pratap Singh

A. Electricity Law – Electricity Act, 2003 – Section 145 – Civil Court – Jurisdiction – Bar of suit – Suit seeking injunction to restrain the defendants/petitioners not to erect electricity poles and electricity line over plaintiff's plot – Maintainability – Held, S. 145 excludes jurisdiction of the Civil Courts in the matter where orders have been passed by the assessing officer referred in S. 126 or appellate authority as mentioned in Section 127 or adjudicating officer appointed u/s 6 – The controversy raised with regard to erection of electric poles and electric line over the plaintiff's plot is clearly not barred by S. 145 and consequently, the trial Court did not commit any error while holding that the suit in this regard was maintainable and not barred under Section 145 of the Act, 2003. (Para 10 and 11)

Writ petition dismissed. (E-1)

List of cases cited:

1. Dwarka Prasad Agarwal Vs Ramesh Chander Agarwal; (2003) 6 SCC 220

2. Ram Swarup Vs Shikar Chand; AIR 1966 SC 893

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

1. Heard Sri Rajesh Chandra Mishra, learned counsel for the petitioners. No one appears for the respondents.

2. Learned counsel for the petitioners at the very outset has prayed that he may be permitted to make amendment in the memo

of writ petition for treating it to be writ petition under Article 227 rather than petition under Article 226 of the Constitution of India.

3. Learned counsel for the petitioner is permitted to make necessary incorporation in the memo of writ petition during course of the day.

4. By means of present writ petition the petitioners have challenged the order dated 09.02.2012, passed by the Additional Civil Judge (Junior Division), Raebareilly whereby he has decided the issue with regard to jurisdiction in favour of the plaintiff and against the petitioners. The petitioners subsequently assailed the order dated 09.02.2012 before the District Judge, Raebareilly by filing revision being Civil Revision No. 35 of 2012, which was also rejected and order of trial Court in this regard has been affirmed.

5. It has been submitted by learned counsel for the petitioners that respondent no. 1 had filed a suit for permanent injunction seeking prayer for restraining the defendants/petitioners and respondent nos. 2 to 4 not to erect electricity poles and electricity line over plot no. 632, situated at Village - Purey Alpi Majre, Chilaula Bhangaria, Post - Kalyanpur Raili, Pargana, Tehsil & District - Raibereilly. The said suit was subsequently amended and plaintiff had further prayed for mandatory injunction against defendants.

6. The petitioners had appeared in the suit proceedings and filed their objections and submitted that the Civil Court did not had jurisdiction to interfere in the suit and same would be liable to be dismissed as not maintainable. The Additional Civil Judge (Junior Division) has framed four issues and issue no. 4 pertains to jurisdiction of the civil Court to entertain and decide the issue raised by the plaintiff.

7. The trial Court while rejecting the objections filed by the petitioners recorded that Section 145 of the Electricity Act, 2003 is not applicable in the facts of the present case and provisions which bar maintainability of the suit, restricts only to matters which an assessing officer referred to in Section 126 or the appellate Court referred to in Section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

8. The trial Court was of the view that the dispute in the present case is not relatable to any assessment proceedings and permanent injunction has been sought against defendants for erecting electric poles and electricity line over the said land. For the sake of convenience Section 145 of the Electricity Act, 2003 is re-produced herein below :-

***"145. Civil court not to have jurisdiction**.- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in Section 126 or the appellate Court referred to in Section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*

9. From the perusal of aforesaid provision it is clear that the civil Court can entertain the matters with regard to assessment which fall under Chapter XII - Investigation and Enforcement. The said Chapter deals with the matters pertaining to assessment of electricity consumed and under Section 127 provides for appeal before the appellate authority and further in relation to investigation of certain matters.

10. Undisputedly, where ever there is statutory prescription excluding powers of the civil Court then such a provision has to be interpreted strictly. Section 145 of the Electricity Act, 2003 excludes jurisdiction of the civil Courts as specifically stated that the civil Courts shall not have jurisdiction in the matter where orders have been passed by the assessing officer referred in Section 126 of the Electricity Act, 2003 or appellate authority as mentioned in Section 127 or adjudicating officer appointed under Section 6 of the Electricity Act, 2003. There is no exclusion of jurisdiction of the civil Courts in relation to other matters.

11. The controversy raised in the present case is with regard to permanent injunction sought by the plaintiff with regard to erection of electric poles and electric line over the plot owned by the plaintiff. Such a dispute is clearly not barred by Section 145 of the Electricity Act, 2003 and consequently, the trial Court did not commit any error while interpreting provisions of Section 145 of the Act, 2003 and holding that the suit in this regard was maintainable and not barred under Section 145 of the Act, 2003. At this stage it would be useful to consider judgments of Hon'ble Supreme Court in this regard.

12. Hon'ble Apex Court in the case of **Dwarka Prasad Agarwal Vs. Ramesh Chander Agarwal, (2003) 6 SCC 220,** in para 22 of the judgment has discussed the issue regarding civil Court's jurisdiction as follows :-

"In a catena of judgments, the Hon'ble Supreme Court as well as various High Courts have held that exclusion of civil court's jurisdiction cannot be readily inferred. Such exclusion must either be explicitly expressed or clearly implied. Even if the jurisdiction is so excluded, the civil courts have jurisdiction to examine the cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the principles of judicial procedure. [Dewaji v. Ganpatlal, AIR 1969 SC 560;Sree Kandregula Srinivasa Jagannath Rao Pantulu Bahadur Garu v. State of A.P., (1969) 3 SCC 71.] Similarly the civil court can always entertain and decide the suit where fraud has been practised upon the court and this point has been settled by the Hon'ble Supreme Court in its celebrated judgment delivered in S.P. Chengalvaraya Naidu v. Jagannath [(1994) 1 SCC 1.] wherein it has been observed by Their Lordships thus:

1. "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree?by the first court or by the highest court?has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings. [(1994) 1 SCC]"

13. The Constitution Bench of the Apex Court in the case of **Ram Swarup**

Vs. Shikar Chand, AIR 1966 SC 893, while dealing with the issue of jurisdiction of Civil Courts has formulated the following two tests :-

"The two tests, which are often considered relevant in dealing with the question about the exclusion of civil courts' jurisdiction are (a) whether the special statute which excludes such jurisdiction has used clear and unambiguous words indicating that intention; and (b) does that statute provide for an adequate and satisfactory alternative remedy to a party that may be aggrieved by the relevant order under its material provisions. Applying these tests the inference is inescapable that the jurisdiction of the civil courts is intended to be excluded."

14. Hon'ble Apex Court in the case of Dhruv Green Field Ltd. Vs. Hukum Singh & Others, 2002 (6) SCC 416, has outlined the principles for deciding the issue of jurisdiction of Civil Court's, in the following manner :-

"10. In the light of the above discussion, the following principles may be restated:

(1) If there is express provision in any special Act barring the jurisdiction of a civil court to deal with matters specified thereunder the jurisdiction of an ordinary civil court shall stand excluded.

(2) If there is no express provision in the Act but an examination of the provisions contained therein leads to a conclusion in regard to exclusion of jurisdiction of a civil court, the court would then inquire whether any adequate and efficacious alternative remedy is provided under the Act; if the answer is in the affirmative, it can safely be concluded that the jurisdiction of the civil court is barred. If, however, no such adequate and effective alternative remedy is provided then exclusion of the jurisdiction of the civil court cannot be inferred.

(3) Even in cases where the jurisdiction of a civil court is barred expressly or impliedly, the court would nonetheless retain its jurisdiction to entertain and adjudicate the suit provided the order complained of is a nullity."

15. This Court has also perused the record as well as arguments of the petitioners and has also gone through the statutory provisions and judgments of the Apex Court and is of the considered view that there is no infirmity in both the impugned orders and the suit would not barred by the provisions of Section 145 of the Act, 2003.

16. The District Judge while rejecting the revision has also duly considered the arguments raised by the petitioners and had also affirmed the findings recorded by the trial Court.

17. In view of discussion made above as well as in the light of aforesaid case law, this Court is of the considered view that no interference in the matter by this Court under Article 227 of the Constitution of India is called for.

18 . From the perusal of Section 145 of the Electricity Act, 2003 it is clear that controversy as raised by the petitioner is with regard to the dispute pertaining to erection of electric poles in the private lands, hence the said nature of case has not been provided for in Section 145 of the Act, 2003, and consequently, the

jurisdiction of civil Courts has not been ousted. The matters which have been excluded have been clearly stated in Section 145 of the Act, 2003 and the dispute in the present case is not covered.

19. The writ petition devoid of merits is **dismissed**.

(2024) 1 ILRA 1361
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 3000066 of 1998

Rakesh Kumar ...Petitioner
Versus
Addl. Commissioner Admn. Faizabad & Ors. ....Respondents

Counsel for the Petitioner:
H.S. Sahai, S.K. Gupta, U.S. Sahai

Counsel for the Respondents:
C.S.C.

A. Civil Law - Ceiling on Land Holdings – Validity of Adoption Under U.P. Imposition of Ceiling on Land Holdings Act, 1960 – Petitioner challenged the orders dated 30.03.1995 and 24.01.1998, which rejected his claim of being the adopted son of Sant Ram, arguing that Sant Ram's land devolved upon him and not his brothers, Ramdhan and Govardhan – Held, the Prescribed Authority and Appellate Authority erred in dismissing overwhelming oral and documentary evidence, including St.ments from the petitioner's mother, village Pradhan, priest, and revenue records, confirming the adoption, rendering their findings arbitrary and perverse. (Paras 6, 7, 9, 10, 11, 12, 14, 16, 17)

B. Hindu Adoptions and Maintenance Act, 1956 – Compliance with Section 11 – Respondents argued the adoption was a camouflage to evade ceiling limits – Held, the adoption complied with Section 11(vi) of the Hindu Adoptions and Maintenance Act, 1956, as evidenced by the priest's testimony and villagers' St.ments confirming a formal ceremony where the petitioner, a minor, was given and taken in adoption by Sant Ram, satisfying legal requirements for a valid adoption. (Paras 12, 20, 21)

C. Devolution of Property Post-Adoption – The Prescribed Authority held that Sant Ram's land devolved upon his brothers, Ramdhan and Govardhan, leading to surplus land declarations – Held, as the petitioner was validly adopted by Sant Ram, his property devolved upon the petitioner, not his brothers, and thus, the land should not have been included in Ramdhan and Govardhan's holdings for ceiling calculations under the Act, 1960. (Paras 7, 17, 18, 22)

D. Evaluation of Evidence – Arbitrary Rejection – Petitioner contended that the Prescribed Authority misread his mother's St.ment and ignored consistent testimonies – Held, the authorities' rejection of the adoption based on Shanti Devi's absence during the ceremony and an erroneous interpretation of her St.ment was hyper-technical and ignored corroborative evidence from multiple witnesses and revenue records, violating the court's earlier directive in Writ Petition No. 3387 of 1980 to consider all evidence holistically. (Paras 13, 14, 16, 17, 19)

E. Judicial Review of Ceiling Orders – The Appellate Authority upheld the Prescribed Authority's finding without properly evaluating evidence – Held, the orders dated 30.03.1995 and 24.01.1998 were unsustainable due to their failure to consider substantial evidence of adoption and misapplication of the Act, 1960, warranting their quashing and recognition of the petitioner's right to inherit Sant Ram's land. (Paras 15, 17, 23)

Writ Petition Allowed.

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

1. Heard Sri U.S. Sahai, 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 the order dated 24.01.1998, passed by the Additional Commissioner, Faizabad Division, Faizabad whereby he has dismissed the appeal preferred by the petitioner against the order of Prescribed Authority dated 30.03.1995, which was passed under Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 *(hereinafter referred to as the Act, 1960").*

3 . Notice under Section 10(2) of the Act, 1960 was issued to one Sant Ram and as he was found to be having land less than the ceiling limit, proceedings against him were dropped. In the said proceedings it was found that Sant Ram had two brothers namely Ramdhan and Govardhan and after death of Sant Ram his land devolved upon Ramdhan and Govardhan and after accretion of the said land their land was more than the ceiling limit and accordingly notices under Section 10(2) of the Act, 1960 were issued to Ramdhan and Govardhan. The proceedings were finalized by the Prescribed Authority by means of order dated 30.12.1977 and portion of their land were declared surplus.

4. Against the order dated 30.12.1977, appeals were filed before the Appellate Authority which were allowed by means of order dated 17.05.1978 and the matter was remanded to the Prescribed Authority for decision afresh. In the remand proceedings the Prescribed Authority again passed the order declaring the land of tenure holders to be surplus by means of order dated 28.10.1978. Again appeals were preferred by the petitioner as well as recorded tenure holders namely Ramdhan and Govardhan, which appeals were allowed on 16.07.1979 and the matter was again remanded to the Prescribed Authority. The Prescribed Authority on the second occasion again reiterated his previous order by means of order dated 02.06.1980, rejecting the objections filed by the petitioner and other tenure holders. Against the order dated 02.06.1980, the appeals preferred by the petitioner and other recorded tenure holders were also dismissed by the Appellate Authority by means of order dated 18.08.1980, upholding the order of Prescribed Authority dated 02.06.1980, on the ground that the petitioner as well as recorded tenure holders had surplus land.

5. Against the order dated 02.06.1980, writ petition being Writ Petition No. 3387 of 1980 was filed. This Court by means of order dated 15.11.1988, allowed the writ petition considering the fact that the District Judge did not considered the provisions of The Hindu Adoptions and Maintenance Act, 1956 particularly Section 11 and for the limited purposes had remitted the matter to the Appellate Authority. The Appellate Authority by means of order dated 29.10.1992, allowed the appeals and further remanded the matter to the Prescribed Authority.

6. It is in the remand proceedings that the Prescribed Authority has passed the impugned order dated 30.03.1995, holding that the petitioner is not adopted son of Ramdhan and consequently rejected the objections by means of order dated 30.03.1995 and the said order has been upheld by the Appellate Authority ? Additional Commissioner (Administration), Faizabad Division, Faizabad by means of order dated 24.01.1998 and the petitioner in the present writ petition has assailed the validity of both the orders dated 30.03.1995 and 24.01.1998 in the present writ petition.

7. The sole question to be considered in the present writ petition is as to whether

the petitioner is the adopted son of Ramdhan and accordingly land of Sant Ram devolved upon the petitioner in case it is held that petitioner is adopted son of Sant Ram and land of Sant Ram would devolve upon the petitioner and if not then land of Sant Ram will devolve to Ramdhan and Govardhan and their land subsequently would be considered under the provisions of Act, 1960.

9. The petitioner has submitted that he was adopted by Sant Ram when he was around 6-7 years old and since then he was living with Sant Ram. He has further submitted that after his adoption his education was looked after by Sant Ram till his death. During the proceedings before the Prescribed Authority mother of the petitioner Shanti Devi was examined and statements of Govardhan, Udairaj (Gram Pradhan) and Sewak Ram (Priest) who conducted ceremonies of adoption were adduced and various other persons of village had also testified in favour of petitioner that he was duly adopted by Sant Ram and after his adoption he lived as son of Sant Ram. All the testimonies are similar in nature which are to the effect that Sant Ram did not have any children and because of this fact the petitioner was given in adoption by Sant Ram's brother Ramdhan.

10. It is stated that ceremony for adoption was performed wherein formally the petitioner was handed over in the custody of Sant Ram. Mother of the petitioner Shanti Devi has also deposed before the Prescribed Authority verifying the fact that the petitioner was her son and was given in adoption to Sant Ram. Village Pradhan Udairaj has also reiterated the same facts. He has further stated that when the ceremony was performed invitation were issued to all the villagers and relatives and it is in the said ceremony that the petitioner was given in adoption to Sant Ram.

11. It was stated that at the time of adoption the petitioner was minor and that Sant Ram died in 1973. It has been further stated that after death of Sant Ram all the properties of Sant Ram devolved upon the petitioner and his name was also mutated in the revenue records and he was in possession of the properties held by Sant Ram.

12. Statement of Sewak Ram (Priest) who was the Priest at the time of adoption ceremonies, has stated that he had conducted the ceremonies for adoption of petitioner and he was voluntarily given in adoption by Ramdhan and Shanti Devi who are parents of petitioner. The petitioner was 2-2and half years old and large ceremony was organised in which adoption had taken place.

13. It is in the aforesaid facts adduced before the Prescribed Authority he has disbelieved the averments of the petitioner and other witnesses that he was given in adoption to Sant Ram. While rejecting the objections filed by the petitioner it was stated that adoption is merely camouflage to escape from the clutches of the Act, 1960. He has stated that the mother of petitioner Shanti Devi has stated that she did not participated in the adoption ceremony and that said adoption had been done only to escape from the clutches of Ceiling provisions of Act, 1960 and hence the Prescribed on the basis of above facts disbelieved the aspect of adoption.

14. Learned counsel for the petitioner has submitted that perusal of statement of Shanti Devi would indicate that said

statement as quoted by the Prescribed Authority in the impugned order is erroneous and perverse and infact Shanti Devi had affirmed the fact that petitioner was given in adoption to the Sant Ram, though she was not present when ceremony was performed. It is submitted that merely because Shanti Devi was not present during the ceremony, her statement cannot be disbelieved that the petitioner was not given in adoption.

15. The Appellate Authority has affirmed the findings recorded by the Prescribed Authority and also held that from the evidence on record that petitioner was given in adoption to Sant Ram and dismissed the appeal.

16. Assailing both the orders, learned counsel for the petitioner has submitted that there is overwhelming evidence on record that petitioner was given in adoption to Sant Ram apart from above statements of relatives including his mother, uncle and other independent witnesses who included Chinta Ram, Nanmun, Udai Raj (Gram Pradhan) etc. All the persons who had deposed had unequivocally stated that the petitioner was given in adoption when he was minor. Grand ceremony was organized and invitations were sent to all the villagers and in their presence adoption ceremony was carried out. Priest - Sewak Ram in his statement has stated all the aforesaid facts. Apart from oral evidence in the revenue records name of petitioner was mutated in place of Sant Ram.

17. Considering the aforesaid this Court is of the considered view that there was sufficient evidence before the Prescribed Authority to conclude that the petitioner had infact been given in adoption to Sant Ram and once he had been given in adoption to Sant Ram, then he was legally entitled to inherit the property of Sant Ram and therefore the same property would not have been devolved upon Govardhan and Ramdhan. Accordingly this Court is of the considered view that sufficient evidence were adduced by the petitioner. The finding returned by the learned Authorities below is clearly arbitrary and perverse.

18. Once the lands of Govardhan and Ramdhan has been stated to be within the ceiling limit and the Prescribed Authority has proceeded against them on such an assumption. This Court is of the considered view that adoption was legally and validly done for the purposes of Act, 1960, then property of Sant Ram would have devolved upon the petitioner and not in favour of Govardhan and Ramdhan.

19. This Court has also taken into account the findings recorded by this Court in Writ Petition No. 3387 of 1980, where this Court has also analysed the aforesaid oral evidence adduced in favour of petitioner and this Court was also not satisfied that the Prescribed Authority had rejected the oral testimony on basis of hyper technical issues. This Court had directed the Prescribed Authority to consider the entire evidence and not merely evidence which had come from the individuals which may not be in favour of petitioner. This Court had further directed the Prescribed Authority to consider case of the petitioner in the light of provisions of Section 11 of The Hindu Adoptions and Maintenance Act, 1956.

20. This Court has also examined the case of petitioner in the light of provisions of Section 11 of Hindu Adoption and Maintenance Act. Section 11 of the The

Hindu Adoptions and Maintenance Act, 1956 provides that :-

"11. Other conditions for a valid adoption.- In every adoption, the following conditions must be complied with:-

(i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;

(iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;

(iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v) the same child may not be adopted simultaneously by two or more persons;

(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 be validity of an adoption."

21. In the light of sub section VI of Section 11 of Hindu Adoption and Maintenance Act there is ample evidence on record in the form of statement of one Sewak Ram (Priest) and other villagers including biological mother of petitioner that petitioner was given in adoption and formal ceremony was held where he was given in adoption. This Court is of the considered view that all the provisions provided for adoption of a son have been duly complied with in the present case.

22. In the light of above documentary and oral testimony available on record, this Court is of the considered opinion that the petitioner has to be considered to have been validly adopted by Sant Ram and hence after death of Sant Ram his property will devolve upon the petitioner and not upon brothers of Sant Ram.

23. Accordingly, impugned orders dated 30.03.1995 and 24.01.1998 are hereby set aside. The writ petition stands **allowed.**